STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-80
FOIL-AO-5408

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

January 3, 1989

Mr. Robert A. Mazur
[redacted]

Dear Mr. Mazur:

I have received your note of December 14, which appears on a response to an appeal rendered under the Freedom of Information Law by Salvatore R. Curiale, Executive Director of the State Insurance Fund.

According to Mr. Curiale, you requested copies of records maintained by the Fund "pertaining to your claim for workers' compensation benefits against your employer, the State of New York Department of Taxation and Finance". Mr. Curiale added that the Fund represents that agency "in the pending litigation before the Workers' Compensation Board". In addition, you apparently also requested "internal forms, memoranda, worksheets and notes pertaining to your claims".

Mr. Curiale upheld the denial on the basis of section 87(2)(g) of the Freedom of Information Law, stating that:

> "Your files and the papers in them contain information gathered, and opinions and thoughts expressed, in connection with the defense against certain aspects of your workers' compensation claims.
>
> "The files, at this point, do not contain final agency determinations of the issues related to your claims. The relate to the State Insurance Fund's internal work product and materials prepared in connection with the litigation of your workers' compensation claims which we are defending as your employer's representative."

While I am unfamiliar with the records that you sought, internal memoranda, notes and the like prepared by the staff of the Fund would constitute "intra-agency materials". Moreover, assuming that those records are reflective of the opinions and thoughts of staff in relation to the proceeding, I believe that section 87(2)(g) would serve as a proper basis for denial.

Another ground for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". To the extent that the records sought consist of material prepared solely for litigation or attorney work product or are subject to the attorney-client privilege, I believe that they would be specifically exempted from disclosure pursuant to sections 3101(d), 3101(c) and 4503 of the Civil Practice Law and Rules respectively.

Lastly, as noted earlier, Mr. Curiale also cited section 96(2)(d) of the Personal Privacy Protection Law as a basis for denial. Although that citation is, in my view, inappropriate, a different provision of that statute is likely applicable. By way of background, the Personal Privacy Protection Law pertains to information maintained by state agencies that may be retrieved by means of a person's name or other identifier. Section 96 refers to the capacity of an agency to disclose personal information about an individual to third parties. It is assumed that your request involved records pertaining to yourself. If that was so, a request could have been made under section 95 of the Personal Privacy Protection Law. While that section generally confers rights of access to a "data subject", the subject of the records, to records pertaining to him or her, subdivision 6(d) of section 95 states that section 95 does not require that an agency provide a data subject with access to:

> "attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivision (c) and (d) of section three thousand one hundred one of the civil practice law and rules..."

Therefore, to the extent that the records sought consist of attorney work product or materials prepared for litigation before the Workers' Compensation Board, the Personal Privacy Protection Law would not grant rights of access to you.

He also cited Public Officers Law, section 96(2)(d), which is part of the Personal Privacy Protection Law, and which states that nothing in section 96 requires the disclosure of attorney's work product or material prepared for litigation, before judicial, quasi-judicial or administrative tribunals...".

Your note indicates that, in your view, Mr. Curiale's response "is just another device for the agency to hide behind". As such, you "appealed" his answer.

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 and Personal Privacy Protection Laws. The Committee is not empowered to render a determination following an appeal. However, in view of Mr. Curiale's affirmance of a denial following your appeal, you may seek judicial review of his determination pursuant to Article 78 of the Civil Practice Law and Rules.

Second, it appears that the denial of your request by the Fund was appropriate. Although the Freedom of Information Law provides broad rights of access, the provision cited in the determination on appeal, 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

I hope that the foregoing has served to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Salvatore R. Curiale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5409

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

January 3, 1989

Ms. Joan Santulli
Board of Trustees
Village of Millport
Drawer B
5446 Main Street
Millport, NY 14864

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

Dear Trustee Santulli:

I have received your letter of December 21, as well as the materials attached to it.

In brief, you wrote that the Board of Trustees of the Village of Millport, on which you serve, has attempted without success to obtain records from the Millport Fire Department, which is apparently a volunteer fire company, concerning its expenditure of taxpayers' money. Although you have obtained copies of the Department's monthly treasurer's reports, "they block out their money amounts when they send the Village Board a copy of their minutes".

You have asked "what the Village's options are under the Freedom of Information Laws" with respect to the information in question. In this regard, I offer the following comments.

First, the issue in essence is whether a volunteer fire company is subject to and required to comply with the Freedom of Information Law. That statute 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."

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local government.

Second, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the Court of Appeals, the state's highest court, found that volunteer fire companies, which are not-for-profit corporations, are subject to the Freedom of Information Law. In so holding, the Court stated that:

> "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' (emphasis added; Public Officers Law, section 84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, sections 560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the

> achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [id. at 579].

Further, in a recent decision in which it was held that several volunteer fire companies are subject to the Freedom of Information Law, it was stated that:

> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function" (S.W. Pitts Hose Company et al. v. Capital Newspapers, Supreme Court, Albany County, January 25, 1988).

In short, based upon judicial decisions, volunteer fire companies are "agencies" subject to the requirements of 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) of the Law.

Lastly, with respect to records involving expenditures by an agency, of relevance is section 87(2)(g). Although that provision represents one of the grounds for withholding records, due to its structure, it often requires disclosure. 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;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

While the information sought might be characterized as "intra-agency material", I believe that it consists solely of "factual" information available under section 87(2)(g)(i).

In sum, based upon judicial decisions, the Fire Department is an agency required to comply with the Freedom of Information Law. Further, records reflective of expenditures by the Department must, in my opinion, be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Millport Fire Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1568
FOIL-AO- 5410

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

January 3, 1989

Ms. Dorothy F. Crawford
[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. Crawford:

I have received your letter of December 14 and the material attached to it.

Your inquiry focuses on a resolution adopted by the Town Board of Schuyler Falls in which the Board resolved "that the Town Clerk will not make copies of the taped recordings of Town Board meetings unless specifically ordered to do so by the Courts".

You have questioned the propriety of the resolution and raised a series of related questions. 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 an open meeting 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)].

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 an open meeting 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.). If an individual seeks to listen to or make a copy of a tape recording with his or her own tape recorder, I do not believe that a fee could be charged.

Second, you indicated that meetings are recorded "on a special tape recorder...which records at a lower speed than normal...". As such, you wrote that: "This makes it difficult for a resident to even listen to one of the Town Board meetings on tape unless the Town tape recorder is also used". You pointed out further that, due to the use of the special tape recorder, "tapes can not be played on a regular tape recorder". In conjunction with those factors, you asked whether the records access officer should enable people to listen to a tape by using the "special town tape recorder". In my opinion, the Freedom of Information Law is intended to ensure meaningful access to records. If the use of the Town tape recorder represents the only method of providing meaningful access, the records access officer should, in my opinion, permit its use.

Third, assuming that the resolution conflicts with the Freedom of Information Law, you asked for advice concerning "the appropriate manner in which to address this matter". In this regard, in an effort to advise, educate and persuade, copies of advisory opinions are sent to agencies involved in issues arising under the Freedom of Information Law. To attempt to do so, a copy of this opinion will be sent to the Town Board. If the Board remains unconvinced by the foregoing, a proceeding under Article 78 of the Civil Practice Law and Rules could be initiated.

However, there may be another solution to the problem. Although the Open Meetings Law is silent concerning the use of tape recorders at meetings, the courts have held that members of the public may use their own tape recorders to record open meetings of public bodies.

By way of background, until 1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings. There are no judicial determinations of which I am aware that pertain to the use of video recorders or similar equipment at meetings.

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive,, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades

> to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, Second Department, unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meeting and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording devices is inconsistent with the goal of a fully informed citizenry, we accordingly affirm the judgment annulling the resolution of the respondent board of education" (id. at 925).

In view of the judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

In my opinion, since the Board uses a tape recorder at meetings, it could not effectively be contended that the use of portable cassette recorders by others would affect the deliberative process.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Schuyler Falls

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5411

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

January 3, 1989

Mr. Kenneth F. Christian
86-C-0532
135 State Street
Auburn, NY 13021

Dear Mr. Christian:

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

Your inquiry concerns a request for the "arraignment minutes" of a preliminary hearing held in the justice court in the Town of Camillus on January 20, 1986. You apparently sought the minutes from the Onondaga County Attorney, and in a letter prepared by Zachary L. Karmen, Deputy County Attorney, you were informed that the issue would be researched, and that a response would be sent to you as soon as possible.

I have contact Mr. Karmen on your behalf to learn more of the situation. I was informed that the County Law Department does not maintain the records. Further, having contacted both the Town Justice and the Office of the District Attorney, Mr. Karmen was told that neither of those offices maintains the records. Mr. Karmen added that, at the time of the hearing, stenographic minutes often were not taken or prepared. As such, it is possible that the arraignment minutes do not exist.

Under the circumstances, I can offer but one suggestion. Although the arraignment occurred in Town Justice Court, you did not indicate where the case was finally heard or determined. If, for example, the case was transferred to County Court, it is possible that the arraignment minutes, if prepared, are kept by that court. Should that be so, a request might be directed to the clerk of the court. I point out that, while the courts and court records are not subject to the Freedom of Information Law, court records are often available under different provisions of law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 5412

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

January 4, 1989

Ms. Beatrice R. Parker
[redacted]

Dear Ms. Parker:

I have received your letter of December 16 which, once again, pertains to a request directed to Mr. Dean Palen of the Ulster County Department of Health. You have asked that I "intervene" on your behalf in the matter.

In this regard, I point out that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, the Committee is not empowered to compel an agency to grant or deny access to records.

As you requested, I have contacted Mr. Palen, who informed me that he is making every effort to fulfill your request. He also indicated that he would contact you in an attempt to resolve the matter.

Mr. Palen added that some of the information in which you are interested may not exist. In this regard, it is noted that the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, to the extent that your request involves information that does not exist in the form of a record or records, the Department of Health would not be obligated to prepare new records on your behalf.

I hope that the foregoing serves to clarify the matter, and I trust that Mr. Palen can resolve the issue to your satisfaction and in a manner consistent with the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dean Palen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 5413

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

January 5, 1989

Mr. John Anthony
[redacted]

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

Dear Mr. Anthony:

I have received your letter of December 17, as well as the materials attached to it.

You referred to an enclosure indicating a refusal to supply copies of records by the records access officer of the Village of Croton-on-Hudson, which was apparently signed by a person other than the records access officer. Please be advised that no such document was enclosed with your letter. If you are referring to previous correspondence, which was the subject of a letter sent to you on December 21, I do not believe that the response to your request could be characterized as a denial. Further, there is no requirement that a records access officer sign a response to a request. The regulations dealing with the duties of a records access officer state that: "The records access officer is responsible for assuring that agency personnel..." respond appropriately to requests [21 NYCRR section 1401.2(a)]. As such, while a records access officer may personally sign a response to a request, there is no requirement that he or she do so.

The only remaining issue raised in your correspondence that has not been previously considered involves a request for "an unedited copy" of videotaped proceedings characterized as "Croton Forum V". According to your request, Croton Forum V was televised by a local television station. It is unclear whether the videotape is maintained by the Village. If it is not maintained by an entity of government, the Freedom of Information Law

would not be applicable. If it is maintained by a governmental entity, such as the Village, I believe that it would be subject to the Freedom of Information Law. That statute pertains to all records of an agency, and section 86(4) defines the term "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."

Therefore, if an agency has possession of the videotape, or if the videotape was produced for an agency, it would constitute a "record". Assuming that it is an agency record, it would be likely accessible under the Law, for none of the grounds for denial would apply. The only possible impediment to reproduction of the tape that I can envision would involve a situation in which a videotape is copyrighted. In such a case, the tape could not be reproduced without the consent of the copyright holder.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Herbek, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5414

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

January 6, 1989

Mr. Robert Boyette
83-B-2475
Green Haven Correctional Facility
Box B
Stormville, NY 12582

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

Dear Mr. Boyette:

I have received your letter of December 21, as well as the materials attached to it.

You have raised the following questions:

> "a. an inmate, in any correctional facility, has a right to request and receive, all documents, items presented, or materials used as evidence against an inmate at a disciplinary hearing held within the facility;
>
> b. following the final disposition of a disciplinary hearing, should an inmate request any documents pertaining thereto, are the facility administrators bound by the time limit designated to respond to a F.O.I.L. request; and
>
> c. if the F.O.I.L. statutes are applicable to the Department of Correctional Services, and they do not abide by, or act in accordance with said statutes, what sanctions can be applied."

First, the Freedom of Information Law is applicable to records of an "agency", a term defined by section 86(3) of the Law to include entities of state and local government in New York. As such, the Department of Correctional Services is clearly subject to the requirements of the Freedom of Information Law.

Second, with respect to rights of access to records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am not familiar with each kind of disciplinary hearing that may be conducted by the Department, I cannot advise with certainty as to the extent, if any, to which records related to a hearing may be withheld.

Third, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) prescribe time limits within which agencies 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, sections 1401.5(d) and 1401.7(c)].

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, when a request is denied following an appeal, the person denied access may initiate a proceeding under Article 78 of the Civil Practice Law and Rules to challenge the denial.

Enclosed is a copy of the regulations adopted by the Department of Correctional Services pursuant to the Freedom of Information Law. A review of those regulations might be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5415

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

January 6, 1988

Mr. Frank Gennuso
85-C-0127
Green Haven Correctional Facility
Stormville, New York 12582

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

Dear Mr. Gennuso:

I have received your letter of December 20 which concerns a request made under the Freedom of Information Law.

According to your letter, you requested a "subject matter list" pursuant to section 87(3)(c) from the Division of Human Rights. In response to the request, you received an "index of available records pursuant to Freedom of Information Law 88.4..." from Ms. Michelle Randolph of the Division's Legal Management Records Unit. You added that the index "appears to be outdated, for the index is marked "Rev. September 24, 1976".

You have asked whether the language of the former section 88(4) and the current section 87(3)(c) are the same. In this regard, I offer the following comments.

Section 88(4) was part of the Freedom of Information Law as originally enacted in 1974. That provision stated that:

> "Each agency or municipality shall maintain and make available for copying...a current list, reasonably detailed, by subject matter of any records which shall be produced, filed, or first kept or promulgated after the effective date of this article.

> Such list may also provide identifying information as to any records in the possession of the agency or municipality on or before the effective date of this article."

The original statute was repealed and replaced with the current version of the Freedom of Information Law, which became effective on January 1, 1978. As you are aware, the existing provision concerning the subject matter list, section 87(3)(c), states that each agency shall maintain:

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

The major distinction between the current and former provisions concerns the requirement that the subject matter list include reference not only to records first kept or filed since September 1, 1974, the effective date of the original Freedom of Information Law, but to all records of an agency, notwithstanding the date of their creation or maintenance by an agency.

It is noted, too, that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) indicate that an agency's records access officer is responsible for assuring that the subject matter list is current, and that it be updated not less than twice per year.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michelle Randolph

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1571
FOIL-AO- 5416

162 WASHINGTON AVENUE, ALBANY, NEW YORK [illegible]
(518) 474-2518 [illegible]

January 6, 1989

Ms. Beatrice Parker
[redacted]

The staff of the Committee on 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. Parker:

I have received your letter of December 21, as well as the materials attached to it.

Your letter focuses upon the inability of the public to gain access to various records maintained by the Town of Gardiner Planning Board. You indicated that minutes of meetings of the Planning Board are often not approved for months and that tape recordings of meetings are destroyed "as they are transcribed". It is your view, however, "that tapes should be kept available to the public in lieu of minutes, when the latter are so long delayed". In addition, one of the enclosures is a letter addressed to Town personnel by Ken Tenedini, Chairman of the Planning Board, in which he indicated that the Planning Board "has determined that [its] files will only be available to the public through the Recording Secretary". He also wrote that: "An appointment may be made at the convenience of both parties to review the files, at which time only one folder at a time will be present."

In this regard, I offer the following comments.

First, with respect to minutes, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, section 106 of the Open Meetings Law pertains to minutes and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear that minutes need not consist of a verbatim transcript of the entire discussion at a meeting, but rather only "a record or summary" of "motions, proposals, resolutions and any other matter formally voted upon..." Therefore, when a public body merely discusses public business, but does not engage in the making of "motions, proposals, resolutions" or voting, presumably the minutes need not reflect the nature of the discussion. Further, minutes of executive sessions are required to be prepared only when action is taken during an executive session.

It is also clear that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Although many public bodies, as a matter of practice or policy, approve their minutes, there is no requirement that minutes must be approved. In those situation in which a public body seeks to approve its minutes, but cannot do so within two weeks, to comply with law, it has consistently been advised that minutes be prepared and made available within the appropriate time period and that they be marked "unapproved", "non-final" or "draft", 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.

Second, while a tape recording would likely contain the elements of minutes, I believe that minutes should be reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, the Town might need a permanent written record readily accessible to Town officials who must refer to or rely upon the minutes in the performance of their duties. Moreover, in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280). As such, I do not believe that tape recordings of meetings constitute a valid substitute for written minutes.

Third, with regard to access to tape recordings, I direct your attention to the Freedom of Information Law, which is applicable to all agency records. 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."

Since the tape recordings are produced by and for the Town, I believe that they constitute "records" subject to rights of access.

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.

In my view, a tape recording of an open meeting is accessible, for none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, October 3, 1983].

It is noted, too, that there are laws and rules dealing with the retention of records. Specifically, pursuant to section 57.25 of the Arts and Cultural Affairs Law, the Commissioner of Education is authorized to adopt regulations that include reference to minimum periods of time that records must be retained by local governments. That provision also specifies that a local government cannot "destroy, sell or otherwise dispose of" records, except in conjunction with a retention schedule adopted by the Commissioner, or without the Commissioner's consent. Having contacted the Education Department on your behalf, I was informed that tape recordings of meetings must be retained for a period of four months after transcription and/or approval of minutes.

Lastly, I do not believe that the Planning Board has the authority to adopt a directive or rules concerning access to its records. Section 87(1) of the Freedom of Information Law indicates that the governing body of a public corporation, in this instance, the Town Board, is required to adopt uniform rules and regulations applicable to all agencies of the Town, including the Planning Board, to implement the procedural requirements of the Freedom of Information Law. Further, those procedures must be consistent with the Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401).

In a related area, although the Recording Secretary of the Planning Board may have physical possession of certain records, section 30(1) of the Town Law states in part that the town clerk: "Shall have the custody of all the records, books and papers of the town". Therefore, while the Recording Secretary may have physical custody of Planning Board records, I believe that the Town Clerk maintains legal custody of all such records.

Additionally, the regulations promulgated by the Committee on Open Government describe the duties of the designated records access officer, who is apparently the Town Clerk. Specifically, section 1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more personas as records access officer by name or by specific job title and business address, who shall have t he duty of coordinating agency response to public requests for access to records. The designation of

one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.

(b) The records access officer is responsible for assuring that agency personnel:

(1) Maintain an up-to-date subject matter list.
(2) Assist the requester in identifying requested records, if necessary.
(3) Upon locating the records, take one of the following actions:

(i) make records promptly available for inspection; or
(ii) deny access to the records in whole or in part and explain in writing the reasons therefore.

(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 request to copy those records..."

In view of the foregoing, the Town Board is responsible for ensuring compliance with the Law, and the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests. Therefore, in the Clerk's capacity as records access officer and custodian of Town records, I believe that he or she has the duty of ensuring that responses to requests are made in accordance with the law, irrespective of who maintains physical custody of the records sought. Stated differently, even though the Planning Board's Recording Secretary physically possesses the records, the town clerk, as records access officer, must, in my view, when necessary to do so, obtain the requested records from the recording secretary or ensure that the recording secretary provides records in order to comply with a request. I point out that it has been held judicially that there is no requirement that town records must be kept in town offices, so long as provisions are made to guarantee that the records are accessible to the public as required by the Freedom of Information Law [see Town of Northumberland v. Eastman, 493 NYS 2d 93, (1985)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Gardiner
Ken Tenedini, Chairman, Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5417

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

January 6, 1989

Mr. Clarence Adams
78-A-1735
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. Adams:

I have received your letter of January 3 in which you raised a question concerning the Freedom of Information Law.

By way of background, you wrote that you were charged in 1976 and later convicted of attempted murder of a New York City Housing Authority police officer. You indicated that you are interested in obtaining the reports filed by certain Housing Authority police officers concerning the incident in conjunction with an appeal.

You have asked what your right to obtain those records might be. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law (a copy of which is enclosed) is based upon a presumption of access. Stated differently, all records 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 reports in question, I cannot provide specific guidance concerning rights of access. However, it is possible that several of the grounds for denial might be applicable, perhaps with respect to portions of those records.

For instance, section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". The reports might identify witnesses or persons other than yourself and the victim. Section 87(2)(e) permits an agency to withhold records compiled for law enforcement under certain circumstances. The extent to which those circumstances might arise as a result of disclosure would be dependent upon the facts and the contents of the records. Section 87(2)(f) enables an agency to withhold records when disclosure would "endanger the life or safety of any person". Section 87(2)(g) authorizes the withholding of "inter-agency or intra-agency materials" depending upon their contents. A report prepared by a police officer would constitute intra-agency material, and I believe that those portions consisting of advice, opinion, impression or recommendation, for example, could be withheld.

In short, it is reiterated that rights of access would be dependent upon the nature and contents of the records and the effects of their disclosure.

Lastly, since the records were apparently prepared more than 12 years ago, it is questionable whether they continue to exist. Here I point out that the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Law indicates that an agency need not create a record in response to a request.

A request for records maintained by the New York City Housing Authority may be directed to Norman Parnass, Records Access Officer, New York City Housing Authority, 250 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-5418

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

January 9, 1989

Mr. Robert Barnett
[redacted]

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

Dear Mr. Barnett:

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

Your letter concerns a request for records directed to the New York City Department of Investigation made on November 2. Apparently your request was not answered, and you appealed the denial on December 12. As of the date of your letter to this office, you had received no response to the appeal.

In this regard, I offer the following comments.

First, having reviewed our files, the Department has not sent a copy of your appeal or any determination to this office as required by section 89(4)(a) of the Freedom of Information Law.

Second, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government prescribe time limits with 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, sections 1401.5(d) and 1401.7(c)].

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 with the Freedom of Information Law, a copy of this letter will be sent to Commissioner Frawley.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kevin B. Frawely, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-A0- 82
FOIL-A0- 5419

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

January 10, 1989

Mr. Robert E. Diaz
Counsel and Deputy Commissioner
for Legal Affairs
The State Education Department
Albany, New York 12234

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

Dear Mr. Diaz:

I have received your letter of December 22, which deals with questions that have arisen concerning public access to various records maintained by the State Education Department pertaining to teacher discipline at the state and local levels.

Specifically, you asked whether the Freedom of Information Law "prohibits the release of Education Law [section] 3020-a and 8 NYCRR Part 83...disciplinary files". You also asked: "If the statute prohibits the general release of such records, would there be any circumstances when those files or portions thereof may be released by the Department?"

In this regard, I offer the following comments.

First, as I understand the provisions that you cited, section 3020-a of the Education Law and 8 NYCRR Part 83 are different, but related, and there may be some overlapping of those provisions. The former pertains to "charges against a person enjoying the benefits of tenure...". The latter pertains to issues involving the "moral character" of "an individual holding a teaching certificate". As such, tenured individuals presumably would be subject to both provisions, while all of those holding teaching certificates, some of whom might not be tenured, would be subject to Part 83.

Second, there may be distinctions in terms of the authority to disclose on the part of the Education Department as opposed to a local school district or a BOCES, for example. While the definition of "agency" appearing in section 86(3) of the Freedom of Information Law includes entities of both state and local government, the term "agency" is defined in section 92(1) of the Personal Privacy Protection Law to include state agencies only; the definition specifically excludes "any unit of local government". Section 96(1) of the Personal Privacy Protection Law precludes a state agency from disclosing any "record" [see section 92(7)] or "personal information" [see section 92(7)], except in conjunction with a series of exceptions that permit disclosure listed in paragraphs (a) through (n) of that provision. With respect to disclosure to the public, section 96(1)(c) authorizes disclosure pursuant to the Freedom of Information Law, unless disclosure would constitute an unwarranted invasion of personal privacy. From there, in a somewhat circular manner, section 89(2-a) of the Freedom of Information Law states that nothing in that statute:

> "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."

Therefore, if a state agency determines that disclosure of a record or a portion thereof would result in an unwarranted invasion of personal privacy, it would be precluded from disclosing. Since the Personal Privacy Protection Law does not apply to local governments, those entities may withhold records to the extent that disclosure would result in an unwarranted invasion of personal privacy, but they would not be obligated to do so, unless a different statute exempted the record from disclosure [see Freedom of Information Law, section 87(2)(a)].

Third, although the facts relating to particular cases might require a variety of results, several principles are likely applicable.

With respect to public rights of access, 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 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. Based upon the language

quoted in the preceding sentence, I believe that a single record, report or a transcript, for example, may be accessible or deniable in whole or in part. Moreover, that language, in my view, imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Although two of the grounds for denial may be of significance, more important under the circumstances are the provisions concerning unwarranted invasions of personal privacy. While that standard is flexible and often may result in subjective interpretations, there are numerous decisions that pertain to the privacy of public employees. In brief, 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); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of State Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); 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].

The other ground for denial of possible 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Based upon the judicial determinations cited earlier, I believe that a record reflective of final disciplinary action taken against a public employee 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, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations might justifiably be withheld, for disclosure might, depending upon the circumstances, result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed, I believe that they may be withheld. As you are aware, section 3020-a(4) states in part that, following a hearing: "If the employee is acquitted he shall be restored to his position will full pay for any period of suspension and the charges expunged from his record."

I believe that public disclosures related to charges initiated under section 3020-a or an investigation of moral character should be considered in conjunction with the foregoing. For instance, if a hearing is conducted in public, the pendency of an investigation or charges obviously become known to the public. In those instances, the subject of an inquiry would essentially have waived the protection of privacy that might otherwise be available. There may also be situations in which events are made known to the public (i.e., an arrest, a conviction or an incident that is disclosed by a member of the public, by school district officials or by the news media, for example) and which lead or relate to a proceeding the pendency of which is known to the public. If it is publicly known that charges or allegations have been made and that a proceeding has been initiated, and if the charges are subsequently dismissed, disclosure of a determination to that effect would not, in my opinion, likely constitute an unwarranted invasion of personal privacy. Stated differently, where the pendency of charges is publicly known, I believe that a disclosure indicating exoneration of the dismissal of charges would be permissible. On the other hand, if a person is the subject of a charge or an allegation that is unknown to the public, and it is found that those accusations are without merit or cannot be proven, disclosure of any records would likely result in an unwarranted invasion of personal privacy.

There may be investigations conducted under part 83 that might involve a person who holds a teaching certificate, but who is not currently a public employee. Again, the facts surrounding such an incident would be relevant in determining issues of privacy. However, a final determination to annul a certificate would, in my opinion, clearly be accessible.

Another issue that arises with some frequency involves situations in which charges are initiated and in which an employee and a school district resolve the matter by means of a settlement agreement. Based upon case law, I believe that the terms of a settlement agreement must be disclosed.

In Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential.

Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statuses and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).

> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

Another more recent decision also required the disclosure of a settlement agreement between a teacher and a school district following the initiation of disciplinary proceedings (Buffalo Evening News v. Board of Education of the Hamburg School District and Marilyn Well, Supreme Court, Erie County, June 12, 1987). Further, that decision relied heavily upon an opinion rendered by this office.

If you would like to discuss the matter further, or if I have not addressed the issues within your area of concern, either generally or with respect to specific matters that may arise, please feel free to contact me.

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-5420

COMMITTEE MEMBERS
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GILBERT P. SMITH
PRISCILLA A. WOOTEN

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 12, 1989

Mr. John Anthony
[redacted]

Dear Mr. Anthony:

I have received your letter of December 22, as well as the materials attached to it.

You have complained with respect to a response to a request by the Bureau of Corporations of the Department of State. By way of background, you enclosed a news article that refers to the creation of a new organization called "Croton Housing Network, Inc.". In a request received on December 15, you asked for copies of the new corporation's certificate of incorporation, the names and addresses of its directors, and its charter and by laws. In a postcard sent to you on December 15, you were informed that the Department maintained no such records. The postcard also indicates that New York statutes do not require that the names of officers or directors be filed with the Department.

You have complained that the response was inadequate. I disagree. Under the circumstances, the Department of State did not maintain the records sought, and that fact was clearly stated. Where records sought are not maintained by an agency, a response to that effect is not a denial, for an agency cannot withhold what it does not have. Further, as indicated in previous correspondence, an agency's records access officer is not required to sign a response to request. The records access officer has the duty of ensuring that agency personnel respond appropriately to requests. That apparently occurred, for a response to your request was made on the day the request was received.

Despite your inference concerning the likelihood that I might not act since this office and the Bureau of Corporations are in the same Department, I learned of the reason for the response. Very simply, Croton Housing Network, Inc. was incorporated during the first week in January. As such, the response to your

request on December 15 was, in my view, entirely appropriate. Under the circumstances, it is suggested that you renew your request. I believe that the fee for certified copies would be ten dollars; for uncertified copies, I believe that the fee is five dollars.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5421

COMMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 12, 1989

Ms. Mildred Peck
Town Clerk
Town of Clifton Park
One Town Hall Plaza
Clifton Park, NY 12065

The staff of the Committee on 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. Peck:

As you are aware, I have received your letter of December 29.

In your capacity as records access officer of the Town of Clifton Park, you indicated that you have received a request "to see the Building Department Complaint form in connection with construction converting garage space to living space at a residence...". You added that: "The nature of the complaint makes it obvious who the complainant is".

You have requested an advisory opinion concerning rights of access to the record in question. 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, from my perspective, the only basis for denial would be section 87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy".

With respect to complaints made to an agency by a member of the public, it has generally been advised that the substance of a complaint should be made 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. 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."

In my view, 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. However, if, as in this instance, the deletion of identifying details would not serve to protect the privacy of the complainant, I believe that the entire complaint could likely be withheld to protect the privacy of the complainant.

I hope that I 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-83
FOIL-AO-5422

January 12, 1989

Mr. Shah Khan
87-A-3228
Arthur Kill Correctional Facility
2911 Arthur Kill Road
Staten Island, NY 10309-1197

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

Dear Mr. Khan:

I have received your letter of December 28 in which you asked whether medical records fall within the scope of the Freedom of Information Law and the Personal Privacy Protection Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all records maintained by state and local entities of government. The Personal Privacy Protection Law applies to state agencies only. As such, neither of those statutes would be applicable to records maintained by a private hospital or physician, for example.

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. In my view, various medical records maintained by agencies, such as diagnostic opinions and the like, could be withheld under the Freedom of Information Law [see section 87(2)(g)]. While the Personal Privacy Protection Law generally grants rights of access to records pertaining to an individual to that individual, rights conferred by that statute do not apply to "patient records concerning men-

tal disability or medical records where such access is not otherwise required by law" [section 95(6)(c)]. Further, rights of access do not apply to "public safety agency records" [section 95(7)]. The term "public safety agency record" includes records of various agencies, including the Department of Correctional Services, or:

> "any agency or components thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order..." [section 92(8)].

As such, the Personal Privacy Protection Law likely grants minimal rights of access to medical records maintained by law enforcement agencies.

Lastly, a different statute, section 18 of the Public Health Law, generally grants rights of access to medical records to the subject of those records. Further, section 18 also applies to medical records maintained by physicians and hospitals. As such, it is suggested that requests for medical records be made pursuant to section 18 of the Public Health Law.

Enclosed is a brochure published by the New York State Health Department that includes additional information concerning access to medical 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-5423

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

January 12, 1989

Mr. Devine Lewis
87-A-3194 A-1-38
Washington Correctional Facility
Lock 11 Road
P.O. Box 180
Comstock, NY 12821-0180

Dear Mr. Lewis:

I have received your letter of December 26, as well as the correspondence attached to it.

Your inquiry deals with a request of November 3 directed to Mr. Gilbert Jamison of the New York City Department of Correction for records indicating "jailtime" served within the City correctional system. Since you received no response to the request, a second letter was sent to Mr. Edward Felicien, Legal Coordinator for the Department. You have asked that I "see that all statutes are being strictly adhered to so that [you] do get the intended records."

In this regard, I offer the following comments.

First, the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As such, this office is not empowered to compel agencies to "adhere to" law. Further, the Committee cannot require that agencies grant or deny access to records.

Second, I have contacted Mr. Felicien on your behalf. He informed me that no specific "jailtime record" is kept. Rather, the Correction Law, section 600-a, requires that a transcript of jail time be certified.

Third, as I understand the situation, the information that you seek involves the compilation of information and the preparation of a record. I point out that, if that is so, the Freedom of Information Law is not the appropriate vehicle for seeking the

information sought. That statute pertains to existing records, and section 89(3) of the Freedom of Information Law states that an agency need not create or prepare a record in response to a request.

Lastly, although a request for a certification of jail time does not apparently fall within the requirements of the Freedom of Information Law, Mr. Felicien indicated that a response to your inquiry will be sent to you shortly.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 5424

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 13, 1989

Mr. John Anthony
[redacted]

The staff of the Committee 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. Anthony:

I have received your letter of December 27, which deals with several issues. In an effort to clarify the role of this office and to deal with specific aspects of your statements, I offer the following comments.

First, the Committee on Open Government is responsible for advising with respect to the Freedom of Information and Open Meetings Laws. The Committee has no authority to compel an agency to comply with those statutes. By means of advisory opinions, the Committee, through its staff, attempts to advise, educate and persuade. With respect to the correspondence that you have been forwarding to this office, I point out that we receive hundreds of copies of letters, requests and appeals annually. Since the staff consists of myself and a secretary, it is impossible to monitor every issue that arises in every piece of correspondence. We do not "discard" correspondence, except in accordance with rules governing the retention and disposal of records. All correspondence received is kept for a minimum of two years.

Second, one aspect of your letter alleges that a request directed to the records access officer of the Village of Croton-on-Hudson was not answered within five business days of its receipt. In this regard, the regulations promulgated by the Committee on Open Government indicate that a failure to respond to a request within five business days of its receipt by an agen-

cy may be construed as a constructive denial of the request that may be appealed. The provisions concernings the right to appeal are found in 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."

Another issue involves a request for a videotape of a forum held in the Village hall. You characterized the request as having been "denied and deflected to Continental Cablevision". I have discussed the matter with the Village's records access officer, who informed me that the Village does not maintain the videotape. As suggested in earlier correspondence, if an agency does not have possession of a record, a response to that effect is not a denial. If the Village does not have the videotape, it can neither grant nor deny access to that record. When that is so, there is no denial to be appealed.

With regard to your efforts to obtain the videotape from Continental Cablevision, I point out that the Freedom of Information Law is applicable to records of an agency. Section 86(3) of the Law defines "agency" to mean:

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

As such, the Freedom of Information Law applies to records maintained by governmental entities. If Continental Cablevision is not a governmental entity, it would not be subject to the Freedom of Information Law.

Similarly, with respect to another aspect of your correspondence, which pertains to "Croton Housing Network, Inc.", as suggested in a letter sent to you yesterday, that corporation did not exist until early January. Further, as a not-for-profit corporation that is not a governmental entity, I do not believe that it would be an "agency" that falls within the scope of the Freedom of Information Law.

Other aspects of your correspondence have been considered in earlier communications.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5425

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

January 13, 1989

Ms. Mildred Peck
Town Clerk
Town of Clifton Park
One Town Hall Plaza
Clifton Park, NY 12065

The staff of the Committee on 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. Peck:

I have received your letter of December 30 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you have received a request for "copies of a subdivision map that was submitted to the Planning Department and Planning Board for their approval". However, you indicated that representatives of the Planning Department suggested that, while you could allow inspection of the map, you could not legally copy it, "since they believe there is some kind of copyright pertaining to it". Specifically, "there is a small circle with a C in it located near the engineers/architect's name". You also wrote that a question has arisen:

> "as to the legality of making copies of utility designs that are a part of the subdivision map as well as certain elevation sketches on site plan maps. In the case of application for approval of houses or apartments, the design has a statement on it that it may not be reproduced."

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. Under the circumstances, it does not appear that any of the grounds for denial could justifiably be asserted.

Second, as you are aware, the Law requires that accessible records be made available for inspection and copying [see section 87(2)], and that an agency prepare copies of accessible records upon payment of the appropriate fee for copying [see section 89(3)].

Third, I am not an expert with respect to copyright law. However, 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. A recent federal court decision tends to confirm the view of the Justice Department. Although the case did not deal with a request for records maintained by a government agency, Demetriades v. Kaufmann [60 OF. Supp 658 (1988)] involved a suit brought by a home builder based upon copyright infringement by a competitor. Citing 17 USC section 411(a), the Court in its discussion of the matter stated that: "An action for Federal copyright infringement does not lie until registration of a copyright claim has been made in accordance with [Federal copyright laws]..." (id. at 661). As such, unless records are registered with and accorded copyright protection by the U.S. Copyright Office, I believe that they may be copied, despite the appearance of the "C" on the document, assuming that the "C" merely indicates a "common law" copyright.

Similarly, 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.

Based upon the foregoing, absent registration of records with the U.S. Copyright Office, I believe that records may be reproduced, notwithstanding a statement to the contrary appearing on the document.

It is noted that in other contexts, it has been found that even though records might be marked as "confidential", for example, such notations or claims may be irrelevant. An assertion of confidentiality, absent specific statutory authority, may be all but meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, 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)].

I hope that I 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-5426

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

January 17, 1989

Mr. Ronald Hart
82-A-2728
LocK 11 Road
P.O. Box 180
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. Hart:

I have received your letter of December 30, as well as the materials attached to it.

As I understand your inquiry, you were assigned to work at your facility's law library. For "no apparent reason", you were dismissed from that position. Consequently, you requested records concerning your work in the law library and your dismissal from that assignment. In response to the request, you were informed that you cannot have copies of "evaluations/progress reports as they are evaluative in nature...". It appears that you believe that you are entitled to the records pursuant to the Freedom of Information Law and "D.O.C.S. Directive #662".

In this regard, I offer the following comments.

First, I am unfamiliar with the directive in question.

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

Under the circumstances, it appears that one of the grounds for denial, section 87(2)(g), is relevant to the request. Specifically, the cited provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Records prepared by and transmitted among the staff of the Department could be characterized as "intra-agency" materials. Further, as indicated above, to the extent that those materials consist of an opinion concerning you, i.e., to the extent that they are "evaluative in nature", it appears that the denial was appropriate.

Lastly, section 89(4)(a) of the Freedom of Information Law enables you to appeal a denial. 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."

Further, the appeals officer for the Department of Correctional Services is Counsel to the Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1573
FOIL-AO-5427

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

January 17, 1989

Mr. Joseph Francis Colao
[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 Mr. Colao:

I have received your letter of December 26 in which you allege that the Board of Trustees of the Village of Pine Valley has disregarded the provisions of open government laws.

In good faith, it is noted that I have received a letter concerning your correspondence from Mr. Steven M. Schapiro, special counsel to the Village. According to his letter, your letter represents and effort "to set forth political grievances" that you have regarding the Board. Further, Mr. Schapiro wrote that, to the best of his knowledge, none of your allegations "have any factual basis".

Obviously, without having been present at the Board's meetings, I have no personal knowledge of the manner in which the Board has carried out the requirements of the Open Meeting and Freedom of Information Laws. As such, I offer the following general comments for purposes of clarification and education.

First, the definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is 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 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)]. It is noted that the decision cited above dealt with so-called "work sessions" and held that those sessions are "meetings" subject to the same requirements as those gatherings that might be characterized as "formal" or "official", for example.

Second, every meeting of a public body must be preceded by notice of the time and place of the meeting. Section 104(1) of the Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 104(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in section 104(1) "to the extent practicable" at a reasonable time prior to such meetings. There is nothing in the Open Meetings Law pertaining to the scheduling of a meeting on a holiday or a Sunday.

Third, the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, section 105(1) of the Open Meetings Law 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..."

In view of the foregoing, it is clear in my view that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting during which the public may be excluded. It is also clear that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss a subject listed in the Open Meetings Law as appropriate for discussion behind closed doors.

With regard to minutes of a meeting, section 106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, if action is taken during an executive session, minutes indicating the nature of the action and the vote, by member, must be prepared within one week of the executive session. Further, they are accessible to the public to the extent required by the Freedom of Information Law. However, if a public body discusses an issue or issues during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

Although the Open Meetings Law is silent with respect to the use of tape recorders, judicial decisions indicate that any person may use a portable cassette tape recorder at an open meeting of a public body [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985); People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979)].

Mr. Schapiro referred to your recent complaint to the effect that you were instructed not to interfere with discussions by Board members during meetings. Here I point out that, although the Open Meetings Law permits any person to attend a

meeting and listen to a public body's discussions and deliberations, nothing in the Law confers a right upon members of the public in attendance to speak or otherwise participate. As such, it has consistently been advised that a public body need not permit the public to speak at meetings or work sessions. If a public body chooses to permit public participation, it may do so, presumably based on reasonable rules that treat members of the public equally.

Lastly, you wrote that the Board has "refused to provide the names of those individuals who are 'working on the village master plan and zoning ordinances'". Here I direct your attention to 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law.

If a record exists containing the information in question, I believe that it should be available, for none of the grounds for denial would apparently apply. However, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law provides in part that, as a general rule, an agency need not create a record in response to a request. Therefore, if the information sought does not exist in the form of a record or records, the Village would not be obliged to prepare a new record in response to a request.

I hope that the foregoing serves to provide clarification. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Steven Schapiro
Hon. Mary Petraszewski, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5428

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

January 19, 1989

Mr. John Anthony
[redacted]

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

Dear Mr. Anthony:

I have received your letters of January 3 and January 11, as well as the materials attached to those documents.

Having reviewed the correspondence, it appears that your difficulties relate to several issues. In this regard, I offer the following general comments concerning those issues. Some of my remarks may involve the repetition of commentary offered in earlier responses to your inquiries. Nevertheless, it appears to be necessary to reiterate those points.

First, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states that an agency is generally not required to create a record in response to a request. It appears in many instances that the information in which you are interested simply does not exist in the form of a record or records. In those instances, an agency is not required to prepare new records in order to supply the information requested. Further, as stressed in the past, a response indicating that records do not exist does not constitute a denial. Only when an agency maintains records can it deny access to records.

Second, section 89(3) of the Law requires that an applicant "reasonably describe" the records sought. It has been held that a request reasonably describes the records when sufficient detail is included to enable agency officials to locate and identify the records. It would appear that several of your requests might not have met the standard of "reasonably describing". It

is noted, too, that, even though a request may be quite specific, records might be not retrievable due to the nature of an agency's filing system. For instance, if certain records are filed chronologically, rather than by subject or location, it may be all but impossible to locate records absent a date.

Third, while the Freedom of Information Law provides broad rights of access, there are exceptions. Some of your requests involve information concerning individuals which if disclosed might constitute "an unwarranted invasion of personal privacy" and may be withheld on that basis [see section 87(2)(b)]. Others include requests for records prepared by agencies that are used internally, communicated within an agency or sent to other agencies. Those kinds of records fall within the scope of section 87(2)(g), which permits the denial of "inter-agency or intra-agency" materials under many circumstances.

Fourth, with respect to your requests directed to the Village of Croton-on-Hudson, I believe that most of the issues have been considered in previous correspondence, and that the Village has disclosed to you virtually all of its records regarding the issue that precipitated your requests to the Village and other agencies.

Fifth, the Freedom of Information Law deals with access to records. It does not deal with whether an agency should have prepared records, nor does it deal with the retention or disposal of records.

Lastly, due to the passage of time and the occurrence of events, even if all of the information that you have requested has been created in the form of records, and even if all of that information was disclosed to you, it is unclear whether any such records would, at this juncture, enable you to achieve your goal, whatever that goal might be.

Once again, I hope that the foregoing has served to provide clarification relative to the issues raied in your correspondence.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5429

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

January 23, 1989

Mr. Arthur Powers
88-A-6090
Collins Correctional Facility
Helmuth, NY 14079

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

Dear Mr. Powers:

I have received your letter of January 5, as well as the correspondence attached to it.

Your inquiry deals with an unanswered request directed to the Records Access Officer at the Orange County Jail on December 8. According to the correspondence, you requested records pertaining to an injury that you incurred while at the jail due to a leaking roof. You requested medical records concerning the incident, the names and titles of all officers on duty at the time, reports of those officers concerning the leaking roof, the names of those of fixed the roof following your injury and log books concerning the incident.

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that an agency is generally not required to create a record in response to a request. If, for example, there are no reports identifying officers who might have been on duty when the incident occurred, the agency would not be obliged to prepare new records containing the information sought.

Second, with respect to medical records, I point out that the Freedom of Information Law permits an agency to withhold portions of those records reflective of diagnostic opinions or evaluations. However, a different statute, section 18 of the Public Health Law, generally requires that medical records pertaining to an individual be made available to that person by a

physician, hospital or other medical facility that provided treatment and care. A request for medical records should be made pursuant to section 18 of the Public Health Law. It is unclear from your letter how medical care was provided. If it was provided by a hospital, it is suggested that a request for medical records be directed to the hospital.

With respect to the remainder of the information sought, it is likely that one of the grounds for denial is of particular relevance. Specifically, section 87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits 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. As such, the specific contents of the records would determine the extent to which they would be accessible or perhaps deniable.

Lastly, 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 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, sections 1401.5(d) and 1401.7(c)].

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: Records Access Officer, Orange County Jail

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5430

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

January 24, 1989

Mr. Alvin W. DuBois, Jr.
Albany County Jail
840 Albany Shaker Road
Albany, New York 12211

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

Dear Mr. DuBois:

I have received your letter of January 6, as well as the materials attached to it.

According to your letter, some time ago, you requested records from the Division of Parole. Although the request was answered by a particular parole officer, he did not indicate whether he was the records access officer. Further, in his denial of your request, there was no identification of the person to whom an appeal could be made. As such, you appealed to the parole officer who denied the request. As of the date of your letter to this office, you had not received a response to the appeal.

In this regard, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law, state in part that a denial must include reference to the right to appeal and the name and address of the person or body designated to determine appeals [21 NYCRR section 1401.7(b)].

Second, with respect to the right to appeal generally, 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, for future reference, the person designated as records access officer for the Division of Parole is Mr. William Altschuller; the appeals officer is Mr. Marc Hannibal. Both are located at the Division of Parole, 97 Central Avenue, Albany, NY 12206.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5431

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

January 24, 1989

Mr. David Zaire
83-A-2242
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

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

Dear Mr. Zaire:

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

Specifically, you wrote that you are attempting to obtain "a listing of the names (only) of all individuals who were arrested on the date of August 18, 1982 by personnel connected to the Midtown South Police Precinct in New York County, New York". You asked whether you are entitled to such a record.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law provides in part that an agency is not required to create a record in response to a request. I have no knowledge of whether a list containing the information sought has been prepared or, if so, whether it continues to exist. If, however, no list exists identifying those who were arrested in a particular precinct on a certain date, the agency would not be obliged to prepare such a list on your behalf in order to satisfy your request.

Second, although the Freedom of Information Law provides significant rights of access, there are several grounds under which an agency may withhold records. The first ground for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". Of potential significance is section 160.50 of the

Criminal Procedure Law. That statute indicates that in situations in which a person is charged with a criminal offense, but the charges are later dismissed in favor of the accused, the records pertaining to the charges may be sealed. In cases in which records have been sealed pursuant to section 160.50 of the Criminal Procedures Law, references to persons arrested could likely be withheld. As such, even if the kind of list in which you are interested is maintained, it would appear that names of persons arrested whose charges were dismissed 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5432

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

January 25, 1989

Ms. Edna Braham
[redacted]

The staff of the Committee 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. Braham:

I have received your letter of January 9, which pertains to a request directed to the SUNY Health Science Center in Brooklyn, as well as an advisory opinion concerning your request prepared on October 18.

You wrote that I advised that certain aspects of the information sought should be disclosed. However, you indicated that the agency's records access officer, Ms. Priscilla Penman, has not sent the information to you. The specific information sought includes records indicating that names, work addresses, work telephone numbers and the dates of hire of employees in a certain title, any records indicating disciplinary action taken with respect to persons in that title, and a subject matter list.

In this regard, having reviewed several items of correspondence, I believe that Ms. Penman indicated that there are no records indicating disciplinary action. With respect to the remainder of the request, the records, in my opinion, must be disclosed. As suggested in an opinion rendered on December 20, section 89(3) of the Freedom of Information Law states in part that an agency generally need not create or prepare records in response to a request. However, exceptions to that general rule involve records that an agency must maintain pursuant to section 87(3). Relevant to your request are paragraphs (b) and (c) of that provision, which require that each agency must 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."

Under the circumstances, since you have not received the information, I point out that an applicant may appeal a denial of access to existing records. 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."

If an appeal is denied, or if the person designated to determine appeals fails to do so within ten business days of the receipt of an appeal, the person whose request is denied may initiate a judicial proceeding under Article 78 of the Civil Practice Law and Rules. Similarly, if an agency fails to carry out a duty that it is required to perform, i.e., if it has not prepared a subject matter list, an Article 78 proceeding may be commenced to seek to compel the agency to carry out a duty required by law to be performed.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Ms. Penman.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Priscilla Penman, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5433

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

January 25, 1989

Mr. Anthony C. Brandon
85-A-4828 A-1-36
Washington Correctional Facility
Lock 11 Road
P.O. Box 180
Comstock, NY 12821-0180

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

Dear Mr. Brandon:

I have received your letter of December 26, which reached this office on January 10.

Your inquiry concerns media access to criminal records. Specifically, you asked whether a newspaper would "have access and be allowed to publically [sic] list the individuals that have been granted parole and their anticipated release dates".

In this regard, I offer the following comments.

First, as a general matter, I believe that a newspaper may publish and disseminate any information that it obtains.

Second, in terms of rights of access, records indicating "anticipated release dates" may, in my opinion, generally be withheld. The date of one's anticipated release is subject to change and is essentially advisory in nature. As such, I believe that a record indicating an anticipated release date could be withheld under section 87(2)(g) of the Freedom of Information Law, which permits the withholding of inter-agency or intra-agency materials in many circumstances.

A determination to grant parole would, however, be a matter of public record. Although inter-agency or intra-agency materials may generally be withheld, section 87(2)(g)(iii) specifies that final agency determinations, such as a determination made by the Parole Board, must be disclosed.

Lastly, although determinations to grant parole are public, I do not believe that agencies generally make those records available unless the records are specifically requested. Similarly, agencies do not apparently issue news releases, for example, announcing that people have been granted parole. As such, while the determinations are available, it is unlikely that agencies purposefully engage in efforts to disseminate 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5434

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

January 25, 1989

Ms. Karen Timko
Assistant Counsel
Metro-North Commuter Railroad
347 Madison Avenue
New York, NY 10017

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

Dear Ms. Timko:

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

According to your letter, the Metro-North Commuter Railroad has received a request for "copies of the transcripts from a non-public preliminary investigation held on Metro-North premises on April 14 and 15, 1988 and all accompanying exhibits". You added that:

> "The hearings were convened for purposes of investigating a collision of trains which resulted in the death of a Metro-North employee and extensive property damage. The hearings did not result in the assessment of discipline, although they did result in a final report which gave conclusions concerning the cause of the collision."

Further, during our recent telephone conversation, you indicated that all of those who testified were employees of Metro-North. Those employees are identified in the transcripts by name and, in some instances, by home address, social security number and date of birth.

You have requested my views concerning rights of access to the records. 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. It is also noted 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. The phrase quoted in the preceding sentence indicates that a single record may be accessible or deniable in whole or in part. That phrase, in my view, 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, even though some aspects of a record may be withheld, the remainder would be available.

Second, based upon the facts described in your letter and our conversation, virtually all of the records sought fall within one of the grounds for denial, section 87(2)(g), for the records constitute "inter-agency or intra-agency materials". It is emphasized, however, that, due to its structure, the authority to withhold records pursuant to section 87(2)(g) is dependent upon the specific contents of the records. 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Moreover, it has been held that statistics and facts that may be "intertwined" with opinions, for instance, should be available. Specifically, 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 statistical or factual information may be "intertwined" with opinions, for instance, the statistical or factual portions should in my opinion be disclosed, unless different grounds for denial apply.

The only other ground for denial of apparent significance is section 87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Since the references to individuals in the records involve public employees, I point out that there are numerous decisions that pertain to the privacy of public employees. In brief, 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); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of State Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); 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, to the extent that records identifiable to public employees contain information irrelevant to the performance of their duties, those portions may be redacted on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, November 23, 1977 and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Under the circumstances, I believe that the identities of those who testified should be disclosed. All appeared in their capacities as public employees and their statements were made with respect to activities carried out in the performance of their official duties. However, ancillary personal information could, in my view, be withheld, such as home addresses, social security numbers and dates of birth. It is noted, too, that section 89(7) of the Freedom of Information Law states in part that nothing in that statute requires the disclosure of the home address of a current or former public employee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5435

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

January 26, 1989

Mr. Roger & Ms. Caroline Staples-Strom
Mountainbrook
Glengary
Croton, NY 10520

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

Dear Mr. & Ms. Staples-Strom:

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

Your inquiry focuses upon two requests. With respect to one, your wrote that "Westchester County refuses to answer... requests about job descriptions, departmental organization, or biographies of Social Services Dept. members who decided that homes at Black Rock 'weren't worth saving'". The other involves an unanswered request directed to the Governor's "Office for Motion Picture and Television Development". You also commented that this office, which is "supposedly empowered to enforce the New York State Freedom of Information Law", has done nothing to implement the Law.

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 enforce" the Law, nor does it have the capacity to compel an agency to grant or deny access to records.

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, to the extent that the information sought does not exist in the form of a record or records, an agency would not be obliged to prepare records in order to satisfy a request.

Third, section 89(3) of the Law requires that an applicant "reasonably describe" the records sought. As such, a request should include sufficient detail to enable agency officials to locate and identify the records.

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

With respect to your request to Westchester County, it appears that two of the grounds for denial may be relevant. The records sought fall within the scope of 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

I believe that records reflective of job descriptions should be disclosed, for they represent the policy of an agency concerning the duties to be performed by persons in particular job titles. If an organization chart exists, it would, in my opinion, be available, for it consists of factual information.

With regard to "biographies", I point out that 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". With regard to public employees, it has been held that disclosure of records that are relevant to the performance of a public employee's official duties would constitute a permissible rather than an unwarranted invasion of personal privacy [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986), Scaccia v. NYS Division of State Police, 138 AD 2d 50 (1988); 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]. On the other hand, if records are irrelevant to the performance of one's official duties, disclosure has been found to result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1984].

In my view, records reflecting a public employee's official duties and responsibilities would be available under the Freedom of Information Law. Likewise, records that indicate that an individual meets the requisite qualifications for a 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, in my opinion, would disclosure of records indicating that the employee has met the requisite qualifications for 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 of privacy if disclosed, such as marital status, age, home address, social security number and similar information.

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 likely be withheld.

Similarly, when a civil service examination is given, generally an "eligible list", which is available to the public, identifies those who passed and their rankings. Since most public employees obtain their positions through civil service exams, eligible lists may be the best source of confirming an individual's qualification for a position. Further, it is unlikely that an agency maintains "biographies" concerning most of its employees.

With respect to your request to the Governor's Office for Motion Picture and Television Development, I point out that a request for records of the Governor's office may be directed to Harold Iselin, Records Access Officer, Executive Chamber, Albany, NY 12224.

Lastly, you questioned whether a particular county official was the "Records Access Officer", or "Freedom of Information Officer" or both. Those titles are generally interchangeable.

I hope that I 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-5436

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

January 26, 1989

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 letter and the correspondence attached to it, all of which reached this office on January 17.

The correspondence consists of two letters, the first of which is a request made in 1986 for "an approximate schedule for road work to be done in the Town of Catherine for 1986". The second letter is a request made on January 12 of this year to the Town Supervisor, John Wickham. You sought a job description for the Town's highway superintendent, his work schedule, salary and related information. None of the information sought has apparently been made available.

In this regard, I offer the following comments.

First, it is emphasized at the outset that the Freedom of Information Law generally pertains to existing records. Section 89(3) of the Law states in part that an agency need not create records in response to a request. Therefore, to the extent that your requests involve information that does not exist in the form of a record or records, the Town would not be obliged to prepare records in order to satisfy your request.

Second, to the extent that the information sought does 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.

In my opinion, a work schedule, a log of work performed and attendance records would be accessible under the Law. Similarly, a job or duties description would, in my view, be available. Relevant to those kinds of records is section 87(2)(g). Although that provision represents one of the grounds for denial, due to its structure, it often requires disclosure. 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Schedules and logs concerning work scheduled and performed would likely consist of factual information available under section 87(2)(g)(i). A job or duties description would represent either instructions to staff that affect the public or the policy of the Town with respect to the nature of duties that must be performed by a person or persons holding a particular position. Those kinds of records would, in my opinion, be available under section 87(2)(g)(ii) or (iii). Attendance records indicating days present or absent have been found by the Court of Appeals, the state's highest court, to be available [see Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986)].

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 with the Freedom of Information Law, a copy of this opinion will be sent to the Town Supervisor. Enclosed are copies of the Freedom of Information Law, the Committee's regulations, and an explanatory pamphlet on the subject. Those materials will also be sent to the Supervisor.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Hon. John Wickham, Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5437

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

January 26, 1989

Mr. Harold Robinson
83-A-8069
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Robinson:

I have received your letter of January 12 in which you raised a variety of questions concerning access to records.

You indicated initially that you are interested in obtaining medical records that were submitted into evidence at your trial. In this regard, it appears that the best source of those records would be the clerk of the court in which the trial was conducted. I point out, however, that the Freedom of Information Law would not apply to those records. That statute 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 on the foregoing, the Freedom of Information Law excludes from its coverage the courts and court records. Nevertheless, many court records are available under other provisions of law (see e.g., Judiciary Law, section 255), and it is suggested that a request be directed to the clerk of the appropriate court.

The second area of inquiry pertains to records maintained by Consolidated Edison. Since that company is not a governmental entity, an agency, its records would not be covered by the Freedom of Information Law.

You also seek to request records pertaining to your case from the New York City Police Department and the office of the district attorney that prosecuted. Since I am unfamiliar with the with the nature or contents of the records in question, I cannot provide specific guidance. 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. Enclosed is a copy of the Law for your review. To request records from the Police Department, you may apply to Ms. Eneta McAlister, Records Access Officer, Public Information Section, New York City Police Department, 1 Police Plaza, New York, NY 10038. A request for records of a district attorney should be directed to the records access officer of the appropriate district attorney's office.

Lastly, you wrote that you were informed that a report of a private investigator that you hired was being withheld from you. Again, a private investigator's records would not be subject to the Freedom of Information Law, for they would not be agency records. Further, I am unfamiliar with provisions of law that might pertain to the situation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5438

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

January 30, 1989

Mr. William L. Catto
Public Health Director
Cayuga County Health Department
160 Genesee Street
P.O. Box 219
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. Catto:

I have received your letter of January 16, as well as the materials attached to it.

Your inquiry concerns rights of access by the subject of a complaint to a record identifying the person who made the complaint. In this regard, I offer the following comments.

It is noted at the outset that, 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.

From my perspective, the only basis for denial would be section 87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy".

With respect to complaints made 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 per-

sonal privacy. 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."

In my view, 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. If the deletion of identifying details would not serve to protect the privacy of the complainant, the entire complaint could likely be withheld.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5439

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

January 30, 1989

Mr. Clarence Adams
78-A-1735 G-4-179
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Adams:

I have received your letter of January 17 in which you referred to a letter that I addressed to you on January 6.

In the earlier correspondence, I indicated that I could not provide specific guidance, for the records in which you are interested were not described in detail. Your recent letter indicates that you are interested in obtaining "notes and reports" prepared by two named Housing Authority police officers on the night of October 13, 1976 relating to your arrest.

Once again, I must reiterate that I have no specific knowledge of the contents of any such records, or whether those records exist. However, I will more specifically describe the provisions of the Freedom of Information Law that would likely be relevant.

Perhaps most important 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..."

Since the records were prepared by persons employed by the Authority, section 87(2)(g) is also relevant. 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. Concurrently, those portions of inter-agency or intra-agency materials that are re- flective of opinion, advice, recommendation and the like could in my view be withheld.

As indicated in the earlier letter, section 87(2)(b) states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", and section 87(2)(f) permits withholding when disclosure "would endanger the life or safety of any person".

I regret that I cannot be more specific in terms of rights of access to the records in question. It is suggested that you submit a request to Mr. Norman Parnass, the Authority's Records Access Officer. Your request should contain as much detail as possible in order 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-5440

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

January 30, 1989

Mr. Dennis Duboy
86-A-0700 F-5-257
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Duboy:

I have received your letter of January 16, which concerns your request for a copy of a pre-sentence report pertaining to you.

According to your letter, you have unsuccessfully requested the pre-sentence report from both the Albany County Probation Department and the sentencing judge. You added that the report is needed for an appeal.

In this regard, I offer the following comments.

It is noted at the outset that, 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."

As such, pre-sentence reports are confidential with respect to the public and may be made available to a defendant only by a court. Since you referred to the possible importance of the report relative to an appeal, I point out that the last sentence of subdivision (2) of section 390.50 represents an amendment. In a decision concerning the amendment, it was found that:

> "The obvious purpose of the legislature in enacting Chapter 132 of the Laws of 1984 was to make the presentence report generally more accessible to counsel and/or the defendant pro se. The spirit of such amendments was open disclosure and discussion of the information before the Court in sentencing and/or appelative review of sentencing and the need to remedy the mischief created by bureaucratic roadblocks to that process. Therefore, this court holds that the agency should be obligated to make them available pursuant to court order..." [see People v. Zavaro, 481 NYS 2d 845, 846 (1984)].

In view of the foregoing, it is suggested that you seek a court order from the sentencing judge authorizing disclosure pursuant to section 390.50 of the Criminal Procedure Law. You might also want to discuss the matter with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5441

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

January 30, 1989

Mr. Harry Gaillard
84-B-2346
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. Gaillard:

I have received your letter of January 9, which reached this office on January 19.

Your first area of inquiry involves difficulties that you have faced concerning requests for records kept at your facility.

In this regard, as a general matter, requests cannot be "ignored". 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, provide guidance concerning agencies' obligations to respond to requests in a timely manner. 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, sections 1401.5(d) and 1401.7(c)].

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, you wrote that, in some instances, the records access officer "has intentionally given inflated prices to hamper and discourage [you] from purchasing the requested records". Assuming that records are accessible under the Freedom of Information Law, you may inspect the records at no charge; if you want copies made, the agency may charge up to twenty-five cents per photocopy.

Third, you asked what penalties may be imposed against an agency that fails to comply with the Freedom of Information Law. The only "penalty" would involve a situation in which a person denied access challenges the denial in court and "substantially prevails". In such a case, if the agency lacked a reasonable basis for withholding, and if the records are of clearly significant interest to the general public, a court may award reasonable attorney's fees to the petitioner [see Freedom of Information Law, section 89(4)(c)].

You also asked whether you can obtain a copy of an inmate grievance submitted by a person other than yourself at another facility. Without knowledge of the contents of such a record, I cannot provide specific guidance. However, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy". I would conjecture that section 87(2)(b) would be relevant to the record you described.

Lastly, I have no information dealing with the Public Health Law generally. I have, however, enclosed a copy of a brochure published by the State Department of Health concerning patients' rights of access to medical records. Also enclosed are copies of "You Should Know", which pertains to the Personal Privacy Protection Law, and the regulations promulgated by the Department of Correctional Services 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5442

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

February 1, 1989

Mr. Jeffrey Sommers
[redacted]

The staff of the Committee 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. Sommers:

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

By way of background, in October, you submitted a request to the Westchester County Clerk to "survey all records of filed and granted Pistol Permit applications". Based upon conversations with staff, you expressed the understanding that approved applications are stapled to "non-public documents". Consequently, the Clerk permits the public to inspect a maximum of twenty-five applications per day. You suggested that the records should be kept in a way that would permit the public to readily inspect accessible records, i.e., "in a manner that is conducive to survey".

You have requested an advisory opinion on the matter. In this regard, I offer the following comments.

First, as you are aware, section 400.00(5) of the Penal Law indicates that approved pistol license applications are public records. In this instance, attached to those public records is related documentation that could justifiably be withheld. Therefore, in order to permit the inspection of public records, personnel must separate the public portions of the documentation from those other portions of a file or record. That system effectively precludes the public from gaining unrestricted access to the files containing approved pistol license applications. It also necessitates that requests be made in advance in order that staff can retrieve accessible documents.

Second, the Freedom of Information Law deals with rights of access to records. Although from your perspective it would be preferable if approved applications were kept separately from other records, thereby permitting continual access, the Freedom of Information Law does not address the manner in which agencies maintain records.

Third, on your behalf, I have contacted Ms. Cecilia Bikkal, Legal Advisor to the County Clerk. She informed me that the clerk maintains index cards that identify some 55,000 license holders by name and file number. Access to the index cards is unrestricted. On the basis of the index cards, the public can identify license holders in order that approved license applications may be requested. Ms. Bikkal also told me that, at one point, you were interested in applications approved by particular judges, and that in 1987 a computer system was developed that permits the retrieval of applications authorized by a particular judge. On the basis of that kind of list, again, up to twenty-five applications may be requested per day. Ms. Bikkal also indicated that individual applications may be requested by name, date or serial number. As such, there are a variety of methods of attempting to obtain approved license applications.

In my view, the question is whether the procedure established by the County Clerk, whereby a maximum of twenty-five approved applications is furnished per day, is reasonable and consistent with the Freedom of Information Law. It does not appear that the County is denying access to records; rather it is attempting to regulate access in consideration of the burden imposed upon the agency. Further, although the agency has the capacity to locate the records sought, it is questionable, in my opinion, whether a request to review 55,000 applications would "reasonably describe" the records sought as required by section 89(3) of the Law. If a court determined that a request to review "all" approved pistol applications does not "reasonably describe" the records sought, it would appear that requests would be required to be submitted on the basis of names, the dates that applications were granted, or by serial number. I point out that in a recent decision involving a request for a voluminous number of records, many of which were clearly available, the court found that acceding to the request "would bring in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy" (Fisher & Fisher v. Davison, Sup. Ct., New York Cty., NYLJ, Oct. 6, 1988). On that basis and others, the court dismissed the petition.

Without knowledge of the extent of the burden imposed upon the County Clerk when it is necessary to retrieve and separate accessible records from others, I cannot conjecture as to the propriety of the limitation on the specific number of records that are made available on a daily basis. However, it is clear, in my opinion, that under the circumstances, it would be inappro-

priate to permit unrestricted access to files containing approved pistol license applications, for those files include other records. In addition, it is emphasized that Ms. Bikkal suggested that you request records in advance in order to maximize access. In our conversation, she expressed a willingness to make twenty-five applications available your review every business day.

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: Cecilia Bikkal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5443

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

February 1, 1989

Mr. Paul Moses
Reporter
New York Newsday
U.S. Courthouse
Press Room, Room 508-A
40 Foley Square
New York, NY 10007

Dear Mr. Moses:

I have received your letter of January 18 and the materials attached to it. For reasons unknown, your correspondence did not reach this office until January 30.

According to the correspondence, you "recently waited 13 months for the New York City Department of Environmental Protection's legal office to acknowledge a freedom-of-information request". I agree with your statement that the agency's response is "inadequate". 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 aspects of the Law (see attached 21 NYCRR Park 1401). In turn, section 87(1) requires each agency to adopt regulations "pursuant to such general rules as may be promulgated by the committee on open government in conformity with the provisions of this article" (the Freedom of Information Law).

Second, the Freedom of Information Law and the Committee's regulations provide guidance concerning the procedural requirements 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

Based on the foregoing and an assumption that the Committee's regulations are binding upon agencies with respect to the time limits for response, the time within which the Department responded to your request is inconsistent with those regulations.

It is noted, too, that the regulations promulgated by Mayor Koch pursuant to the Freedom of Information Law are consistent with those adopted by the Committee on Open Government. The Mayor's regulations, which became effective in 1979, state in part in section 5(d):

> "If because of unusual circumstances, an agency is unable to determine within five days whether to grant, deny or otherwise respond to a request for inspection and copying, the records access officer shall, within such five day period, acknowledge receipt of the request in writing to the requesting party, stating the approximate date, not to exceed ten business days from the date of the acknowledgement, by which a determination with respect to the request will be made. If the agency does not make a determination with respect to the request within ten days from the date of such acknow-

> ledgement, the request may be deemed denied and an appeal may be taken to the person or body designated in the agency to hear appeals."

As such, the Mayor's regulations applicable to agencies within the jurisdiction of his office include time limits for responding to requests. Those time limits were exceeded in the situation that you described.

In an effort to enhance compliance with the Freedom of Information Law, copies of this letter will be sent to Department officials.

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: Harvey W. Schultz, Commissioner
Marie Dooley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5444

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

February 1, 1989

Ms. Miriam Gettinger
[redacted]

The staff of the Committee on 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. Gettinger:

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

As I understand the situation, in conjunction with a grievance, you have requested various records from the Putnam/Northern Westchester BOCES. Among the records sought were various minutes of meetings, information reflective of criteria used to take certain action, and "appointment and assignment" letters pertaining to certain other teachers employed by the BOCES. Although many of the records were disclosed, those involving the other teachers were withheld. In denying your request for those records, the records access officer wrote that: "We consider teacher files to be confidential and will not release them under the Freedom of Information law. We are treating this request in the same way we would treat a request from a member of the public who asked to review documents in your personnel file". You appealed the denial without success. In his affirmance of the records access officer's denial, Dr. John J. Battles, District Superintendent, wrote that: "The documents you have requested are found in the personnel files of individual teachers. The teachers involved have refused to release these documents. Therefore, your appeal is denied".

You have requested my views on the matter. 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, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

Third, the provision in the Freedom of Information Law of most significance under the circumstances is, in my view, section 87(2)(b). That provision permits an agency to withhold records to the extent that 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 officers and 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 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, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981]. Conversely, to the extent that records or portions of records are irrelevant to the performance of one's official duties, it has been held that section 87(2)(b) may appropriately be asserted [see Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, November 22, 1988 and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Further, in one of the decisions cited above, the Court of Appeals held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 79). 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 government officers (Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [citing Public Officers Law section 84]).
> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (see, Public Officers Law section 87 [2]; Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY2d 75, 79-80, supra)... Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 80, supra; Matter of Fink v Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566).

From my perspective, a record indicating that a person has been appointed or assigned to a particular position would be available. I do not believe that disclosure would result in an unwarranted invasion of personal privacy, for the record is relevant to the performance of the duties of the person appointed or assigned as well as the appointing authority. Moreover, a decision to appoint an individual to a position is likely reflective of a final agency determination and would, therefore, be accessible pursuant to section 87(2)(g)(iii) of the Freedom of

Information Law (see attached). It is also noted that section 87(2)(b) of the Law requires that each agency must maintain "a record setting forth the name, public office address, title and salary of every officer or employee of the agency". As such, by reviewing an agency's payroll record, the public has the ability to know the identities, titles and salaries of all public employees.

Lastly, I point out that, based upon judicial interpretations of the Freedom of Information Law, neither a request for nor a promise of confidentiality would be relevant to a determination of rights granted by the Law. In Washington Post v. Insurance Department, the Court of Appeals held that a promise or assertion of confidentiality is all but meaningless and that, unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, records must be disclosed [61 NY 2d 557, 567 (1984)]. Similarly, in a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference concerning the agency's disclosure of the incident to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold the record based upon the "preference" of the person who reported an offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

> "There is no question that the 'releasable copies' of reports of offenses prepared and maintained by the Genesee County Sheriff's office on the forms currently in use are governmental records under the provisions of the Freedom of Information Law (Public Officers Law art 6) subject, however, to the provisions establishing exemptions (see, Public Officers Law section 87[2]). We reject the contrary contention of respondents and declare that disclosure of a 'releasable copy' of an offense report may not be denied, as a matter of law, pursuant to Public Officers Law section 87(2)(b) as constituting an 'unwarranted invasion of personal privacy' solely because the person reporting the offense initials a box on the form indicating his preference that 'the incident not be released to the media, except for police investigative purposes or following arrest'."

Based upon the foregoing, I do not believe that consent to disclose by the subjects of the records is relevant to a decision to grant or deny access to the records. Assuming that records are accessible under the Freedom of Information Law, they should be made available to you or to any member of the public, notwithstanding the absence of consent given by those who are the subjects of the records.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Dr. Battles.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. John J. Battles, District Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5445

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

February 1, 1989

Mr. Emanuel Cruz
83-A-1998
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

Dear Mr. Cruz:

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

In brief, since 1986, you have been seeking various records from the New York City Police Department, including the Department's "business index file (ownership and or proprietor) of the Webster Deli, located at 1965 Webster Avenue, Bronx, New York (that would be a part of the 46 precinct) business index files for the year 1980 through 1981". Although you have obtained much of the information sought, the "business index file" has not yet been disclosed. You added that you were the proprietor of the Webster Deli for the period in question. Most recently, on December 30, you against requested the record. On January 11, the receipt of your request was acknowledged, and you were informed that you will be notified when a determination is made.

You have requested assistance in the matter. In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Since the information in which you are interested was apparently prepared several years ago, it is possible that the records containing that information may have been discarded. If that is so, the Police Department would not be obliged to create a new record on your behalf. If the record no longer exists, a response should so indicate.

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. If the information sought exists in a record, I believe that it would be available under the Law, for it would pertain to you, and because none of the grounds for denial could appropriately be asserted.

Third, under the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401.5) and the Mayor's Uniform Regulations adopted under the Freedom of Information Law, when an agency acknowledges the receipt of a request, the agency has ten business days from the date of the acknowledgement to respond by granting or denying access to the record sought. If the agency fails to respond within that period, you may consider the request to have been constructively denied, and you may appeal the denial on that basis. 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."

I believe that the person designated to make determinations following appeals is Mr. John J. Grimes, Assistant Deputy Commissioner for Civil Matters.

I hope that I 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- 85
FOIL-AO- 5446

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

February 2, 1989

Mr. David Corbin
[redacted]

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

Dear Mr. Corbin:

I have received your letters of January 25 and January 27, as well as the materials attached to them. You have raised a series of questions relating to a request for records directed to the Division of Housing and Community Renewal (DHCR).

By way of background, you sought to inspect various records of DHCR on September 7. Since you received no response within five business days, you appealed DHCR's constructive denial of your request on September 16. Paul Blank, DHCR's Appeals Officer, responded on October 17 and denied your request. You pointed our that, for reasons that are unclear, DHCR's Records Access Officer, John Procopio, responded to and denied your initial request on January 3.

Your appeal indicates that you requested to inspect:

> "1) Any and all records, including books, maintained in the law libraries of DHCR's Gertz Plaza, Jamaica, New York and the Fordham Plaza, Bronx, new York offices.
>
> 2) Any and all indices, which categorize by subject matter or by section number of the regulations, the determinations made in every docket, as well as cases involving rent regulation which were subject to judicial review, dating back to the commencement of rent control.

3) Any and all determinations, which are required by either laws or regulations to be available for public inspection."

In response to the appeal, Mr. Blank wrote:

"a) That with regard to the records as itemized in paragraph 1 of your appeal, wherein you seek to examine all records, books, etc. maintained in law libraries, etc., your request fails to reasonably describe that which is requested.

b) That with regard to indices referred to in paragraph 2 of your appeal, arrangements to have same created are now underway. Presently no complete or official index exists, and no requirement exists for creating an index for matters predating the State's takeover of the rent regulatory system in April 1984.

c) That with regard to the third numbered paragraph of your appeal to examine and obtain copies of any and all determinations, same fails to reasonably describe that which you request. Were same adequately described then subject to redaction of names and addresses and rental information, etc., to protect the privacy of persons involved, etc., same can be made available to you at a cost of $.25 per page, upon receipt of a deposit therefor to cover the quantity of items to be ordered.

You asked whether I concur with Mr. Blank's response, particularly in consideration of Corbin v. Eimicke (Supreme Court, New York County, December 19, 1988). Corbin involved a situation in which the petitioner (you) sought to inspect numbers and labels appearing on boxes of DHCR records stored at Leahy Business Archives, Inc. The Court granted the petition and permitted "a simple visual inspection of the outside of the boxes...". The order did not deal with the standard that an applicant "reasonably describe" the records sought as required by

section 89(3) of the Freedom of Information Law, nor did it deal with rights of access to the contents of the box in which you were interested, should that box be found. In short, I do not believe that Corbin is necessarily relevant in terms of substance or precedential value.

From my perspective, although I am unfamiliar with the volume of materials maintained by DHCR, it appears that the response was appropriate. As suggested earlier, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Based upon a decision rendered by the Court of Appeals, a request meets that standard when the agency can "locate and identify" the records [see Konigsberg v. Coughlin, 68 NY 22d 245, 249 (1986)]. While DHCR can undoubtedly locate its libraries, the first aspect of your request is so general and broad that it would not permit the identification of records found within those libraries. In short, in my view, that portion of your request did not "reasonably describe" the records sought.

In the second aspect of the request, you asked for "indices" that categorize determinations and cases. Mr. Blank indicated that no such indices currently exist. With respect to the Freedom of Information Law, section 89(3) states in part that an agency generally need not create a record in response to a request. Under the circumstances, I do not believe that the Freedom of Information Law would require DHCR to prepare the kinds of indices that you requested. Although 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", judicial decisions indicate that section 87(3)(c) does not require that opinions of or final orders issued by agencies be indexed by topic or components [see D'Alessandro v. Unemployment Insurance Appeal Board, 56 AD 2d 962 (1977) and Wattenmaker v. NYS Employees' Retirement System, 95 AD 2d 910 (1983)].

The third aspect of your request pertains to "any and all determinations, which are required by either laws or regulations to be available for public inspection". For reasons expressed with regard to the first portion of your request, it appears that you would not have reasonably described the records.

I point out that in a recent decision involving a request for thousands of records, the Court upheld the agency's denial, stating that:

> "Petitioner's actual demand transcends a normal or routine request by a taxpayer. It violates individual privacy interests of thousands of persons...and would bring in its wake an enormous administrative burden that would interfere

> with the day-to-day operations of an already heavily burdened bureaucracy" (Fisher & Fisher v. Davison, Supreme Court, New York Cty., Oct. 6, 1988).

Again, I am unfamiliar with the volume of records falling within the scope of your request. However, if the number of records is voluminous, the points made in Fisher & Fisher would apparently be apt.

You referred to the State Administrative Procedure Act, section 307. While that statute may be relevant to DHCR's duty to maintain an index by "subject" of its determinations, the requirements of section 307 are separate and distinct from the Freedom of Information Law. As such, issues arising under the State Administrative Procedure Act are beyond the scope of the jurisdiction of this office.

You asked whether, if you seek to inspect the records described in section 26-410(e) of the New York City Rent Control Law, which is part of the Unconsolidated Laws, additional specificity would be necessary. The cited provision refers to the "city rent agency". That phrase is defined in section 26-403(b) to mean DHCR. Section 26-410(e) states that:

> "The city rent agency shall compile and make available for public inspection at reasonable hours at its principal office and at each appropriate local office a copy of each decision rendered by it upon granting, or denying, in whole or in part, any protests filed under this section and shall have available at each appropriate local office a register of properties concerning which a vacate order was issued by a city department having jurisdiction or proceedings have been brought to determine whether any housing accommodations therein became vacant as a result of conduct prosribed by subdivision d of section 26-412 of this chapter."

I am unaware of the manner in which the decisions described above are maintained. Since you indicated that you "merely want to browse through the decisions", without knowledge of the manner in which the decisions are kept, or the volume of those decisions, I cannot provide specific guidance.

With respect to the same provision, you asked whether the records constitute a "system of records". That phrase arises under the Personal Privacy Protection Law and is defined to mean:

> "any group of records pertaining to one or more data subjects from which personal information is retrievable by use of the name or other identifier of a data subject" [section 92(11)].

A "data subject" is a "natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, section 92(3)]. If for example, decisions can be retrieved by means of an individual's name or other identifying details pertaining to the individual, it appears that the records in question would constitute a system of records. If they cannot be retrieved on that basis, but rather chronologically or by location, for instance, I do not believe that the records would constitute a system of records.

You wrote that "past practice has been to make these decisions available without redacting names and addresses", and you asked whether "there is any requirement under FOIL or [section] 307(h) of the State Administrative Procedure Act or other law to redact this information. Again, the Administrative Procedure Act falls beyond the scope of our jurisdiction. However, section 89(2)(a) provides that an agency may delete identifying details from records to protect against unwarranted invasions of personal privacy. If it is determined that disclosure would constitute an unwarranted invasion of personal privacy, I believe that DHCR would be precluded from disclosing. Section 96(1) of the Personal Privacy Protection Law precludes state agencies from disclosing personal information, except in conjunction with paragraphs (a) through (n) of that provision. In turn, section 89(2-a) of the Freedom of Information Law 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."

"If there is a lawful requirement to redact this information", you expressed the belief that DHCR could charge $0.25 per page only if copies were requested". You added that: "Otherwise, [you] believe DHCR could cover the names and addresses and make them available for inspection without requiring payment of a fee". You asked whether I agree with your contention. If certain aspects of records may or perhaps should be withheld, there may be no way of permitting inspection of those records short of preparing photocopies, from which appropriate portions would be deleted. I am unaware of how an agency would "cover" names and addresses while permitting inspection. If redactions cannot effectively be made without photocopying the records, I believe that you could be required to pay the fee.

I am not an expert with respect to the New York City Rent Control Law. However, of possible significance is section 26-409(h) of the Unconsolidated Laws, which originally appeared as section Y51-7.0(h) of the New York City Administrative Code. That provision states that:

> "The city rent agency shall not publish or disclose any information obtained under this title that the city rent agency deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the city rent agency determines that the withholding thereof is contrary to the public interest."

Moreover, case law has held that, although the city rent agency does not have absolute discretion to publish or disclose any information in its possession, the provision quoted does authorize the agency to prohibit disclosure where there is a rational basis for such a determination in light of the nature, purpose and application of the particular matter involved [Bernkrant v. City Rent and Rehabilitation Administration, 1963, 40 Misc. 2d 157, 242 NYS 2d 753, aff'd 20 AD 2d 682]. Since I am not an expert in the area of rent control law, I do not know the relevance of section 26-409(h) to your inquiry.

Your next series of questions involve various aspects of DHCR's regulations. 9 NYCRR 2650.6 requires that a request "specifically describe" the records sought. That requirement is more restrictive than section 89(3) of the Freedom of Information Law, which requires that an applicant "reasonably describe" records. 9 NYCRR 2650.8(c) states essentially that when the receipt of a request is acknowledged, DCHR has 30 days to grant or deny a request. That provision is inconsistent with the regulations promulgated by the Committee on Open Government, 21 NYCRR 1401.5(d), which states that an agency has 10 business days following the acknowledgement of the receipt of a request to grant or deny access. I point out, too, that section 87(1) of the Freedom of Information Law states that agencies shall adopt regulations "pursuant to such general rules and regulations as may be promulgated by the committee on open government...". 9 NYCRR 2650.11(b)(4) requires that payment for copies be made by U.S. money order or by certified bank check". In my view, legal tender, cash, must be accepted. Further, as you indicated, it has been held that an agency must accept "United States currency" as payment of fees for copies (Reese v. Mahoney, Supreme County, Erie County, June 28, 1984).

Section 9 NYCRR 2050.1 states that records maintained by DHCR for the purpose of administering the New York City Emergency Housing Rent Control Law "shall be deemed confidential". It is your view that those regulations conflict with the Freedom of Information Law and other regulations promulgated by DHCR. In this regard, as a general matter, I believe that records may be considered confidential only when a statute, an act of the State Legislature, permits or requires confidentiality. In those instances, records fall within the scope 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". Moreover, it has been held that an agency's rules or regulations do not constitute statutes for purposes of interpreting the Freedom of Information Law, and that they cannot diminish rights conferred by the Freedom of Information Law. It is possible, however, that the regulations in question reiterate language contained in a statute. For example, as indicated earlier, section 26-409(h) of the Unconsolidated Laws confers confidentiality, as does section 8607 of the Unconsolidated Laws, which is part of the Local Emergency Housing Rent Control Act. That statute applies to New York City (see section 8602). If indeed the regulations reiterate or are based upon statutory authority conferring confidentiality, I believe that they would be valid.

It is also noted that other provisions concerning rent administration apparently confer confidentiality. For instance, the Emergency Tenant Protection Act states that:

> "Registration pursuant to this section shall not be subject to the freedom of information law, provided that registration information relative to a tenant, owner, lessor or subtenant shall be made available to such party or his authorized representative" [Unconsolidated Laws, section 8632-a(b)].

Similar considerations and analyses would apply with respect to the regulations discussed in your letter of January 27.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Paul Blank
James Procopio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5447

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

February 3, 1989

Mr. Leon Street
88-A-1530
Box 500
Elmira, NY 14902-500

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

Dear Mr. Street:

I have received your letter of January 18, which reached this office on January 30.

Your inquiry pertains to a request for medical records maintained by the Elmira Correctional Facility. In response to the request, you were informed that there would be a charge of 25 cents per photocopy, as well as additional fees to cover staff time for locating and monitoring your review of the records.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by the Department of Correctional Services and its facilities. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appear in section 87(2)(a) through (i) of the Law.

With respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personal could be characterized as "intra-agency materials" that

fall within the scope of section 87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, on January 1, 1987, a new statute, section 18 of the Public Health Law, became effective. In brief, that statute generally grants rights of access to medical records to the subjects of the records.

With respect to fees, unless another statute permits the assessment of a different fee, records accessible under the Freedom of Information Law may be inspected free of charge, and the agency cannot impose a fee involving personnel costs, for instance. When copies are requested, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing records that cannot be photocopied, unless otherwise provided by a statute other than the Freedom of Information Law. Section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of inability to pay."

In view of the foregoing, it appears that the fees assessed by the Department are being imposed pursuant to the Public Health Law rather then the Freedom of Information Law.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

> Access to Patient Information Coordinator
> New York Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5448

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

February 3, 1989

Mr. W.C. Dannenbrink
Executive Editor
The Daily Messenger
73 Buffalo Street
Canandaigua, NY 14424-1085

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

Dear Mr. Dannenbrink:

I have received your letter of January 27 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you believe that you have not had adequate access to records of the activities of police agencies that you routinely cover. You added that the problem generally is that you are "given information about whatever investigations the police agency involved decides to give [you]". As such, you asked whether the Freedom of Information Law or any other statute prohibits you from "seeing the daily blotter - the log of police activities". You indicated that, from your perspective, "it would be ideal if [you] could scan the list of complaints, arrests, etc. and ask to see the reports on any of those that show promise of being newsworthy".

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.

I point out, too, that the introductory language of section 87(2) refers 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 on the quoted language, I believe that the State Legislature envisioned situations in which a single record might be both available and deniable in part. Further, the same language, in my opinion, imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. As such, even though some aspects of a police blotter or other records might properly be denied, the remainder might nonetheless be available.

Second, an applicant, in my view, is not required to identify with particularity exactly which record, or perhaps which portion of a record he or she may be interested in reviewing. The Freedom of Information Law as originally enacted in 1974 required an applicant to identify the records sought [see original Law, section 88(6)]. The current provision, section 89(3), however, merely requires that an applicant "reasonably describe" the records sought. According to two decisions rendered by the Court of Appeals, the State's highest court, if an agency can locate the records based upon the terms of a request, the applicant has met the burden of reasonably describing the records sought [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984); Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. Therefore, I do not believe that a journalist or member of the public can be required to seek a portion of the police blotter with reference to a particular incident. Rather, an applicant could, in my view, request the blotter as it pertains to particular days or dates.

Third, the phrase "police blotter" is not specifically defined in any statute. It is my understanding that it is a term that has been used based, more than anything else, upon custom and usage. Further, the contents of what may be characterized as a police blotter may vary from one police department to another. As you may be aware, the Third Department, Appellate Division, held that police blotters were available under the Freedom of Information Law [Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. The court in Sheehan determined that, based on 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 specified that a traditional police blotter contains no investigative information, but rather merely a summary of events or occurrences and that, therefore, it is accessible under the Freedom of Information Law.

It is possible that some of the police agencies that you cover maintain police blotters or similar documents that may be more expansive than the traditional police blotter described in Sheehan. Therefore, although those records are subject to rights of access, portions of the blotter might be withheld, depending

upon their specific contents. Several grounds for denial may be relevant. It is emphasized that many of the grounds for denial are based upon potentially harmful effects of disclosure. The following paragraphs will review the grounds for denial that may be significant.

The initial ground for withholding, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". In brief, when a statute exempts particular records from disclosure, they may, in my view, be considered "confidential". For instance, a blotter or other record might refer to the arrest of a juvenile. In that circumstance, a portion of the records might be withheld due to the confidentiality requirements imposed by the Family Court Act (see section 784).

Also of potential 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". It might be applicable relative to the deletion of identifying details in a variety situations, such as domestic disputes, complaints that neighbors' dogs are barking, or where a record identifies a confidential source or a witness, for example.

The next ground for denial of relevance is section 87(2)(e), which permits an agency to withhold record that:

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

Although the resolution of the issue is unclear, a police blotter as described in Sheehan might be characterized as a record compiled in the ordinary course of business, rather than a record "compiled for law enforcement purposes". If that is so, section 87(2)(e) would not be applicable. Records relating to a blotter

entry such as investigative reports would likely fall within the scope of section 87(2)(e). Those records would be accessible or deniable, depending upon their contents and the effects of disclosure.

Another ground for denial to which reference is made on the blotter is section 87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is section 87(2)(g). The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Since a police blotter is prepared by employees of a police department, I believe that it could be considered as "intra-agency material". However, it would generally consist of factual information. As such, section 87(2)(g) could not, in my opinion, be asserted as a basis for denial.

Enclosed is a copy of an article that I prepared concerning police records that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1583
FOIL-AO-5449

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

February 3, 1989

Ms. Melanie Dennis
[redacted]

The staff of the Committee 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. Dennis:

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

You have requested an advisory opinion with respect to the implementation of the Freedom of Information Law and the Open Meetings Law by the Village of Canastota. You raised issues concerning the timeliness of response to requests for records, the propriety of executive sessions and notice of meetings.

In this regard, I offer the following comments.

First, with respect to requests for records, 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 aspects of the Law [21 NYCRR Part 1401]. In turn, section 87(1) states that the governing body of a public corporation, such as the Board of Trustees of the Village, is required to adopt its own regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee.

The Law and the Committee's regulations prescribe time limits within which an agency is 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

Having contacted Ms. Sena Clarke, Village Clerk, I was informed that she is attempting to comply with your requests. She indicated that one of the reasons for the delay is due to the recent death of the deputy clerk.

Second, based upon copies of minutes of "executive meetings" that you sent, it appears that the Board of Trustees may be acting in a manner inconsistent with the requirements of the Open Meetings Law.

By way of background, 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". It is noted that the Court of Appeals, the State's highest court, has interpreted the definition broadly to include so-called "work sessions" and similar gatherings, even though there may be no intent to take action [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As such, any gathering of a quorum, a majority of the total membership of a public body, held for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law that must be convened open to the public, whether or not there is an intent to vote or to take action, and irrespective of the manner in which the gathering may be characterized.

With regard to executive sessions, I point out that the phrase "executive session" is defined in section 102(3) of the 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 an open meeting, but rather is a part of an open meeting. Section 105(1) of the Law prescribes a procedure that must be accomplished by a public body, during an open meeting, before it may enter into an executive session. Specifically, the cited provision states in relevant part that:

> "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..."

The ensuing provisions specify and limit the topics that may appropriately be discussed during an executive session. As such, a public body may not enter into an executive session to discuss the subject of its choice; on the contrary, unless the subject matter falls within one or more of the topics listed in paragraphs (a) through (h) of section 105(1) of the Law, a public body would not have the authority to conduct an executive session. Enclosed are copies of the Open Meetings Law and "Your Right to Know", an explanatory brochure. Both list the grounds for entry into an executive session.

The minutes of one "executive meeting" in my opinion indicate a proper subject for a closed door discussion, for the topic involved a matter leading to the appointment of a particular person [see Open Meetings Law, section 105(1)(f), and minutes of the meeting of December 29, 1988]. However, the minutes of a different executive session held on July 13 suggest that there was no basis for conducting the discussion during an executive session. The topics involved the payment of a bill and bonding, neither of which appear to have fallen within the grounds for entry into an executive session.

Third, section 104 of the Open Meetings Law requires that every meeting be preceded by notice of the time and place of the meeting. Subdivision (1) pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Subdivision (2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news and to the public by means of posting "to the extent practicable" at a reasonable time prior to such meetings.

Lastly, section 106 of the Open Meetings Law pertains to minutes of meetings. Subdivision (1) deals with minutes of open meetings; subdivision (2) deals with minutes of executive sessions, which must be prepared only if action is taken 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."

Therefore, minutes of open meetings must be prepared and made available within two weeks of such meetings; minutes of action taken in an executive session must be prepared and made available within one week of the executive session. If it is the practice of the Board to approve minutes, but the Board does not meet within two weeks to vote its approval, to comply with the Law, it has been suggested that the clerk or the person who prepares minutes should do so and make them available within the appropriate time. If they have not been approved, when disclosed, they may be marked as "unapproved", "draft" or "non-final". By so doing, the public can generally learn what transpired at the meeting; at the same time, notification is effectively given that the minutes are subject to change.

In an effort to enhance compliance with law, copies of this opinion will be sent to the 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: Board of Trustees, Village of Canastota
Sena C. Clarke, Clerk
Leo F. Kane, II, Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0 3450

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

February 3, 1989

Ms. Louis B. Johnson
[redacted]

Dear Ms. Johnson:

I have received your letter of January 27 in which you requested that this office "monitor [your] Freedom of Information Act request to obtain [your] medical records" from Jamaica Hospital.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the New York Freedom of Information Law. The Committee, however, is not empowered to compel an agency to grant or deny access to records.

Second, the Freedom of Information Law is applicable to agency records, and 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, as a general matter, the Freedom of Information Law applies to records maintained by entities of state and local government in New York. It would not apply to Jamaica Hospital if that facility is a private rather than a governmental entity. Since you also referred to the federal Freedom of Information Act, I point out that the Act is applicable to federal government agencies. Therefore, it is unlikely that the federal Freedom of Information Act would be relevant to your request.

Third, even if neither the state Freedom of Information Law nor its federal counterpart is applicable to records of Jamaica Hospital, a relatively new law, section 18 of the Public Health Law, generally provides the subjects of medical records with rights of access to those records. Enclosed for your consideration is a publication of the NYS Department of Health entitled "You and Your Medical Records". That publication describes your rights to health records pertaining to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5451

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

February 7, 1989

Mr. John L. Rizzo
Genesee County Attorney
County Building No. 1
Main and Court
Batavia, NY 14020-3199

The staff of the Committee 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. Rizzo:

As you are aware, your letter addressed of January 12 addressed Mr. O. Peter Sherwood of the Department of Law has been forwarded to the Committee on Open Government.

Your inquiry was precipitated by a request for an opinion made by a member of the Genesee County Legislature. The first question raised is whether "an appointed County Manager [may] keep all applications and resumes, for an appointed position, in his office only". With respect to the second question, the Legislator asked: "Is it not the responsibility of the Personnel Officer to maintain all records of applications and resumes of all individuals, whether they be appointed and/or civil service employees or committee appointments".

In this regard, I point out that the Freedom of Information Law provides a framework concerning rights of access to records and the authority of an agency to withhold records. Nothing in the Freedom of Information Law pertains specifically to the location where records must be kept or the responsibility of particular public officers to maintain records. As such, the Freedom of Information Law does not provide guidance with respect to the questions raised. Further, the issues raised in those questions fall beyond the jurisdiction or expertise of this office.

During our telephone conversation on the matter, you indicated that the issue relates in part to the disclosure of applications, resumes and similar records concerning a vacancy in an appointive position that has not yet been filled. It is noted in this regard that section 89(7) of the Freedom of Information Law states in relevant part that nothing in that statute shall require the disclosure of the name or home address "of an applicant for appointment to public employment".

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-5452

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

February 7, 1989

Ms. Patricia Minton
[redacted]

The staff of the Committee on 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. Minton:

I have received your letter of January 30, as well as the correspondence attached to it.

According to the materials, a request for records was directed to the Troy School District on December 12. Since you did not receive the records sought, you appealed. In response to the appeal, on January 24, Mr. Charles A. Morse, Assistant Superintendent for Business "determined that you were not denied access to information concerning your requests dated December 12, 1988". Mr. Morse added that:

> "As a result of your appeal, [he has] determined original documents can be provided and [he has] directed certain employees of the Business Office to retrieve and make copies of them. Please be advised that the research on your requests will take some time. As soon as the research is completed and the documents copies you will be notified."

In your letter to this office, you wrote that "they say [you] can have it, but not when". You indicated that you "have waited almost two months in some cases for information [you] have requested. Information consisting of simple public records."

You have requested an advisory opinion concerning the matter. In this regard, I offer the following comments.

First, I point out that section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law [21 NYCRR Part 1401]. In turn, section 87(1) states that the governing body of a public corporation, such as the Board of Education, is required to adopt its own regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee.

The Law and the Committee's regulations prescribe time limits within which an agency is required to respond to requests and make records available. 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, sections 1401.5(d) and 1401.7(c)].

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, with regard to the nature of a response to an appeal, section 89(4)(a) of the Freedom of Information Law states in relevant part that the person designated to render a determination following an appeal "shall within ten business days of the receipt of an appeal fully explain in writing to the person requesting the record the reasons for denial, or provide access to the records sought". As such, a response to an appeal must be made within ten business days of the receipt of an appeal, and

the response must either state the reasons for affirming a denial, or grant access to the records sought. In my view, the response cannot result in a further delay of disclosure beyond ten business days. In short, access delayed, in my opinion, is the equivalent of access denied.

Lastly, it has been held judicially that a shortage of manpower to comply with a request does not constitute a valid basis for a denial of access to records. In United Federation of Teachers v. New York City Health and Hospitals Corporation, it was stated that:

> "Were the court to recognize the 'defense' of a shortage of manpower by the agency from which disclosure is sought, it would thwart the very purpose of the Freedom of Information Law and make possible the circumvention of the public policy embodied in the Act" [428 NYS 2d 823, 824 (1980)].

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Mr. Morse.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles A. Morse, Assistant Superintendent for Business

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5453

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

February 7, 1989

Mr. Alfred Mower
87-A-8232 H5-37
Clinton Correctional Facility
Box 367B
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. Mower:

I have received your letter of January 30, which pertains to rights of access conferred by the Freedom of Information Law.

Your inquiry relates to your right "to obtain information concerning people other than yourself", such as birth certificates, marriage licenses and social security numbers. You wrote that you would like to know whether you have the right to records indicating "whether certain people had telephone, gas & electric, and where and what address their social security checks were mailed".

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and section 86(3) of the Law defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally pertains to records of entities of state and local government in New York. The Law would not apply to public utilities, such as the New York State Electric and Gas Company or the New York Telephone Company.

Second, there are many statutes other than the Freedom of Information Law that deal with access to particular records. For example, birth records, according to section 4173(2) of the Public Health Law, "shall be issued only upon order of a court of competent jurisdiction or upon a specific request therefor by the person, if eighteen years of age or more, or by parent or other lawful representative of the person to whom the record of birth relates". Marriage licenses are, in my opinion, generally available from local registrars of vital records pursuant to section 19 of the Domestic Relations Law. However, it may be difficult to obtain those records, because the State Health Department, which has general responsibility with respect to vital records, has directed registrars to restrict access to those kinds of records. You also referred to records of a public housing authority. While a public housing authority is an "agency" subject to the Freedom of Information Law [see Westchester Rockland Newspapers v. Fischer, 101 AD 2d 840 (1985)], section 159 of the Public Housing Law states in part that:

> "Information acquired by an authority or municipality or by an officer or employee thereof from applicants for dwellings in projects of an authority or municipality or from tenants of dwellings thereof or from members of the family of any such applicant or tenant or from employers of such persons or from any third person, whether voluntarily or by compulsory examination as provided in this chapter, shall be for the exclusive use and information of the authority or municipality in the discharge of its duties under this chapter and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the authority, municipality or successor in interest thereof is a party or complaining witness to such action or proceeding."

Lastly, information regarding social security would be maintained by a federal agency. Such an agency would be subject to the federal Freedom of Information Act (5 USC 552) rather than the New York Freedom of Information Law. Further, like the Freedom of Information Law, the federal Act permits agencies to with-

hold records when disclosure would constitute an unwarranted invasion of personal privacy. I would conjecture that disclosure of records indicating where social security checks are mailed would result in an unwarranted invasion of personal privacy.

Based on the foregoing, it appears that much of the information in which you are interested would either fall outside the scope of the Freedom of Information Law or could otherwise 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-5454

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

February 7, 1989

Mr. Angelo L. Gonzalez, Jr.
83-C-724
135 State Street
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, unless otherwise indicated.

Dear Mr. Gonzalez:

I have received your letters of December 20 and January 30, the latter of which was addressed to Ms. Laura Rivera, a member of the Committee. As indicated above, the staff is authorized to respond on behalf of the Committee and its members.

With regard to your inquiry, this office is permitted to advise with respect to the Freedom of Information Law. The Committee does not have the authority to enforce the Law, to obtain records on behalf of an applicant, or to compel an agency to grant or deny access to records.

The focal point of your letter pertains to a request for a variety of records directed to the Division of State Police. You have complained that the reasons for the initial denial differ in some respects from the reasons for denial expressed in the determination following your appeal. You also contended that, since the records sought pertain to you, you have a right to those records.

In this regard, I offer the following comments.

First, there is nothing in the Law that indicates that the reasons for denial offered initially and those following an appeal must be entirely consistent. Were that so, there would be no rationale for the appeal process, and initial denials would never be reversed.

Second, although the Freedom of Information Law provides broad rights of access, it permits an agency to withhold records pursuant to the grounds for denial appearing in section 87(2)(a) through (h). Further, while section 89(2)(c) generally grants access to records to the subject of those records, the introductory phrase of that provision states that those records are available "unless otherwise provided by this article". Therefore, even though disclosure of personal information identifiable to you would not constitute an unwarranted invasion of your personal privacy, there may be a variety of other applicable grounds for a denial.

Third, I have contacted the Division of State Police on your behalf. Based upon the description of the facts given to me, it appears that several of the grounds for denial could appropriately have been asserted to withhold the kinds of records that you requested. As I understand their contents, the records sought identify you, as well as others. Consequently, it would appear that records or portions thereof might properly have been withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" with respect to persons other than yourself who may be identified in the records [see Freedom of Information Law, section 87(2)(b)]. Also of likely relevance 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". Further, of possible significance is section 87(2)(f), which enables an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person".

In short, based upon the facts given to me, it appears that there were several bases for withholding. As indicated in the determination on appeal, you may seek judicial review of the determination by initiating 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5455

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

February 13, 1989

Mr. Anthony Morgan
87-A-3765
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

Dear Mr. Morgan:

I have received your letter of February 7 addressed to the Appeals Officer of the Committee on Open Government. Your appeal deals with denials of access to records by the Attica Correctional Facility and the New York City Police Department.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee neither maintains the records in which you are interested, nor is it empowered to render a determination following an appeal. In short, the Committee has no authority to compel an agency to grant or deny access to records.

The provision for appealing a denial of access to records is 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 promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that appeals should be directed to Counsel to the Department in Albany. I believe that the appeals officer for the New York City Police Department is Thomas E. Slade, Assistant Deputy Commissioner for Civil Matters.

Lastly, the correspondence attached to your letter suggests that your requests were not sufficiently specific to determine which records you want. Here I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. As such, a request should include sufficient detail to enable agency officials to locate and identify the records in which you are interested.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5456

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

February 13, 1989

Mr. Douglas Ritter
[redacted]

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

Dear Mr. Ritter:

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

Your inquiry pertains to requests for records of the Broome County Department of Social Services. One of the persons with whom you corresponded is Thomas B. Oakes, Deputy County Attorney. Mr. Oakes has written to me on the same subject, and I have spoken with him concerning the matter.

In conjunction with the facts as I understand them, I offer the following comments.

First, part of the problem appears to involve the time within which an agency must respond to a request. You referred to Mr. Oakes' acknowledgement of the receipt of your request and to what you characterized as a "bps" (which you did not enclose) in which he wrote that he had "just ten more days to respond with the information requested". With respect to that statement, you wrote that you "don't find that right in state law".

For future reference, there are provisions that permit an agency to respond within ten business days of its acknowledgement of the receipt of a request. 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 regulations concerning the procedural aspects of the Law [21 NYCRR Part

1401]. In turn, section 87(1) states that the governing body of a public corporation, such as as a county legislature, is required to adopt its own regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee.

The Freedom of Information Law and the Committee's regulations prescribe time limits within which an agency is required to respond to requests and make records available. 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, sections 1401.5(d) and 1401.7(c)]. As such, the regulations promulgated by the Committee permit the ten business day extension to which Mr. Oakes apparently referred.

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, there was apparently confusion, or perhaps a lack of clarity, concerning the particular records that you requested. Although the initial request involved records of payment by the County to a pest control company, Mr. Oakes indicated that the request in fact pertained to a situation concerning infestation and neglect.

Third, if the records sought pertain to neglected children or child abuse, for example, I believe that they would be outside the scope of public rights of access. Section 87(2)(a) of the Freedom of Information Law, the first ground for withholding records, pertains to records that are "specifically exempted from disclosure by state or federal statute". Records concerning neglected children or child abuse are exempted from disclosure respectively pursuant to sections 372 and 422 of the Social Services Law. I point out, too, that if a class of records is exempted from disclosure by statute, as in the case of sections 372 and 422 of the Social Services Law, the Court of Appeals has held that the records would be exempted in their entirety; stated differently, portions of the records would not be accessible, even if identifying details were deleted to protect against an unwarranted invasion of personal privacy [see Short v. Board of Managers of Nassau County, 57 NY 2d 399 (1982)].

I hope that my understanding of the matter is accurate and the foregoing has served to clarify the situation.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas B. Oakes, Deputy County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5457

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

February 13, 1989

Mr. John C. 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 February 2, which deals with your unsuccessful attempts to obtain "a list of records" from the New York City Health and Hospitals Corporation.

In this regard, I offer the following comments.

First, the provision concerning the so-called "subject matter list" is found in section 87(3)(c) of the Freedom of Information Law. That provision requires 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."

From my perspective, it is clear that a subject matter list is not required to consist of an index of each and every record maintained by an agency. Rather, I believe that it is intended to consist of a list, by category, of the kinds of records maintained by an agency, whether or not the records are accessible to the public under the Law. Further, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, provide in part that "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [21 NYCRR section 1401.6(b)].

Second, as indicated earlier, the Committee has promulgated regulations in conjunction with the requirements of section 89(1)(b)(iii) of the Freedom of Information Law. In turn, section 87(1) of the Freedom of Information Law requires each agency to adopt similar 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..." (the Freedom of Information Law). The Office of the Mayor has in fact adopted the appropriate rules and regulations applicable to agencies under the aegis of the Mayor. Relevant to your inquiry is section 3 of the Mayor's "Uniform Rules and Regulations Pertaining to the Administration of the Freedom of Information Law", entitled "Responsibilities of records access officer". Specifically, section 3.a. states that the records access officer:

> "shall maintain a reasonably detailed current subject matter list of all records in the possession of the agency, whether or not such records are available for inspection and copying pursuant to the Freedom of Information Law. The list shall be of sufficient detail to permit identification by the public of categories of records. The subject matter list shall be updated not less than twice per year and the date of the most recent revision of the list shall appear on its first page."

The Mayor's regulations became effective on April 16, 1979. Further, under the Freedom of Information Law and the regulations, the subject matter list should be maintained on an ongoing basis.

As you requested, and in an effort to enhance compliance, a copy of this letter will be sent to Ms. Pat Lockhart, Records Access Officer for the Health and Hospitals Corporation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Pat Lockhart, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5458

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

February 13, 1989

Mr. David L. Lewis
Staff Writer
Westchester Rockland Newspapers
733 Yonkers Avenue
Yonkers, NY 10704

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

Dear Mr. Lewis:

I have received your letter of February 7, as well as the correspondence attached to it.

According to the materials, you requested attendance records, salary and related information concerning two employees from the Mount Vernon School District. Although their salaries and dates of hire were disclosed, you were denied access to the attendance records pursuant to section 87(2)(b) of the Freedom of Information Law.

You have requested an advisory opinion concerning the denial, as well as rights of access to the reasons for an absence. 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, although two of the grounds for denial relate to attendance records, based upon the language of the Law and its judicial interpretation, I believe that records indicating the dates or number of absences of public employees are available. Further, records indicating the category of leave time used, such as sick or vacation leave, would, in my opinion be available.

Of 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Attendance records could be characterized as "intra-agency materials". However, those portions reflective of dates or numbers of absences, or the category of leave time used, would constitute "statistical or factual" information accessible under section 87(2)(g)(i).

Also of relevance 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. In a decision that reached the Court of Appeals that dealt specifically with attendance records, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the right of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave

> in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985); aff'd 67 NY 2d 562 (1986)].

Further, in affirming the decision of the Appellate Division, the Court of Appeals held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 79). 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 government officers (Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [citing Public Officers Law section 84]).
>
> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (see, Public Officers Law section 87 [2]; Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY2d 75, 79-80, supra). This presumption speci-

> fically extends to intraagency and interagency materials, such as the report sought in this proceeding, comprised of 'statistical or factual tabulations or data' (see, Public Officers Law section 87 [2] [g] [i]). Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 80, supra; Matter of Fink v Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566).

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, or the dates of leave time claimed under a particular category (i.e., sick or vacation leave) would not in my view represent a person 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 sum, for the reasons described in the preceding paragraphs, I believe that the denial was inappropriate. In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to District officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Elia C. DeBenedictis, Clerk of the Board
Dr. William C. Prattella, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5459

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

February 13, 1989

Mr. Donald V. Brandt
[redacted]

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

Dear Mr. Brandt:

I have received your letter of February 7, in which you asked that I "send FOIA directions and any application forms available". You also requested that I "describe the relationship of the Governor's Policy of 'Accountability of Public Officers to the General Public'". In addition, you are seeking information concerning "limitations if any on Medical Records of deceased persons".

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law that requires that a specific form be completed when requesting records. However, section 89(3) of the Law states that an agency may require that a request be made in writing. Further, that provision requires that an applicant "reasonably describe" the records sought. As such, when making a request, an applicant should include sufficient detail to enable agency officials to locate and identify the records. Enclosed are copies of the Freedom of Information Law and "Your Right to Know", which describes the Law in detail and contains a sample letter of request that may be useful to you.

Second, I do not clearly understand your inquiry with respect to the Governor's policy on accountability. However, as you may be aware, in an effort to increase accountability, the Governor has sponsored legislation in the areas of ethics and financial accountability. Moreover, he has recommended legislation to strengthen the Freedom of Information Law and the Open Meetings Law.

Lastly, with respect to medical records, I point out that private physicians and hospitals would not be subject to the Freedom of Information Law, for that statute applies only to records maintained by governmental entities. However, there are statutes in the Public Health Law pertaining to medical records, such as sections 17 and 18. Section 18 deals with access to medical records by the subjects of those records. To obtain additional information concerning medical records, it is suggested that you contact the New York State Department of Health, Access to Patient Information Coordinator, Division of Public Health Protection, Room 2517, Corning Tower, Empire State Plaza, Albany, NY 12237. That office may be reached by phone at (518)474-2383.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5460

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

February 13, 1989

[redacted]
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear [redacted]:

I have received your letter of February 6, which concerns your efforts in obtaining mental health records from the mental health unit at the Green Haven Correctional Facility.

According to your letter, you "have been told that the mental health unit can withhold information based on OMH 33.13 (a directive)". You added that the directive is not section 33.13 of the Mental Hygiene Law, and you asked whether a copy could be sent to you.

In this regard, I offer the following comments.

First, I am unfamiliar with any such "directive". Further, the Committee generally does not serve as a source of records. I am familiar, however, with section 33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

Second, a relatively new statute, section 33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. It is my understanding that the mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State

Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to Mr. Charles Giglio, Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. I point out that under section 33.16, there are certain limitations on rights of access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5461

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

February 13, 1989

Mr. James R. McGuire
Schenectady Gazette
332 State Street
Schenectady, NY 12301-1090

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

Dear Mr. McGuire:

I have received your recent letter, which reached this office on February 8.

According to your letter, the Fulton County Economic Development Corporation (EDC) has denied your request for its 1989 budget. You added that J. Paul Kolodziej, EDC's attorney, contends that, "as a not-for-profit local development corporation, the EDC is not subject to the state's Freedom of Information Law".

You have requested an advisory opinion concerning the status of local development corporations under the Freedom of Information Law. In this regard, I offer the following comments.

First, the scope of the Freedom of Information Law is determined in part by section 86(3), which defines "agency" to include:

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

In view of the language quoted above, the question is whether a local development corporation, such as the Fulton EDC, is a "governmental" entity performing a "governmental" function.

Second, specific reference to local development corporations is found in section 1411 of the Not-for-Profit Corporation Law. The cited provision describes the purposes of local development corporations and states in part that:

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

Therefore, due to its status as a not-for-profit corporation, it is not clear that a local development corporation is a governmental entity; however, it is clear that such a corporation performs a governmental function.

In an effort to learn more about local development corporations generally, it has been found that their relationships to government are inconsistent. Some are apparently analogous to chambers of commerce and, in great measure, carry out their duties independent of government. Others appear to be partners with or extensions of government that carry out their duties in conjunction with government. I am unfamiliar with the activities of the Fulton County EDC or the background concerning its creation.

Third, although I am unaware of any judicial determination that deals specifically with the status of a local development corporation under the Freedom of Information Law, it is noted that there is precedent regarding the application of the Freedom of Information Law to certain not-for-profit corporations. Specifically, in Westchester Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the Court of Appeals found that volunteer fire companies, which are not-for-profit corporations, are subject to the Freedom of Information Law. In so holding, the Court stated that:

> "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' (emphasis added; Public Officers Law, section 84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, sections 560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [id. at 579].

In sum, the status of local development corporations under the Freedom of Information Law is unclear. However, case law rendered under the Freedom of Information Law suggests that, to give effect to the intent of the Law, a not-for-profit entity that performs "an essential governmental function" might be found to be subject to the requirements of the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: J. Paul Kolodziej

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5462

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

February 13, 1989

Ms. Elena Cacavas
Hodgson, Russ, Andrews,
Woods & Goodyear
1800 One M & T Plaza
Buffalo, NY 14202-2391

The staff of the Committee on 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. Cacavas:

I have received your letter of January 31 in which you requested an advisory opinion concerning the Freedom of Information Law.

You asked:

> "whether a school district is required to release census data collected with respect to 4 and 5 year old children residing within the district who are not yet of compulsory attendance age, but who will be required to enroll in school within one or two years."

You added that:

> "The census data in question is a listing of each child's name, birth date, address and his or her parents' names. This information is requested by groups which wish to use it as the basis for soliciting children for enrollment in non-public educational programs."

In conjunction with the foregoing, you contend that rights of access are governed by the Freedom of Information Law rather than the Family Educational Rights and Privacy Act (20 U.S.C. section 1232g). You also expressed the understanding that "a school

district would be prohibited from releasing the census data on the grounds that such would constitute an unwarranted invasion of personal privacy unless identifying details of the children and their families are deleted" (emphasis yours).

In this regard, I offer the following comments.

First, the information sought is similar to "directory information" as that phrase is defined in 34 C.F.R. section 99.3, which is a portion of the regulations promulgated by the U.S. Department of Education under the Family Educational Rights and Privacy Act, which is commonly known as the Buckley Amendment. I do not believe that the regulations or the Buckley Amendment are applicable. The same provision of the regulations defines "student" to mean "any individual who is or has been in attendance at an educational agency or institution...". Since the preschoolers who are identified in the records sought have not yet attended school, I agree with your contention that the records fall outside the scope of the Buckley Amendment.

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

Third, as you suggested, section 87(2)(b) permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2)(b) also lists five examples of unwarranted invasions of personal privacy. I believe that those examples represent but five among conceivable dozens of unwarranted invasions of personal privacy. Further, when dealing with questions of privacy, subjective judgments must often be made. While one reasonable person might believe that disclosure of certain personal information would be innocuous, thereby resulting in a permissible invasion of privacy, an equally reasonable person might view disclosure of the same information as offensive, thereby resulting in an unwarranted invasion of personal privacy.

From my perspective, the information contained in census records, such as home addresses, dates of birth and home telephone numbers, could generally be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Moreover, one of the examples of an unwarranted invasion of personal privacy, section 89(2)(b)(iii), states that such an invasion includes:

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

In view of the purpose for which the request was made, it would appear that the list could be withheld on the basis of section 89(2)(b)(iii).

As indicated earlier, while I do not believe that the information falls within the scope of the Buckley Amendment, the federal regulations may serve as a guide to appropriate action by a school district. Specifically, the regulations indicate that an educational agency cannot disclose directory information unless it has followed the procedure set forth in section 99.37. That provision requires that public notice of the intent to disclose directory information be given to parents of students. The parents then may essentially veto disclosure of any item of directory information pertaining to their children. In the case of census data pertaining to children of preschool age and their parents, there is no provision that enables the parents to waive what in the context of the Buckley Amendment would be a right to privacy. Nevertheless, due to the personal nature of the records, once again, it is my view that disclosure would result in an unwarranted invasion of personal privacy and that the records could justifiably be withheld pursuant to the Freedom of Information Law.

Lastly, while the Buckley Amendment generally prohibits the disclosure of education records identifiable to students (unless confidentiality is waived), the Freedom of Information Law is permissive. An agency may withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy; however, there is no obligation to withhold. As such, even though identifying details contained in census data might properly be denied, I do not believe that a school district would be prohibited from disclosing the data.

I hope that I 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-5463

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

February 14, 1989

Ms. Gail Young
Secretary to the Supervisor
Town of Nassau
29 Church Street
P.O. Box 587
Nassau, NY 12123

The staff of the Committee on 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. Young:

I have received your recent correspondence, which reached this office on February 9.

As I understand your inquiry, the Town of Nassau has received a request for "lists of items". In some instances, the Town does not apparently "have lists as such". Your inquiry involves the responsibility of the Town concerning the request. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all records of an agency. I point out that 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."

Therefore, if the Town maintains records, irrespective of when the records were created, the records would be 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.

Third, the Freedom of Information Law pertains to existing records. Section 89(3) states in part that agency is not required to create a new record in response to a request. In the context of your inquiry, if the Town does not maintain lists containing the information sought, I do not believe that Town officials would be obliged to create a list in order to satisfy a request made under the Freedom of Information Law. In short, if the lists that have been requested do not exist, new lists need not be prepared, in my opinion, in response to the request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5464

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

February 14, 1989

[redacted]
135 State Street
Auburn, NY 13022

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

Dear [redacted]:

I have received your letter of December 31, which reached this office on February 6.

As I understand the situation, you are interesting in obtaining mental health records prepared during the course of your incarceration. In this regard, I offer the following comments.

Although the Freedom of Information Law generally pertains to records maintained by units of state and local government in New York, mental health records identifiable to clients or patients are governed by other statutes.

Section 33.13 of the Mental Hygiene Law generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential. However, a relatively new statute, section 33.16 of the Mental Hygiene Law, pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. It is my understanding that the mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health.

Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to Mr. Charles Giglio, Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. I point out that under section 33.16, there are certain limitations on rights of access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1587
FOIL-AO-5465

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

February 15, 1989

Ms. Mary B. Vedder
[redacted]

The staff of the Committee on 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. Vedder:

I have received your letter of February 6, as well as the materials attached to it.

According to the correspondence, you requested from the Horseheads Central School District minutes of meetings of the Board of Education held on particular dates. You indicated that you were especially interested in obtaining minutes involving the Board's decision to terminate your employment, including minutes of executive sessions. In response to the request, Dr. Kenneth Galbraith, Director of Human Resources, forwarded minutes of the open meetings held on the dates specified. He also wrote in an ensuing letter that "no formal action was taken in an executive session on any matter and specifically the Board of Education took no action in executive session regarding the termination of your service". Dr. Galbraith added that "there are no minutes of the Executive Session", and that the Board's action concerning your termination was taken in "open session".

You have requested my assistance in obtaining additional information on the matter. In this regard, I offer the following comments.

First, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law section 105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to section 106(2). It is noted that under section 106(3) of the Open Meetings Law minutes of both open meetings and executive sessions are available in accordance with the Freedom

of Information Law. Nevertheless, various interpretations of the Education Law, section 1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session (see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County 7AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157 aff'd 58 NY 626 (1982)]. More importantly under the circumstances, if no action is taken in an executive session, the Open Meetings Law does not require that minutes of the executive session be prepared.

In sum, since the Board took no action concerning your termination during an executive session, there would be no requirement that minutes of the executive session be prepared. Therefore, Dr. Galbraith's response indicating that there are no minutes of the executive session is, in my view, appropriate and consistent with law.

Second, with respect to access to records, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Since no minutes of the executive sessions in question exist, I do not believe that school district officials would be obliged to prepare new records in response to a request made under the Freedom of Information Law. Similarly, if no records exist reflective of the reasons for your dismissal, the District would not be required by the Freedom of Information Law to create records reflective of those reasons.

Third, with regard to other records that may exist relating to the issue, 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. Assuming that any such records exist, several provisions may be relevant.

Perhaps most significant would be communications among or between members of the staff of the District and the Board. Those records would fall within the scope of 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;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits 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. Based upon section 87(2)(g), it has been held that "predecisional materials" consisting of opinions or recommendations may be withheld [see e.g., McAulay v. Board of Education, City of New York, 61 AD 2d 1048 (1978), aff'd 48 NY 2d 659 (aff'd w/no opinion); Kheel v. Ravitch, 62 NY 2d 1 (1984); Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979)].

Since I am unaware of the nature or content of any records that might exist in relation to the issue, I cannot provide more specific guidance.

I hope that the foregoing has served to clarify the matter and that I have 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. Kenneth Galbraith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5466

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

February 15, 1989

Mr. Andrej Malak
[redacted]

The staff of the Committee 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. Malak:

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

Once again your inquiry pertains to requests for records of the Suffolk County Water Authority "pertaining to the RPZ Valve". Despite your requests, you wrote that you have not received the records sought.

In an effort to learn more of the issue, I have contacted Mr. J.F. Dalo, the Authority's Records Access Officer. In brief, as I understand the situation, you live in an area in which you are required to apply for and use a RPZ valve. Mr. Dalo indicated that some people in the area have been hooked up for water in error without having applied for the valve. Due to the error, those people are now being told to apply. Mr. Dalo also informed me that, due to the unusual circumstances described, the Authority has no records pertaining to the RPZ valve for the period specified in your request. In short, there are apparently no records that exist which fall within the scope of your request. As such, it does not appear that records have been withheld, but rather that the information sought is not maintained by the Authority.

Viewing the issues from a different perspective, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Again, in this instance, based upon Mr. Dalo's description of the facts, the records sought do not exist and are not maintained by the Authority. As such, the Freedom of Information Law at this juncture would apparently be inapplicable.

I hope that the foregoing has served to clarify the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: J.F. Dalo, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5467

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

February 15, 1989

Mr. Lawrence Hanley
Amalgamated Transit Union
Division 276
40 Yukon Avenue
Staten Island, NY 10314

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

Dear Mr. Hanley:

I have received your letter of February 8, as well as the materials attached to it.

As I understand the situation, you requested from the Metropolitan Transportation Authority "information pertaining to property located at 416 Lexington Avenue and the Edgewater Depot". In response to the request, you were supplied with a "Staff Summary Sheet" concerning the status of the property. You were also informed that the Authority currently "does not own or have any other interest in the property located at 416 Lexington Avenue, and, therefore, has no records responsive to that request". However, your request for "the most recent market analysis or appraisal for the site known as the Edgewater Depot in Staten Island" was denied. You were informed that the document in question was prepared by outside consultants for the Authority and, therefore, could be withheld under section 87(2)(g) of the Freedom of Information Law. The denial also indicated that the records could be withheld on the ground that disclosure would "impair present or imminent contract awards".

You have requested my opinion concerning the denial.

Since I am familiar with neither the facts that might relate to the real property in question nor the contents of the records sought, I cannot provide specific guidance. Nevertheless, I offer the following general comments. Many of my comments will reiterate points made in an opinion addressed to you in April 13, 1988.

First, the Court of Appeals has determined that appraisal reports prepared for an agency by a private consulting firm constitute "intra-agency materials" subject to the Freedom of Information Law that would be accessible or deniable depending upon their contents. In its discussion of the issue of consultant reports, the Court likened those records to advisory materials prepared by the staff of an agency, stating that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional material, prepared to assist an agency decision maker***in arriving at his decision' (Matter of McAulay v Board of Educ., 61 AD2d 1048, affd 48 NY2d 659). Such material is exempt 'to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD2d 546, 549).
>
> "In connection with their deliberative process agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v Stubing, 82 AD2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v Hennessy, 82 AD2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY2d 131, 132-133 (1985)].

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. Moreover, it is emphasized 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 that follow. The language quoted in the preceding sentence indicates that a single record or report might be both accessible or deniable, in whole or in part. I believe that it also requires that agency officials review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Third, the provision concerning 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. Concurrently, those portions of inter-agency or intra-agency materials that are re- flective of opinion, advice, recommendation and the like could in my view be withheld.

As indicated earlier, although the records might be characterized as "intra-agency materials" and perhaps portions of those materials may be withheld, other aspects of the materials may be available. It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is 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 statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, should in my view be available.

Similarly, the Court in Xerox, supra, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held 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 or 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 the appellant" (id. at 133).

Lastly, also cited in the response to your request is Murray v. Troy Urban Renewal Agency, Inc. [56 NY 2d 888 (1982)]. That decision dealt with appraisals prepared by an "independent appraiser as to the resale and reuse value of certain buildings owned by the agency" (id. at 889). The Court held that the denial of the appraiser's reports prior to the consummation of the transactions was proper, citing section 87(2)(c) of the Freedom of Information Law. That provision permits an agency to withhold records when disclosure would "impair present or imminent contract awards...". The Court pointed out, however, that "A number of the buildings have since been sold, and it is obvious that the statutory exception to disclosure no longer applies to the appraiser's reports on those buildings" (id. at 890). This is not intended to suggest that appraisals would be accessible in their entirety following the consummation of a transaction, for portions might be deniable pursuant to section 87(2)(g); it is merely intended to indicate that appraiser's reports have been made available after the parcels that are the subjects of the appraisals have been sold.

I hope that I have been of some assistance and the foregoing serves to provide clarification. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeanette deSouza

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5468

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

February 16, 1989

Ms. Jane M. Salchli
Mr. Alfred F. Engeleit
[redacted]

The staff of the Committee on 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. Salchli and Mr. Engeleit:

I have received your letter of February 6, as well as the materials attached to it.

According to your correspondence, you experienced a series of frustrations and delays in your attempts to obtain records from the New York City Department of Buildings. Your initial request was made on September 21, but records were apparently not made available until January 12. One of the reasons for the delay involved a claim that your request could not be processed in a timely manner due to a "heavy work load". It is unclear whether all of the records sought have been disclosed.

You have requested assistance in the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law and the regulations promulgated under that statute provide guidance concerning the matter. By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general rules and regulations pertaining to the procedural implementation of the Law. In turn, section 87(1) of the Law requires each agency, such as the City of New York, to adopt similar 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..." (the Freedom of Information Law). The Committee has promulgated regulations as the Law requires (see attached, 21 NYCRR Part 1401). Further, the Mayor of New York City in 1979 adopted "Uniform

Rules and Regulations Pertaining to the Administration of the Freedom of Information Law". Those regulations (see attached), which are applicable to New York City agencies, including the Department of Buildings, are consistent with the regulations promulgated by the Committee.

Second, the Freedom of Information Law, the Committee's regulations, and the Mayor's Uniform Rules and Regulations prescribe time limits within which agencies must respond to requests. For purposes of clarity, the ensuing references to regulations will pertain to those promulgated by the Committee on Open Government. 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, sections 1401.5(d) and 1401.7(c)].

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, it has been held judicially that a shortage of manpower to comply with a request does not constitute a valid basis for a denial of access to records. In United Federation of Teachers v. New York City Health and Hospitals Corporation, it was stated that:

> "Were the court to recognize the 'defense' of a shortage of manpower by the agency from which disclosure is sought, it would thwart the very purpose of the Freedom of Information Law and make possible the circumvention of the public policy embodied in the Act" [428 NYS 2d 823, 824 (1980)].

In terms of 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.

Lastly, I point out that your request cited the Freedom of Information Act (5 USC section 552). That provision is the federal Freedom of Information Act, which is applicable to federal agencies. The statute that applies in this instance is the New York Freedom of Information Law, which pertains to records of entities of state and local government in New York.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to officials of the Department of Buildings.

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: Charles Sturken
Lenore Norman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5469

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

February 16, 1989

Mr. Anthony P. Fiscarelli
[redacted]

The staff of the Committee 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. Fiscarelli:

I have received your letter of February 8, as well as the materials attached to it.

You have requested an advisory opinion concerning the response to an appeal rendered by Ms. Kathy A. Bennett, Counsel to the Department of Civil Service. The focus of your inquiry involves the denial of access to a report relating to an investigation of a complaint of discrimination made at the Department of Social Services. In her denial, Ms. Bennett wrote that the report is "considered a draft, as we are now attempting to resolve with the Department of Social Services the concerns they raised in responding to the report". You also asked why the Department of Civil Service failed to send a copy of the determination on appeal to this office as the Freedom of Information Law requires.

In this regard, I offer the following comments.

First, although the determination on appeal does not indicate that a copy of that document was forwarded to this office, a copy was indeed sent to the Committee.

Second, in an effort to learn more about the denial, I have spoken with Ms. Bennett. She informed me that it is the policy of the Department of Civil Service to permit agencies to review and comment on the kind of report that is the subject of your inquiry before such a report is considered to be "final". As such, as I understand the situation, the report is not final; rather it is subject to modification and may undergo changes in its contents.

Third, in terms of the Freedom of Information Law, of greatest relevance under the circumstances 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

As such, section 87(2)(g)(iii) requires that "final agency policy or determinations" must be disclosed. Since the report has not yet reached the status of being a final agency determination, it appears that the denial, at this juncture, would have been appropriate.

Lastly, Ms. Bennett indicated that when the report becomes final, it will be accessible in terms of its substance. She added, however, that certain portions might be redacted on the ground that disclosure of those aspects of the report would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, sections 87(2)(b) and 89(2)(b)].

I hope that the foregoing has served to clarify the matter and that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathy Bennett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5470

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

February 22, 1989

Ms. Helga Hickman
[redacted]

The staff of the Committee on 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. Hickman:

I have received your letter of February 16 in which you requested copies of "Open Governments Laws" and described a problem involving requests made under the Freedom of Information Law.

According to your letter, in response to requests for records, you "never...get to see the originals of the files". Further, you expressed the belief that the records shown to you are "doctored".

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 fall within the scope of one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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 grounds for denial that follow. Since you did not describe the nature of the records in question, I point out that there may be portions of those records that could properly be denied. If that is so, an original record would not be available in its entirety, and a copy of that record might be made available after the agency has made the appropriate deletions. In short, while I am unfamiliar with the records at issue, there may be situations in which there is no right to inspect a record or file in its entirety. In those situations, copies of those portions that are accessible should be made available, while the agency could delete the remainder.

Second, section 89(3) of the Law states in part that when copies of records are requested, you may ask that the agency "certify to the correctness of such copy".

If you could provide greater detail concerning the nature and content of the files in question, perhaps more specific guidance could be provided.

Lastly, enclosed are the materials that you requested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5471

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

February 23, 1989

Ms. Ann Smutok
[redacted]

The staff of the Committee on 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. Smutok:

I have received your letter of February 2, which pertains to requests directed to the Department of Health.

Since I am unfamiliar with existing records that fall within the scope of your requests, I cannot offer specific guidance. However, in conjunction with your correspondence, I offer the following general comments.

First, you wrote that, as you understand the Freedom of Information Law, when a request is denied, a reason must be given. In one aspect of your letter, you indicated that the Department's Records Access Officer, Mr. Donald MacDonald, "does not cite why [you] cannot have papers, he just states that there are no papers". Here I point out that the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, to the extent that you have sought information that does not exist in the form of a record or records, the Department would not be obligated by the Freedom of Information Law to prepare records on your behalf in order to satisfy a request. I agree with your contention that when a request for records is denied, a reason for the denial must be given based upon one or more of the grounds for denial appearing in section 87(2) of the Freedom of Information Law. However, if records sought do not exist, an agency can neither grant nor deny access. In short, an agency cannot withhold records that it does not possess, and I do not believe that a statement that "there are no papers" could be characterized as a denial.

Second, the Freedom of Information Law is the statute that generally deals with rights of access to government records in New York. Nevertheless, there are numerous other statutes that deal specifically with rights of access to particular records. When a statute either requires disclosure or confidentiality with respect to particular records, that statute, in my view, overrides the Freedom of Information Law. Similarly, when a statute other than the Freedom of Information Law confers confidentiality, records may be withheld pursuant to section 87(2)(a) of the Freedom of Information Law. That provision pertains to the authority to withhold records that "are specifically exempted from disclosure by state or federal statute".

As I understand the situation, the records sought involve allegations of patient abuse in a nursing home. Section 2803-d of the Public Health Law, entitled "Reporting abuses of persons receiving care or services in residential health care facilities", pertains specifically to the records in which you are interested. Subdivision (6) of section 2803-(d), paragraphs (e) and (f), state that:

> "(e) Except as hereinafter provided, any report, record of the investigation of such report and all other information related to such report shall be confidential and shall be exempt from disclosure under article six of the public officers law.
>
> (f) Information relating to a report made pursuant to this section shall be disclosed under any of the following conditions:
>
> (i) pursuant to article six of the public officers law after expungement or amendment, if any, is made in accordance with a hearing conducted pursuant to this section, or at least forty-five days after written determination is made by the commissioner concerning such report, whichever is later; provided, however, that the identity of the person who made the report, the victim, or any other person named, except a person who the commissioner has determined committed an act of physical abuse, neglect, or mistreatment, shall not be disclosed unless such person authorizes such disclosure;

(ii) as may be required by the penal law or any lawful order or warrant issued pursuant to the criminal procedure law; or

(iii) to a person who has requested a hearing pursuant to this section, information relating to the determination upon which the hearing is to be conducted; provided, however, that the identity of the person who made the report or any other person who provided information in an investigation of the report shall not be disclosed unless such person authorizes such disclosures."

Article six of the Public Officers Law is the Freedom of Information Law.

As Mr. Slocum has indicated, and as specified in the Public Health Law, certain records are confidential, not based upon Department policy, but rather pursuant to statutory requirements.

I hope that the foregoing serves to clarify the matter, and that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Slocum
Donald MacDonald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5472

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

February 23, 1989

Mr. Peter Leonelli
[redacted]

Dear Mr. Leonelli:

I have received your letter of February 17 in which you requested from this office records pertaining to "The communications that transpired between Mr. George B. Burke, Chief Atty., State of N.Y. and Mr. P. Tavelli of Ithaca, N.Y. (Attorney) Tompkins County."

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not maintain records generally, such as those in which you are interested. Further, I am unfamiliar with persons that you identified or the circumstances relating to the request. In short, this office does not have possession of the records sought and, as a consequence, we cannot provide them to you.

For your information, I point out that a request for records should be directed to the records access officer at the agency that maintains the records. Again, I am unaware of the agency that employs Mr. Burke. However, on the basis of your letter, it appears that the agency that employs him would maintain the records, and that a request should be sent to that agency.

It is noted, too, 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.

Further, although I have no knowledge of the nature or content of the records in which you are interested, 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.

I hope that I have been of some assistance. Should any questions arise concerning the Freedom of Information Law, 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-5473

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

February 24, 1989

Mr. John Anthony
[redacted]

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

Dear Mr. Anthony:

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

Your inquiry pertains to a request of February 1 directed to the Westchester County Health Department. In response, the Freedom of Information Officer acknowledged the receipt of the request on February 6 and indicated that it was forwarded to the appropriate staff for response. You have asked whether that reply constituted a constructive denial of your request.

In my opinion, the reply would not represent a constructive denial. As you are aware, section 89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of the receipt of a request. However, that provision states that an agency may extend the time to determine to grant or deny the request when a written acknowledgement of the receipt of a request is given within the five business day period. Since a written acknowledgement of the receipt of your request was given within five business days of the receipt of your request, I do not believe that the response could be characterized as a constructive denial of access.

I point out, however, that both section 89(3) of the Law and the regulations promulgated by the Committee [21 NYCRR section 1401.5(d)] indicate that, when the receipt of a request is acknowledged, the acknowledgement should include a statement of

the approximate date when the request will be granted or denied. Further, the regulations provide that a request should be granted or denied within ten business days of the date of the acknowledgement of the receipt of a request.

I hope that the foregoing is responsive to your inquiry.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5474

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

February 24, 1989

Ms. Patricia Caruso
Records Access Officer
NYC Department of Health
125 Worth Street
New York, NY 10013

Dear Ms. Caruso:

I have received copies of your responses to requests for lists. One involved a "list of swimming pools in New York City that are in health clubs, hotels, etc."; the other involved a list of "Diagnostic Medical X-Ray Units that have permits to operate" in the City.

You denied both requests, stating that "Sections 87(2)(b) and 89(2)(b)(iii) of the Freedom of Information Law (unwarranted invasion of personal privacy) permits the Department to deny such request for sale or release of names and addresses if such lists would be used for commercial or fund raising purposes".

As indicated in previous correspondence regarding similar requests, I do not believe that the provisions upon which you relied to deny access are applicable. Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2)(b) provides a series of examples of invasions of personal privacy, one of which includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [section 89(2)(b)(iii)].

In my view, the provisions in the Freedom of Information Law pertaining to privacy are intended to deal with natural persons, rather than entities, such as corporations or other commercial establishments. Although Article 6-A of the Public Officers Law, the Personal Privacy Protection Law, applies only to state agencies, that statute, when read in conjunction with the Freedom of Information Law, in my opinion, makes it clear that the protection of privacy as envisioned by those statutes is

intended to pertain to personal information about natural persons [see Public Officers Law, sections 92(3), 92(7), 96(1) and 89(2-a)]. Therefore, if the lists in question identify entities, such as health clubs, medical facilities or other business establishments, rather than natural persons, I do not believe that they could be withheld.

Moreover, in a recent decision rendered by the Court of Appeals that focused upon the provisions that you cited in the denials of the requests, the court referred to the authority to withhold "certain personal information about private citizens" [see Matter of Federation of New York State Rifle and Pistol Clubs, Inc. v. The New York City Police Department, February 14, 1989, ___ NY 2d ___]. Based upon the statement made by the Court of Appeals, it is reiterated that the authority to withhold lists is, in my opinion, restricted to those situations in which lists identify natural persons and would be used for commercial or fund-raising purposes.

I hope that the foregoing serves to clarify the matter. If you would like to discuss the issue, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marvin Schildkraut
Stacey Myers
Irwin S. Davison

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5475

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

February 27, 1989

Mr. Richard Bridgham
[redacted]

The staff of the Committee 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. Bridgham:

As you are aware, I have received your letter of February 14, as well as the correspondence attached to it. You have requested assistance in gaining access to a record from the City of White Plains.

By way of background, you apparently requested and received a copy of a portion of a collective bargaining agreement between the City of White Plains and its professional firefighters association. That portion of the agreement provides that:

> "Sick leave claims which arise due to confinement or injury arising under circumstances covered under the New York State No Fault Insurance Law shall be treated in accordance with the attached letter of understanding."

You also requested the letter of understanding to which the portion of the contract quoted above refers. That aspect of your request has not been honored.

In this regard, I offer the following comments.

First, in an effort to learn more of the situation, I have contacted the City's Corporation Counsel, Mr. Anthony Grant, on your behalf. Mr. Grant informed me that, to the best of his knowledge, the portion of the contract pertaining to the letter of understanding has been included in successive contracts over

the course of several years. A search has been made and the City's negotiators have been contacted in an effort to locate the letter of understanding. However, Mr. Grant said that no such letter has apparently ever been prepared.

Second, in terms of the Freedom of Information Law, I point out that the Law pertains to existing records. Section 89(3) of the Law provides in part that an agency need not create a record in response to a request. Therefore, assuming that the letter of understanding has not been prepared, the Freedom of Information Law would not require the City to do so.

Lastly, section 89(3) also states that, in the kind of circumstance described above, upon request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony Grant, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5476

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

February 27, 1989

Mr. John Anthony
[redacted]

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

Dear Mr. Anthony:

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

According to the materials, on January 11 you requested from the Westchester County Clerk's Office a deed and related records concerning a parcel known as Black Rock in Croton-on-Hudson. Since you apparently received no response, you appealed on January 31 to the County Clerk on the ground that your request had been constructively denied. In a response to that letter, Ms. Cecilia G. Bikkal, Legal Advisor to the County Clerk, wrote that:

> "An appeal cannot be made where a request for information pursuant to the Freedom of Information Law has not been denied, Public Officers Law Section 89-4A. This office is not in receipt of a formal request for documents dated January 11, 1989.
>
> "As I have indicated in our previous correspondence, this office does not have records which you have seeked [sic] in the past. We have made every attempt to assist you but find ourselves without means to do so."

Unsatisfied with that response, you wrote to Ms. Bikkal again on February 4, specifying the records in which you are interested and raising a series of questions. On February 8, Ms. Bikkal responded, stating that:

> "Deeds are recorded in the Land Records Division of our office. They may be searched by either the grantor's name (the seller) or the grantee's name (buyer). We cannot search by address or name of property. A complete search may be made in our office by you yourself or by a title company if you wish to engage one.
>
> "You may request a copy of a particular deed, so long as you give us the name of the grantee (buyer), location of the property and, if a available, approximate date of purchase.
>
> "The office does not perform title searches. The documents are located in the public area of our office, thus allowing the public to conduct their own search.
>
> "This office does not record or file abstracts of title, deeds only. We cannot advise as to who would hold abstracts of title.
>
> "Upon furnishing us with the pertinent information, we will advise you of the existence of a deed and, if you wish, the appropriate cost for copies."

You have requested an advisory opinion concerning the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, including those maintained by a county clerk when that person is acting other than as a clerk of a court (see Civil Practice Law and Rules, section 8019-8021).

Second, Ms. Bikkal indicated that the County Clerk does not have the records sought, which you had requested previously, and with respect to which you were informed that the Clerk maintained no such records. As advised in previous correspondence, an agency can neither grant nor deny access to records that it does not maintain.

Third, section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. The Court of Appeals has held that a request reasonably describes the records when agency officials can, based upon the terms of a request, locate and identify the records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. Ms. Bikkal wrote that deeds may be searched by means of a buyer's or seller's names, and she specificed that the Clerk "cannot search by address or name of property". As such, due to the nature of the filing system used by the Clerk, the records sought, if they exist, cannot be located on the basis of the information provided in your request. If that is so, I do not believe that your request would have reasonably described the records.

Lastly, with respect to fees, as stated earlier, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom Information Law, others of which may be held in the capacity as clerk of a court. Further, 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 the case of fees that may be assessed by county clerks, sections 8020 and 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted under the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...". The fees that may be assessed by county clerks acting other than as clerks of a court are specified in section 8021 of the Civil Practice Law and Rules.

I hope that the foregoing has served to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Cecilia G. Bikkal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5477

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

February 27, 1989

Mr. Derry Sykes
78-B-894 D-5-18
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

Dear Mr. Sykes:

I have received your letter of February 2, which reached this office today. You have asked that I forward to you copies of transcripts and related records concerning a judicial proceeding conducted in Supreme Court, Bronx County.

In this regard, it is emphasized that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As a general matter, the Committee does not maintain records, including those that you have requested. In short, I cannot provide the records, because this office does not maintain them.

It is noted, too, that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

In turn, 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 would not be applicable to the courts or court records.

Lastly, other statutes often confer substantial rights of access to court records (see e.g, Judiciary Law, section 255). It is suggested that a request for court records be directed to the clerk of the court in which the proceeding was conducted, and that such a request include as much specificity as possible in order to enable the appropriate officials to locate the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5478

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

February 27, 1989

Mr. John Vnuk
86-A-8163
Housing Unit 118-1
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963

Dear Mr. Vnuk:

I have received your letter of February 20 in which you requested "a list of all records which the New York State Department of Correctional Services has, and are required to provide by Law, for the party to whom the information is about". You made specific reference to access to a pre-sentence report.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not maintain a list of records maintained by the Department of Correctional Services which identifies those records that must be available to the subject of the records. Further, it is doubtful, in my opinion, that the Department would maintain such a list, for I am unaware of any requirement that such a list be prepared.

Since you alluded to the "master list" of records kept at your facility, I point out that the master list was likely prepared in conjunction with section 87(3)(c) of the Freedom of Information Law. That provision states that each agency shall maintain:

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

Based upon the provision quoted above, while an agency must prepare a list that identifies the categories of records maintained by an agency, such a list need not specify whether particular categories are accessible or whether they may be withheld. Further, within a category of records, there may be certain aspects of records that are available, while other aspects could be withheld.

Lastly, with regard to pre-sentence reports, 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, which in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or 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. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in section 390.50 of the Criminal Procedure Law [see Matter of Thomas, 131 AD 2d 488 (1987)].

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-5479

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

February 28, 1989

Mr. Jeffrey Grune
87-A-3957 HU-22
Box 1245
Beacon, NY 12508-0901

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

Dear Mr. Grune:

I have received your letter of February 12, as well as the materials attached to it.

You have requested advice with respect to two issues, one of which arose in the context of an Article 78 proceeding that you initiated under the Freedom of Information Law. Although the issue was "mooted" and a determination was rendered by Supreme Court, I point out that, as a matter of policy, the Committee does not issue advisory opinions following the commencement of litigation brought under the Freedom of Information Law. Although the Court rendered a decision, presumably an appeal could be made. As such, I choose not to render an opinion concerning the first issue. However, enclosed are copies of advisory opinions previously rendered in response to similar inquiries. It is noted that our opinions are indexed and distributed throughout the state and that they may be requested by any person.

The second issue involves a request for copies of photographs maintained by the Town of Putnam Valley Police Department. As I understand the situation, the Department has the photographs, but it cannot find or does not maintain the negatives. As such, the cost of preparing copies, which involves making new negatives, "escalates copying costs". The Chief of Police has offered to have copies of the photos made by "any reputable film lab within 10 miles of our station, who will guarantee no damage to our photos to make the reproduction for you."

In this regard, section 87(1)(b)(iii) of the Freedom of Information Law states in relevant part that the fees for copies of records:

> "shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

As such, if a record cannot be photocopied, as in the case of a photograph, an agency may assess a fee based upon "the actual cost of reproduction". Assuming that the fees sought to be assessed by the Chief of Police are based upon that standard, it appears that the fees to which he referred would be proper.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William G. Carlos, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5480

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

March 1, 1989

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 14, as well as the materials attached to it. As you requested, enclosed is a copy of the Committee's 1988 report.

According to the materials, the minutes of a meeting of the Board of Fire Commissioners of the Fairview Fire District indicate that "the District is not required to go to bid on the foregoing [communications equipment], as all radio equipment has been standardized to use only Motorola equipment". In conjunction with that aspect of the minutes, you requested a "copy of a resolution whereby District authorized to Motorola". In response to your request, the records access officer wrote that you did not reasonably describe the resolution in question in a manner sufficient to enable her to locate the record. She added that you had the right to appeal to the District Appeals Officer, Frank T. Simeone. You appealed, and Mr. Simeone wrote that "when a record is not maintained or cannot be located, the inability to to provide same could not be construed a denial and thus, cannot be subject to appeal". Mr. Simeone added that you have the right to appeal the decision to this office, and you have done so.

In this regard, I offer the following comments.

First, I believe that Mr. Simeone might have misled you, for the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee has no authority to render a determination following an appeal or to compel an agency to grant or deny access to records.

Second, with respect to the issue, section 89(3) of the Freedom of Information Law requires that an applicant request a record "reasonably described". Further, the Court of Appeals has held that an applicant has reasonably described the record sought when, based on the terms of a request, agency officials can locate and identify the record [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. If indeed the records access officer is unable to locate the record, I would agree that your request would not have reasonably described the records sought. It is noted that although a request may be quite specific, due to the nature of an agency's filing or recordkeeping system, agency officials might nonetheless be unable to locate a particular record. For instance, if minutes of meetings are not indexed by subject matter and are filed chronologically, it may be difficult to locate a particular resolution or reference to it without reviewing what might be years of minutes of meetings. It is also noted that the Freedom of Information Law pertains to existing records and that section 89(3) of the Law states in part that an agency is not required to create a record in response to a request. If, for instance, there is no resolution or other record reflective of the information sought, the District would not in my opinion be required to prepare such a record on your behalf to respond to a request made under the Freedom of Information Law.

Lastly, with respect to the right to appeal, I believe that an appeal may be made following a denial of access to records. If a record sought does not exist or cannot be located because the request did not reasonably describe the record sought, I do not believe that a response of that nature could be characterized as a denial. In short, if an agency can neither grant nor deny access to records, I do not believe that the inability to provide a record constitutes a denial that can be appealed.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Thelia I. Wade
Frank T. Simeone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5481

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

March 1, 1989

Mr. James K. Hayes
88-A-6025
Attica Correctional Facility
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. Hayes:

I have received your recent letter and the materials attached to it, which deal with your unsuccessful attempts to obtain records under the Freedom of Information Law from the Workers' Compensation Board and a law firm that you retained.

In this regard, I offer the following comments.

First, I believe that your request and appeal sent to the Workers' Compensation Board were not answered because those communications were improperly addressed. Your correspondence was sent to an address in Manhattan; the Board's offices are located in Brooklyn. Under the circumstances, it is suggested that you resubmit your request and address it to:

Mr. Donald Lazarus
Associate Attorney
Workers' Compensation Board
Room 621
180 Livingston Street
Brooklyn, New York 11248

Second, I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, your request should include sufficient detail to enable agency officials to locate and identify the records.

Lastly, I do not believe that the Freedom of Information Law would apply to records maintained by a law firm. That statute is applicable to records of an "agency", which is defined to mean:

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

As such, the Freedom of Information Law pertains to records maintained by governmental entities in New York. A law firm would not, in my view, constitute an agency subject to the provisions of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1593
FOIL-AO-5482

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

March 1, 1989

Mr. Charles Gombosi
[redacted]

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

Dear Mr. Gombosi:

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

You have raised a series of issues concerning your dealings with the Planning Board of the Town of Walton. It is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. Much of your commentary pertains to compliance with land use laws and regulations that fall outside the scope of the jurisdiction or expertise of the office. To the extent that your correspondence pertains to the Freedom of Information Law or the Open Meetings Law, I offer the following comments.

First, one aspect of your inquiry involves a request for minutes of a Planning Board meeting. You were advised by the Board's secretary that you are "free to review" the minutes, but that a copy would not be made "because we have turned down such requests in the past and cannot discriminate". In this regard, section 106(3) of the Open Meetings Law states in relevant part that: "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting...". The Freedom of Information Law, section 87(2), states that accessible records must be made available for inspection and copying. Further, when a record is accessible under the Law, section 89(3) states that "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record...". Based on the foregoing, I believe that the Town is required to prepare a photocopy of an accessible record upon payment of the appropriate fee, irrespective of its past

practice, which in my opinion is inconsistent with the Freedom of Information Law. I point out, too, that an agency cannot generally charge in excess of twenty-five cents per photocopy [see Freedom of Information Law, section 87(1)(b)(iii)].

Second, in view of the chronology of events that you described, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) 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, sections 1401.5(d) and 1401.7(c)].

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, the Freedom of Information Law pertains to existing records; it does not require agency officials to answer questions or prepare new records in response to a request for information [see Freedom of Information Law, section 89(3)]. Therefore, although the Planning Board or the Town Board could have responded to your questions, they would not be required to do so to comply with the Law.

Insofar as records 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Enclosed are copies of the Freedom of Information Law, the Open Meetings Law and an explanatory brochure pertaining to both 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.

cc: Christine M. Sholes, Secretary
Planning Board
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO- 87
FOIL-AO 5483

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

March 2, 1989

Mr. Neal J. Weissman
[redacted]

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

Dear Mr. Weissman:

I have received your letter of February 18 in which you raised three questions concerning the Freedom of Information Law.

The first is whether "common-law-access" is "still in place in NYS". If I understand your question correctly, I believe that statutes, rather than common law, generally determine rights of access to records. As stated by the Court of Appeals, "The public policy concerning governmental disclosure is fixed by the Freedom of Information Law..." [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Second, you wrote that it "has been suggested that labor unions perform a governmental function". In view of the definitions of "agency" appearing in section 86(3) of the Freedom of Information Law and section 92(1) of the Personal Privacy Protection Law, you asked that I comment on the status of labor unions under those statutes. The definition of "agency" in the Freedom of Information Law includes entities of state and local government; in the Personal Privacy Protection Law, that term is generally defined to mean state governmental entities. Although public employee unions have strong relationships with government, I do not believe that such a union could be characterized as a governmental entity or that it would constitute an "agency" subject to the requirements of the Freedom of Information Law or the Personal Privacy Protection Law.

The third area of inquiry pertains to the New York State Temporary Commission of Investigation and whether records involving closed investigations are "discoverable" under the Freedom of Information Law. In this regard, the first ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". I believe that records relating to the Commission's investigations are specifically exempted from disclosure. Section 2(11)(d) of Chapter 254 of the Unconsolidated Laws states in part that:

> "Unless otherwise instructed by resolution adopted by a majority of the members of the commission, every witness attending before the commission shall be examined privately and the commission shall not make public the particulars of such examination."

Further, section 5 of Chapter 254 states that:

> "Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined, or any information obtained or given upon such examination or investigation, except as directed by the governor or commission, shall be guilty of a misdemeanor."

You raised additional questions concerning the nature of the Commission's investigations. I am not sufficiently familiar with the work of the Commission to answer your questions. It is suggested that you might request the Commission's latest annual report, for it may include the kind of information in which you are interested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5484

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

March 2, 1989

Ms. Mabel Smith
[redacted]

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

Dear Ms. Smith:

I have received your letter of February 13 in which you raised a series of questions concerning "the confidentiality of applicants for contractual and/or consultant employment with a school district". Several of your questions deal with how far school board members may go in terms of their inquiries relative to the suitability of such a candidate.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. Neither of those laws deals with those kinds of issues. It is suggested that answers to those questions might appear in the Education Law, rules promulgated thereunder or in the policies or procedures of a particular board of education.

You also asked whether, prior to selection of a candidate, the names of the finalists may be revealed. There is nothing in the Freedom of Information Law that would prohibit a school district from disclosing the identity of the candidates in question. However, I point that section 89(7) of the Freedom of Information Law states that nothing in that statute shall require the disclosure of "the name or home address...of an applicant for appointment to public employment". If the candidates are individuals, rather than entities, for example, and if they could be characterized as applicants for appointment to public employment, I do not believe that their identities must be disclosed. On the

other hand, if the candidates are firms, such as corporate or other business entitites, records identifying those candidates would, in my opinion, be available. In those circumstances, entities, rather than natural persons, would be identified. As such, there would not be any consideration of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5485

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

March 3, 1989

Mr. Alfred Mower
87-A-8232 H5-37
Clinton Correctional Facility
Box 367B
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. Mower:

I have received your recent letter and the materials attached to it.

According to your letter, you requested medical records pertaining to yourself from St. Joseph's Hospital in Elmira. In response to the request, you received records from the Smart Corporation in Torrance, California. The records include seven pages of medical reports, for which you were charged $29.57. You have questioned the propriety of the fee and whether that fee was improperly assessed under the Freedom of Information Law and the regulations promulgated thereunder.

In this regard, I offer the following comments.

First, the Freedom of Information Law and the regulations that you cited are 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."

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government in New York; it does not apply to records of a private hospital or a California corporation. Therefore, the provisions that you cited are inapplicable.

Second, it appears that the records were made available pursuant to section 18 of the Public Health Law, which generally grants rights of access to medical records to the subjects of the records. With respect to fees, section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of the inability to pay."

It is possible that the records in question were stored by the Smart Corporation for St. Joseph's Hospital. I am unaware of the requirements of the Public Health in that kind of circumstance.

To obtain additional information concerning access to medical records and the fees for those records, you may write to:

> Access to Patient Information Coordinator
> New York State Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> Empire State Plaza
> Albany, New York 12237

Enclosed is a pamphlet dealing with access to patient records prepared by the State Health Department.

As you requested, I am returning the records that were enclosed with your letter.

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-5486

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

March 3, 1989

Ms. Betty R. Perry
[redacted]

The staff of the Committee 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. Perry:

I have received your letter of February 16 in which you asked that I reconsider an advisory opinion rendered last year.

The earlier opinion, which was requested by Rebecca Connolly, Town Clerk of the Town of Somerset, involved a request that you apparently made for the Town's "Blue Cross and Blue Shield listing and billing of employees covered for a specific time period". In brief, it was suggested that records involving the amounts of claims or billings concernings employees and their dependents would largely be irrelevant to the manner in which Town employees perform their official duties and consequently could be withheld as an unwarranted invasion of personal privacy. In your letter, you wrote that you merely requested "to see the names and costs paid by the town for medical insurance coverage for each individual covered under the town policy(s)".

The issue, once again, involves whether or the extent to which disclosure would constitute an unwarranted invasion of personal privacy. As indicated in the letter addressed to Ms. Connolly, there are several judicial decisions concerning the privacy of public employees. To reiterate briefly, it has been found that public employees enjoy a lesser degree of privacy than others, because public employees are required to be more accountable than others. Further, it has been held in a variety of contexts that records concerning public employees that are relevant to the performance of their official duties should be made available, for disclosure in those instances would result in a

permissible rather than an unwarranted invasion of personal privacy. Similarly, where records are not relevant to the performance of a public employee's official duties, it has been determined that records may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

From my perspective, it is difficult to deal with issues involving personal privacy. The standard in the Law is flexible and is in my opinion subject to individual judgements and interpretations. While one reasonable person might contend that disclosure of a particular item of personal information would be innocuous, thereby resulting in a permissible invasion of personal privacy, an equally reasonable person might consider disclosure of the same information to be offensive, thereby resulting in an unwarranted invasion of personal privacy.

I have contacted Ms. Connolly to discuss the matter. She informed me that the Town participates in an employee benefit program under which health insurance is available to all elected officials, who may choose to participate in the program, all full time employees, and retirees under certain conditions. As such, the employee benefit package generally indicates who participates in the health program in which the Town participates. Further, the information contained in the employees' benefit package, as I understand it, provides the amounts that are paid for individual coverage and family coverage, for example. Records describing the employees benefit package would in my opinion be clearly available, for none of the grounds for denial appearing in the Freedom of Information Law would be applicable.

More detailed records indicating the amounts paid by the Town with respect to particular individuals would, according to Ms. Connolly, specify whether an employee or elected official has family coverage or individual coverage. As suggested in the opinion addressed to Ms. Connolly, I do not believe that the nature of the coverage chosen by an employee is relevant to the performance of that person's official duties. Consequently, it is my opinion that records that indicate the kind of coverage chosen by an employee, and therefore the amount paid by the Town for coverage of that employee, would constitute "an unwarranted invasion of personal privacy". Nevertheless, I believe that the employees benefit package, which is a matter of public record, would include information regarding costs to the Town for various kinds of health care coverage without identifying particular employees and the nature of coverage that they have chosen.

I hope that you can appreciate that the issue is difficult to resolve, for it pertains to expenditures by a municipality as well as considerations 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: Rebecca Connolly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5487

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

March 3, 1989

Mr. Keith E. Bammann
[redacted]

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

Dear Mr. Bammann:

I have received your letter of February 16 in which you requested guidance in obtaining "all the information [you] can get" pertaining to yourself.

You wrote that you are interested in gaining access to records of various local and federal agencies including courts, police departments, the FBI and the CIA, as well as hospital records and records that may be maintained in Illinois.

In this regard, I offer the following comments.

It is emphasized at the outset that the Committee on Open Government is authorized to advise with respect to the New York Freedom of Information Law. That statute is applicable to agency records. For purposes of the Freedom of Information Law, the term "agency" is defined to mean:

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

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local governments in New York. The Freedom of Information Law would not apply to the courts, to records of private hospitals, or to federal agencies.

There are, however, other provisions of law that may apply to those entities. Records maintained by federal agencies, such as the FBI, the CIA, Social Security Administration or the Veterans Administration are subject to the federal Freedom of Information Act (5 U.S.C. section 552). Although the courts and court records fall outside the scope of the Freedom of Information Law, court records are often available pursuant to other provisions (see e.g., Judiciary Law, section 255), and requests for court records should generally be directed to the clerk of a court that maintains records in which you are interested. Medical records maintained by a hospital or physician, for example, pertaining to a patient are generally available to the patient pursuant to section 18 of the Public Health Law. I have enclosed a brochure published by the New York State Department of Health that describes patients' rights of access to medical records.

It is noted that both the New York Freedom of Information Law and the federal Freedom of Information Act require that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate and identify the records in which you are interested. A request directed to a police department, for instance, for records pertaining to you, without more, would not in my opinion "reasonably describe" the records that you might want to obtain. Additional information, such as dates, descriptions of events, identification numbers and other details would likely be needed to locate records. Similarly, requests for court or hospital records should include information that would permit officials of those entities to locate the records.

Lastly, you wrote that it is your understanding that there is "some kind of record (which is supposed to be strictly classified) that is recorded from birth, and goes on till death, that deals with life conduct...". To the best of my knowledge, there is no such record, nor is there any central source of information regarding the details of peoples' lives. Further, I am unfamiliar with laws involving access to records that might have been enacted in the State of Illinois.

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-5488

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

March 3, 1989

David S. Shaw, Esq.
[redacted]

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

Dear Mr. Shaw:

I have received your letter of February 17 in which you raised a question concerning the Freedom of Information Law.

Specifically, in your capacity as the attorney for a school district, you inquired "with respect to furnishing documents which no longer exist within the District, because the same have been lost or misplaced, where copies of such documents may exist in the possession of parties or agencies with whom the School District has dealings."

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 the term "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."

Based on the foregoing, if, for example, district records are stored at a facility that is not district property but continues to maintain legal custody of those records, I believe that the obligations imposed by the Freedom of Information Law would be applicable. However, if a district no longer has custody of records because the records no longer exist, the Freedom of Information Law, in my view, would not apply. Similarly, if copies of records are maintained by other agencies or persons with whom the district has had dealings and those records are not in the custody or control of the district, the Freedom of Information Law, as it pertains to the district's obligations, would not be applicable.

Second, as a general matter, the Freedom of Information Law involves existing records. Section 89(3) states in part that nothing in the Freedom of Information Law "shall be construed to require any entity to prepare any record not possessed or maintained by such entity...". Therefore, if records no longer exist or are not maintained by the district, the Freedom of Information Law would not require the district to create or prepare a record in response to a request. Further, I do not believe that the district would be obliged to attempt to obtain records or copies of records that might have been forwarded to other entities.

Lastly, if a request is made for a record that no longer exists or that has been lost or misplaced, section 89(3) also provides that an applicant may ask that the district "certify that it does not have possession of such record or that such record cannot be found after diligent search."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5489

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

March 6, 1989

Mr. Efrain Angulo
82-A-2464
Attica Correctional Facility
P.O. Box 149
Attica, New York 14011

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

Dear Mr. Angulo:

I have received your letter of February 20 in which you requested a clarification of the Freedom of Information Law.

According to your letter, you recently requested a copy of "work reports" pertaining to you from the Attica Correctional Facility. The request was denied on the ground that the records are "evaluative". You have asked that I comment on the matter and inform you of the method of appealing the denial.

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 likely relevance in this instance is section 87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Assuming that the records in question were prepared by the staff of the facility, they could be characterized as "intra-agency" materials. Further, if the records consist of an opinion or "evaluation" of your performance, it would appear that the denial was appropriate.

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

For your information, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that an appeal may be directed to Mr. Jose Hernandez-Cuebas, 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5490

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

March 6, 1989

Mr. Dwight Hendy
87-T-1156
Clinton Correctional Facility
Box 367B
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. Hendy:

I have received your letter of February 22, which concerns a request made under the Freedom of Information Law.

According to your letter, you requested from the New York City Police Department a "'subject matter list' for the arrest of Dwight Hendy on August 18, 1986". In response to the request, although certain records were made available, no subject matter list was included.

In this regard, I offer the following comments.

It appears that you may misunderstand the nature of the subject matter list and its contents. The provision of the Freedom of Information Law pertaining to the issue is section 87(3)(c), which states that each agency shall maintain:

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

Based on the foregoing, a subject matter list should include reference, in reasonable detail, to the categories of records maintained by an agency. There is no requirement that a subject matter list be created with respect to records concerning a particular individual or incident.

In short, while the Police Department is required to maintain a subject matter list concerning the kinds of records that it maintains, it would not, in my opinion, be obligated to prepare a subject matter list pertaining solely to you or to your arrest.

I hope that the foregoing has served to clarify the Freedom of Information Law regarding the maintenance of a subject matter list. 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-5491

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

March 6, 1989

Mr. Ray DelValle
88-A-6655
Southport Correctional Facility
Box 2000
Pine City, NY 14871

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

Dear Mr. DelValle:

I have received your letter of February 19 in which you requested assistance in obtaining information.

You wrote that you are involved in what appears to be litigation concerning a claim of a conflict of interest. As such, you wrote that you want "a copy of all the district attorney's that have prosecuted [you] in the past". If I understand your question correctly, you are interested in requesting the names of those district attorneys or assistant district attorneys who prosecuted you.

In this regard, I offer the following comments.

First, I believe that the records of an office of a district attorney are subject to rights granted by the Freedom of Information Law. That statute pertains to records of an "agency", a term defined in section 86(3) to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 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 (i.e., a county), it is, in my opinion, 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 12 (1983)].

Second, when making a request, 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 and identify the records. If possible, names, dates, indictment or other identification numbers and similar details should be included.

Third, a request 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.

Enclosed is a brochure that describes the Freedom of Information Law in detail 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5492

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

March 6, 1989

Mr. Jose Cruz
77-B-1363
135 State Street
Auburn, NY 13021

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

Dear Mr. Cruz:

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

According to your letter, you have unsuccessfully attempted to obtain from the New York City Police Department the records identifying three witnesses whose names appear in an investigation report. You added that none of the three appeared at your trial or provided testimony against you. Although the reports were made available, the names of the witnesses were deleted.

You have asked that I inform the New York City Police Department that it has no basis for withholding the information. 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 does not have the power 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, although I am unfamiliar with the records sought, it appears that the Department might properly have deleted the names of the witnesses. Several of the grounds for denial are based upon the effects of disclosing records. For instance, one of the grounds for denial cited by the Department, section 87(2)(e), states that an agency may withhold records that:

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

The investigation reports containing the information sought were apparently "compiled for law enforcement purposes". Further, disclosure of the names of the witnesses might identify confidential sources. If that is so, the denial of access to the names would, in my opinion, have been appropriate.

In addition, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". That provision might also constitute a basis for withholding the identities of the witnesses. Further, section 87(2)(f) enables an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person". Again, I am unfamiliar with the contents of the reports or the effects of disclosing those portions identifying the witnesses. However, it is possible that section 87(2)(f) might be relevant as a basis for withholding.

Lastly, a denial may be appealed 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."

I hope that the foregoing has served to clarify your rights and the provisions of the Freedom of Information Law. 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-AU-5493

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

March 6, 1989

Ms. Karen Biesanz
[redacted]

Dear Ms. Biesanz:

I have received your letter of February 27 in which you requested copies of your personnel file. You indicated that you were employed as a correction counselor at the Sullivan Correctional Facility from April 23, 1987 to October 13, 1988.

In this regard, I offer the following comments.

First, the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As 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. In short, a request should be made to the agency that you believe maintains the records sought.

Second, section 87(1) of the Freedom of Information Law requires each agency to adopt rules and regulations concerning the implementation of the Law. Those regulations must be consistent with the Law and the general regulations promulgated by the Committee on Open Government.

Third, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that a request for records kept at a correctional facility may be directed to the facility superintendent, who serves as custodian of the records. With respect to records maintained at the Department's Albany offices, a request may be made to the Deputy Commissioner for Administration, Department of Correctional Services, Building 2, State Campus, Albany, NY 12226.

Section 5.30 of the Department's regulations, entitled "Employee record", states in relevant part that:

> "(a) An employee or former employee shall have the opportunity to inspect and copy his own personal history folder at his work location or former location, respectively.
>
> (b) Former employees may request to have copies of records sent to them. The custodian of the record of a former employee shall respond to a request from a former employee in accordance with section 5.35 of this Part. Present employees may be charged for copies according to section 5.40 of this part, unless otherwise provided by collective bargaining agreement."

The Department may charge up to twenty-five cents per photocopy when copies of records are requested.

Under the circumstances, it is suggested that a request be directed to the facility superintendent.

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 FOIL-AO-5494

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

March 7, 1989

Mr. John M. Hart, Jr.
City Attorney
City of Olean
Municipal Building
P.O. Box 668
Olean, NY 14760-0668

The staff of the Committee 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. Hart:

I have received your letter of February 16, as well as the forms attached to it.

According to your letter, the forms are completed by the Olean City Police Department when there is "an encounter with an apparently mentally ill person or when someone is arrested". One of the forms is entitled "Suicide Prevention Screening Guidelines". It includes the name of the subject, various items of personal information, and observations involving the subject's behavior and appearance. The second form includes a detailed description of the behavior of a person that indicates that he or she may be mentally ill, and information concerning whether the subject should be admitted to a mental health facility.

You wrote that "The Cattaraugus County Mental Health Association (a private, Not-for-Profit corporation) and a hospital providing psychiatric treatment have each requested that the City make these forms available to them for screening and statistical purposes". Although you have not found any statute that prohibits disclosure of the forms, you have requested advice concerning the propriety of "the routine release of the information to the entities requesting it...".

In this regard, I offer the following comments.

First, as a general matter, all records of an agency are accessible under the Freedom of Information Law, except those records or portions thereof that fall within the scope of one or more of the grounds for denial appearing in paragraphs (a) through (i) of section 87(2) of the Law.

Second, I point out that the Freedom of Information Law is permissive; an agency may withhold records, or perhaps portions of records, in accordance with the grounds for denial found in section 87(2) of the Law. However, an agency is not required to withhold records, even when a ground for denial may properly be asserted, unless a statute other than the Freedom of Information Law prohibits disclosure. Further, as indicated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Third, although I attempted unsuccessfully to contact you to discuss the matter, I have discussed the issue with Michael Luty, Chief of the Olean City Police Department. He explained that no formal request for the records has been made under the Freedom of Information Law. Chief Luty indicated, however, that it would likely be desireable to share the records with facilities that might provide services and care to persons who may be mentally ill.

In my view, the records in question could be withheld to the extent that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, sections 87(2)(b) and 89(2)(b)]. As such, in response to a request made under the Freedom of Information Law, I believe that names or other identifying details could be withheld. Further, those portions of the forms reflective of the subjective opinions of a police officer who completes the forms could be withheld pursuant to section 87(2)(g) of the Freedom of Information Law.

Nevertheless, having contacted the Commission of Correction, one of the agencies responsible for devising the Suicide Prevention Screening form, it was advised that, under the circumstances, there is apparently no statute that would prohibit the City from disclosing the forms to the Mental Health Association or a hospital. I point out that, in other circumstances, the result might be different. For example, if the form was

completed by a mental health facility, section 33.13 of the Mental Hygiene Law might preclude disclosure. Similarly, the Personal Privacy Protection Law (Public Officers Law, Article 6-A), which applies only to state agencies, would govern the disclosure of personal information by a state agency.

In sum, while portions of the forms could be withheld from the public if requested under the Freedom of Information Law, there appears to be no statute that would prohibit the City from disclosing the forms to the entities described 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: Michael Luty, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5495

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

March 7, 1989

Mr. Darryl Lee
88-A-4283
Attica Correctional Facility
Box 149
Attica, NY 14011

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

Dear Mr. Lee:

I have received your letter of February 25 in which you described problems involving requests made under the Freedom of Information Law.

One request involved records of the New York City Police Department. The request was received on December 28 and you were informed on January 24 that your request was under review. As of the date of your letter to this office, you have received no further response.

In this regard, 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 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 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, sections 1401.5(d) and 1401.7(c)].

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 on that basis. For your information, I believe that the person to whom an appeal may be made is Thomas E. Slade, Assistant Deputy Commissioner for Legal Matters, NYC Police Department, One Police Plaza, New York, NY 10038.

The other request involved records, which you did not describe, addressed to the Division of Parole office in Brooklyn. In response to that request, you received a letter from your former parole officer indicating that he had contacted Counsel to the Division who advised that you were not entitled to the records sought.

Without knowledge of the nature of the records in which you are interested, I cannot provide specific direction. It is suggested that you submit a new request to the records access officer for the Division of Parole in Albany. That person is William Altschuller, Division of Parole, 97 Central Avenue, Albany, NY 12206.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5496

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

March 8, 1989

Mr. Peter Leonelli
[redacted]

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

Dear Mr. Leonelli:

I have received your letter of February 28, which, once again, pertains to your ability to obtain "copies of correspondence between two attorneys".

You indicated that the matter involves a complaint made concerning your wife's attorney, and that the communications involve Mr. Burke, an attorney with the Committee on Professional Standards. That office operates as part of the Appellate Division, Third Department.

Based upon the new information that you provided, I offer the following comments.

First, I do not believe that the Freedom of Information Law would apply to the records in which you are interested. That Law is applicable to agency records, and section 86(3) of the Law defines the term "agency" to include:

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

In turn, 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 courts and court records are outside the scope of the Freedom of Information Law. Since the Committee on Professional Standards, which investigates complaints concerning the conduct of attorneys, is part of the Appellate Division, a court, I do not believe that the Freedom of Information Law is applicable with respect to the records in question.

Second, for your information, section 90(10) of the Judiciary Law, which pertains to the conduct or discipline of attorneys, states that:

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

> plaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

In short, I believe that the records in question are subject to section 90(10) of the Judiciary Law. Further, I believe that the records may be disclosed only in conjunction with that statute, rather than the Freedom of Information Law. Moreover, even if the Freedom of Information Law is considered to be applicable, section 87(2)(a) of the Law provides that an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute".

I hope that the foregoing serves to clarify the matter. 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-5497

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

March 8, 1989

Mr. Charles M. Adler
[redacted]

Dear Mr. Adler:

I have received your lengthy letter of February 18, which reached this office on March 1.

Having read your letter, it is unclear exactly what you questions are. It appears that the issues involve medical records prepared by an oral surgeon pertaining to your treatment, and complaints about the records and treatment that have been made to both the State Health and Education Departments.

Since I cannot ascertain the nature of your questions, I cannot provide specific guidance. However, based upon my understanding of the matter, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and section 86(3) of that statute defines the term "agency" to mean:

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

Based on the foregoing, entities of state and local government, such as the Departments of Health and Education, are "agencies" subject to the requirements of the Freedom of Information Law. The records of a private physician or dentist, for example, would fall outside the scope of the Freedom of Information Law, for they would not be maintained by an "agency".

Second, a different provision of law, section 18 of the Public Health Law, generally grants rights of access to medical records to the subjects of those records.

Third, in the case of a claim or complaint of professional misconduct concerning a physician or dentist, there are statutes other than the Freedom of Information Law that pertain specifically to the investigations of such complaints. To the extent that those statutes apply, the Freedom of Information Law would be superseded. Further, although the Freedom of Information Law grants broad rights of access, one of the grounds for withholding records, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". As I understand its provisions, section 230 of the Public Health Law requires that records maintained in conjunction with an investigation of a licensee be kept confidential. Similarly, in the case of a proceeding concerning professional conduct held by the Education Department, section 6510(8) of the Education Law provides in part that: "The files of the department relating to the investigation of possible instances of professional misconduct...shall be confidential and not subject to disclosure at the request of any person, except upon order to a court in a pending action or proceeding". As such, records relating to complaints of misconduct are generally outside the scope of rights conferred by the Freedom of Information Law.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5498

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

March 8, 1989

Mr. George Scott
87-A-4269 C2-135
P.O. Box 700
Wallkill, NY 12589

The staff of the Committee on Open 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 March 1, which again pertains to a request for records directed to the New York City Police Department.

You referred to my letter of February 15, in which I indicated that I contacted the Department on your behalf and was informed that you would receive a response as soon as possible. As of the date of your most recent letter, however, you had not yet received a response.

In this regard, I offer the following comments.

The Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) 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 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, sections 1401.5(d) and 1401.7(c)].

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 on that basis. For your information, I believe that the person to whom an appeal may be made is Thomas E. Slade, Assistant Deputy Commissioner for Legal Matters, NYC Police Department, One Police Plaza, New York, NY 10038.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5499

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

March 8, 1989

Mr. Frank Russo, Jr.
[redacted]

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

Dear Mr. Russo:

I have received your letter of February 20, as well as the materials attached to it.

You have requested a clarification of an advisory opinion rendered on December 21 concerning a request directed to Nassau Community College. By way of background, you sought access to a film used by Nassau Community College entitled "Sexual Intercourse" in a course offered by the College. In brief, it was advised that the film constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. It was also indicated that the film may be subject to copyright restrictions that might preclude the showing of the film without the consent of the holder of the copyright.

In your recent letter, you included an excerpt from the contract between the College and the distributor of the film, Focus International. That portion of the contract, according to your letter, states that:

> "Rentals and sales are for educational and non-theatrical purposes only. Films may not be rented, loaned for a fee, leased or subleased to others. They may not be duplicated, reproduced, televised or transmitted in whole or in part without specific written authorization from Focus International."

You added that:

> "This seems to be a standard copyright intended to prevent any purchases or renter from using the films purchased or rented for any commercial purposes. That is standard operating procedure for most film distributors.
>
> "Neither I nor anyone else in our group who is interested in seeing the material used in this course has any commercial purpose in mind. We are solely interested in seeing the material for educational purposes."

You have asked that I reconsider the earlier opinion with respect to "copyright restrictions". In this regard, I offer the following comments.

First, since I am not an authority with respect to issues involving the Copyright Act, I contacted the Office of Counsel at the U.S. Copyright Office, read the portion of the contract that you excerpted, and described the circumstances under which the request to view the film was made. In short, I was advised that if the film would not be duplicated, transmitted, or displayed for any commercial gain, there would be no infringement of the copyright. It is noted that the term "transmit" is defined in 17 U.S.C. section 101 to mean "to communicate...by any device or process whereby images or sounds are received beyond the place from which they are sent".

Second, even though viewing the film under the circumstances you described might not violate copyright provisions, I would like to comment with regard to the issue generally as it pertains to the Freedom of Information Law.

In my earlier opinion, the definition of "record" appearing in section 86(4) of the Freedom of Information Law was cited. Due to the breadth of that provision, it was advised that the film constitutes a "record" subject to the Freedom of Information Law, for the film is an information medium is apparently "kept" or "held" by the College. However, I point out that I am unaware of any judicial decision rendered under the Freedom of Information Law that deals with the kind of question that you have presented. The film, as I understand the situation, is used as a part of a course syllabus of an academic institution. That factor, in my view, raises issues that go beyond the scope of the Freedom of Information Law.

Although you were permitted by the College to view the film, I believe that the film is generally shown only to enrolled students in the context of an academic course of study. In this regard, it may be contended that the request involves information imparted as part of a course, that it is similar to a request to view a portion of a lecture that is generally open only to students enrolled in the course. If students want to partake in a course, ordinarily they must be accepted by the institution and pay a fee. Further, if students do not like the course offerings at an institution or the means by which education is provided, they are free to seek their education elsewhere. It has been suggested that if materials used in the dozens of courses offered by an academic institution must be freely made available to persons who have not enrolled at the institution, there might be no room for matriculated students to gain the education for which they have paid, thereby subverting the purposes of the institution. It has also been suggested that one's personal beliefs concerning materials used in a course could, if those views result in an equivalent of censorship, have an adverse impact upon academic and intellectual freedom. I have been informed that the film has been reviewed by faculty and other officials at Nassau Community College, and that the decision to use the film in context in a course was based upon an academic judgment.

With those factors in mind, the manner in which a court would determine the issue of public rights of access to the film is, in my view, uncertain. If the film is considered by a court as a "record" subject to the Freedom of Information Law, I believe that it would be available for public inspection. However, if a court views the issue in the context of the kinds of academic considerations described in the preceding paragraph, I could not conjecture as to the conclusion that might be reached.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anna Marie Mascolo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5500

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

March 8, 1989

Ms. Donna Wenz
Executive Director
Parent Advocates for the Retarded
& Developmentally Disabled, Inc.
Dixhurst Building
1213 Court Street
Utica, NY 13502

The staff of the Committee on 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. Wenz:

I have received your letter of March 2, as well as the correspondence attached to it.

According to the correspondence, in your capacity as executive director of Parent Advocates for the Retarded and Developmentally Disabled, Inc. (PAR-ADD), a non-profit advocacy organization, you requested from all Oneida County school districts records "indicating names of all special education teachers, certification status and area of certification", as well as records concerning teacher assistants "indicating their names and specialized training as approved by..." the employing boards of education.

Such a request was made to the records access officer of the Utica City School District on October 17. Having received no response, requests were again made in November and December. As of the date of your letter to this office, you had received no response from the district.

You have requested assistance in the matter. 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 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 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 records may justifiably be withheld.

Second, with respect to records indicating teachers' certification or certification status, 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.

It is noted that there have been several judicial interpretations of the privacy provisions concerning records relating to public employees. In a variety of contexts, the courts have found that public employees enjoy a lesser degree of privacy than others, for public employees have a responsibility to be more accountable to the public than others. In addition, the courts have generally found that records that are relevant to the performance of the official duties of a public employee are available, for, in those instances, disclosure would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; 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. 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 teacher'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 records indicating the certification or certification status of teachers 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 related information 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 de- gree 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 con- tain 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.

With regard to the names of teacher assistants and specialized training approved by a board of education, I point out that section 87(3)(b) of the Freedom of Information Law requires that each agency shall maintain:

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

As such, records identifying school district employees, including their titles, must in my opinion be disclosed. If in the performance of their duties, teacher assistants are required to complete certain training, I believe that records reflective of the accomplishment of the training would be accessible for reasons analogous to those described with respect to rights of access to certification records.

Lastly, with regard to the failure of the District to respond to your requests, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Pate 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 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, sections 1401.5(d) and 1401.7(c)].

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, I believe that your requests have been constructively denied and that you may appeal on that basis. It is suggested that you contact the District to ascertain the identity of the person or body designated to determine appeals.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer
Board of Education, Utica City School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5501

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

March 10, 1989

Mr. Joseph R. Codrington
82-A-5883
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. Codrington:

I have received your letter of March 3, as well as the materials attached to it.

You have asked that the Committee on Open Government "intervene" in conjunction with an application to obtain various records from the Office of the District Attorney of Rockland County. Although you referred in your letter to a request made pursuant to the Freedom of Information Law, the request appears to have been made as a "notice of motion" submitted pursuant to section 2214 of the Civil Practice Law and Rules. Nothing in that document or the accompanying affidavit indicates that the request was made under the Freedom of Information Law. Similarly, although you referred in your letter to an appeal made pursuant to section 89(4)(a) of the Freedom of Information Law, the remaining materials that you forwarded nowhere refer to the Freedom of Information Law or an appeal of a denial of access to records made under that statute.

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, the Freedom of Information Law represents one among a variety of provisions under which an agency may be required to disclose records. The Freedom of Information Law generally confers rights of access to the public; other statutes, such as those found in the Civil Practice Law and Rules or the Criminal Procedure Law, may confer access due to one's status as a party to a proceeding. In brief, the Freedom of Information Law is separate and distinct from other statutory vehicles involving disclosure [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Third, the documentation indicates that you sought records pursuant to a "motion", rather than on the basis of the Freedom of Information Law, and that the Office of the District Attorney treated the request accordingly. I believe, however, that you could request records from the Office of the District Attorney under the Freedom of Information Law. The records of an office of a district attorney in my view are subject to rights granted by that statute, for it pertains to records of an "agency", a term defined in section 86(3) to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 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 (i.e., a county), it is, in my opinion, 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 12 (1983)].

When making a request, 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 and identify the records. If possible, names, dates, indictment or other identification numbers and similar details should be included. Further, a request should be directed to the "records access officer" at the agency that maintains the records in which you are interested.

Lastly, I point out that the Freedom of Information Law does not contain provisions concerning the waiver of fees or the status of an applicant as indigent, and that section 87(1)(b)(iii) of the Law generally permits an agency to charge up to twenty-five cents per photocopy.

I hope that the foregoing serves to clarify the matter in conjunction with the materials that you forwarded.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5502

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

March 10, 1989

Mr. William Rappleyea
[redacted]

Dear Mr. Rappleyea:

I have received your letter of March 7 in which you requested "complete written information as to the fiscal assets of Hose Company No. 1, Protection District No. 1" in Catskill. You added that the records sought should include "present money in the company treasury, bank accounts, bonds etc, giving total worth of the company".

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office does mot maintain records generally, nor is the Committee empowered to compel an agency to grant or deny access to records. In short, I cannot make the records available, because this office does not maintain possession or control of those records. However, in an effort to assist you, I offer the following comments.

First, it is unclear whether the records in question are maintained by a fire district, a fire protection district or a volunteer fire company. In any of those cases, however, I believe that the Freedom of Information Law would be applicable. As I understand the law on the subject, a fire protection district is merely a geographical area; it has no governing body or staff. A board of fire district commissioners is the governing body of a fire district, which, according to section 174(7) of the Town Law, is "a political subdivision of the state and a district corporation...". Further, section 66(1) of the General Construction Law defines the term "public corporation" to include a "district corporation".

Second, the Freedom of Information Law is applicable to "agency" records, and section 86(3) of the Law defines "agency" to include:

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

Since a fire district is a public corporation, I believe that it is clearly an "agency" subject to the Freedom of Information Law.

With respect to volunteer fire companies, 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 unclear for some time whether volunteer fire companies were subject to the Freedom of Information Law. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to 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. Further, in a recent decision in which it was held that several volunteer fire companies are subject to the Freedom of Information Law, it was stated that:

> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function" (S.W. Pitts Hose Company et al. v. Capital Newspapers, Supreme Court, Albany County, January 25, 1988).

In sum, the records sought, whether they are maintained by a municipality, a fire district, a board of fire commissioners, or a volunteer company, are, in my opinion, subject to the Freedom of Information Law, and I believe that those entities are obligated to provide access to records as required by the 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) of the Law. To the extent that the information in which you are interested exists in the form of a record or records, I believe that it would be available under the Law, for none of the grounds for denial would apparently apply. I point out, however, that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, if, for example, there is no record that indicates the "total worth of the Company", the Freedom of Information Law would not require that a new record be prepared to reflect total worth.

Lastly, section 89(3) 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 and identify the records.

Enclosed is "Your Right to Know", which describes the Freedom of Information Law in detail and 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Catskill Fire Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5503

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

March 10, 1989

Ms. Edna Braham
[redacted]

The staff of the Committee 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. Braham:

I have received your letter of February 24, as well as the materials attached to it.

Your inquiry deals with a request of February 7 directed to the Manhattan Developmental Center. Among the records sought are the payroll and subject matter lists required to be maintained pursuant to section 87(3)(b) and (c) of the Freedom of Information Law respectively, and records relating to the hiring of a calculations clerk. As of the date of your letter to this office, you wrote that you had received no reply to the request.

In this regard, I offer the following comments.

First, in an effort to learn more of the situation, I contacted Ms. Theresa Johnson of the Personnel Department at the Center. She informed me that you have been provided with copies of the eligible list concerning the position in question that includes your position on that list, and the name and position on the list of the person who was hired. Ms. Johnson indicated that the appointment was made properly, for the person hired, who had the same score as you, had more experience than you. She also indicated that the only "files maintained under your name" would be your application.

Second, you also requested records indicating "the number of years of education achieved" by the person hired. In my view, if such a record exists, it could likely be withheld as "an unwarranted invasion of personal privacy" [see Freedom of Information law, sections 87(2)(b) and 89(2)(b)(i)]. Moreover, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that an agency generally need not create a record in response to a request. Therefore, if, for example, there is no records containing a total of the numbers of years of education of the person hired, the agency would not be obliged to prepare such a record on your behalf.

Third, I believe that the payroll and subject matter lists must be disclosed upon payment of the appropriate fee for photocopying.

Lastly, if you feel that certain of the records sought have been denied due to the agency's failure to respond to your request, you may appeal the denial pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

For your information, an appeal may be directed to Counsel, Office of Mental Retardation and Developmental Disabilities, 44 Holland Avenue, Albany, NY 12229.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Theresa Johnson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5504

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

March 13, 1989

Mr. Michael P. Fahey
[redacted]

Dear Mr. Fahey:

As you are aware, I have received your "release" concerning a fire occurring in January and Albany County's response to the matter.

By way of background, the fire resulted in a fatality and the destruction of a home in Selkirk. You wrote that the Albany County Fire Advisory Board, which issued a brief report concerning the incident, "was to have addressed the claim that the closed Jericho Bridge delayed response of firefighting units...". However, the Board's report, according to your letter, merely indicates that the Fire Department complied with reporting requirements and noted that "The controversy being aired in the media relating [to] this incident and the Jericho Road Bridge Problem are unfounded and a manipulation."

You also wrote that, in a letter dated February 14, you requested from the County copies of the "Charter/Statute" that established the Fire Advisory Board which describe its functions, powers and duties, as well as copies "of all other reports rendered by the Board, similar in scope to the one in progress (at the time) on the South Bethlehem fire". As of March 6, you have received no response to your request.

In this regard, I offer the following comments.

First, with respect to the 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 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 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, sections 1401.5(d) and 1401.7(c)].

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 on that basis. It is suggested that you contact the County Clerk's office to ascertain the identity of the person to whom an appeal may be directed.

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.

In my view, records reflective of the provisions concerning the creation of the Fire Advisory Board and which describe its functions, powers and duties would be available, for none of the grounds for denial would apply. With respect to the reports, assuming that the Board's reports represent its findings and could be considered final determinations of the Board, I believe that the reports would be available pursuant to section 87(2)(g)(iii) of the Freedom of Information Law. It is noted that in one of the first decisions rendered under the Freedom of Information Law, what were apparently similar reports were found to be available [see Matter of Dwyer, 378 NYS 2d 894 (1975)].

Lastly, I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. As such, a request should include sufficient detail to enable agency officials to locate and identify the records. It is unclear, from my perspective, whether the portion of your request concerning reports "similar in scope" to the report on the South Bethlehem fire reasonably describes the records. Although the County might be able to locate and identify the reports in which you are interested, as an alternative, you might request reports prepared during a given time period.

For future reference, enclosed is "Your Right to Know", which describes the Freedom of Information Law in detail. In addition, in an attempt to enhance compliance with Law, a copy of this letter will be sent to the County Clerk.

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: Hon. James Clingan, County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5505

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

March 13, 1989

Mr. Anthony Dixon
86-A-4087
Box 338
Napanoch, NY 12458-0338

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

Dear Mr. Dixon:

I have received your letter of March 4.

In conjunction with a conviction that you are appealing, you asked initially when the services of the Committee on Open Government become relevant. You also asked whether under "the the FOIA or FOIL" you could obtain a copy of a statement made by a witness who did not testify at your trial. You indicated that the Nassau County Police Department and District Attorney's Office have the statement, but that you do not know where to request the record.

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. Any person may seek the advice of this office, unless litigation concerning the Freedom of Information Law is pending, in which case advice will not be provided. There is no requirement that the Committee be directly involved when a request is made under the Freedom of Information Law. Other than providing advice on request, the only statutory provision that necessarily involves the Committee on Open Government would pertain to a situation in which a request is denied and is later appealed. When an appeal is made, section 89(4)(a) of the Freedom of Information Law requires that the agency in receipt of an appeal forward to the Committee a copy of the appeal and the ensuing determination of the appeal.

Second, since you referred to both "FOIL and FOIA", I point out that the latter, the federal Freedom of Information Act, pertains to records maintained by federal agencies. The New York Freedom of Information Law is generally applicable to entities of state and local government, including a county police department or office of a district attorney.

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

Although I am unfamiliar with the record sought, it appears that it might properly be withheld. Several of the grounds for denial are based upon the effects of disclosing records. For instance, one of the grounds for denial, 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..."

A statement by a witness would likely have been "compiled for law enforcement purposes". Further, the witness statement might consist of "confidential information relating to a criminal investigation", and disclosure might "identify a confidential source". In addition, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted

invasion of personal privacy". That provision might also constitute a basis for withholding the statement. Further, section 87(2)(f) enables an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person". Again, I am unfamiliar with the contents of the record or the effects of disclosure. Those factors would, in my view, be determinative of rights of access to the statement.

Lastly, a request should be directed to the records access officer at the agency that maintains the record. With regard to records of the Police Department, a request may be directed to Samuel Rozzi, Commissioner, Nassau County Police Department, 1490 Franklin Avenue, Mineola, NY 11501. A request may be directed to the Records Access Officer, Office of the Nassau County District Attorney, 262 Old Country Road, Mineola, NY 11501.

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-5506

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

March 13, 1989

Mr. Lawrence Levine
[redacted]

Dear Mr. Levine:

I have received your thoughtful letter of March 6.

At the beginning of your letter, you commented with respect to the difficulty faced by members of the public who may seek to review advisory opinions rendered by the Committee. At the end of your letter, you offered a series of suggestions that would facilitate the dissemination of information pertaining to the Freedom of Information Law and the Open Meetings Law. In this regard, it is noted that the staff of the Committee consists of two, myself and a secretarial assistant. Since approximately 600 written advisory opinions are prepared annually, we have neither the physical nor the financial resources to publish the opinions or to distribute them to a large number of repositories. We have, however, taken steps to provide information concerning the Committee's areas of responsibility. For instance, enclosed is a copy of the Committee's latest annual report. The report contains indices to advisory opinions rendered under both the Freedom of Information Law and the Open Meetings Law. The index to opinions issued under the Freedom of Information Law identifies the opinions by means of approximately 450 "key phrases" and by number. By means of the index, any person can request opinions directly from this office or may review opinions at certain libraries across the state. Public service announcements have been produced and aired throughout the state concerning the laws and the services rendered by the Committee. We have prepared other publications that have been widely disseminated, including "Your Right to Know" and a pocket guide summarizing open government laws, both of which are enclosed. Several hundred thousand copies of each of those publications have been distributed. This week, a program will be conducted on the Freedom of Information Law in commemoration of the anniversary of the birth of James Madison, who is often considered the founder of the concept of freedom of information. In conjunction with that event, the Governor has issued a proclamation urging citizens of New York to

be aware of rights conferred by the Freedom of Information Law and declaring March 16 "Freedom of Information Day". In sum, we have tried to provide information concerning open government laws within the confines of a modest budget.

With respect to your question, you referred to advisory opinion number 4439, which you indicate contains advice to the effect that "a school district cannot be held accountable for unwarranted invasion of personal privacy pursuant to [section] 89, subd. 2-a". I have reviewed that opinion, and the issue concerned the propriety of a denial of a request for a record involving the settlement of a disciplinary action against a teacher. The point concerning section 89(2-a) was that the provision in question refers to section 96 of the Public Officers Law, which is part of the Personal Privacy Protection Law. That statute applies only to state agencies. It specifically excludes entities of local government, including school districts. Even if the Personal Privacy Protection Law had been applicable, it would have been advised that the record in question should be made available. In the discussion of the issue, it was advised that numerous judicial decisions indicate that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than others. It was further advised that in similar situations, records reflective of disciplinary action taken against public employees, including settlement agreements reached in the context of a disciplinary matter, were found to have been available, for disclosure in those instances would result in a permissible rather than an unwarranted invasion of personal privacy. In fact, the issuance of that opinion was followed by the initiation of a lawsuit by the Buffalo News, in which the court specifically agreed with the opinion rendered by this office (see attached, Buffalo Evening News, Inc. v. Hamburg Central School District, Sup. Ct., Erie Cty., June 12, 1987).

You also contended that the opinion previously discussed conflicts with a later opinion, number 4680. Having reviewed the latter opinion, I do not believe that there is any conflict between the two.

You referred to medical information that might be maintained by a school district concerning a teacher. From my perspective, that kind of information could generally be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, section 89(2)(b)(i)]. If, for example, an attendance record is sought, it has been advised and held judicially that a record indicating the days and dates of sick leave claimed by a particular public employee is available [see Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 582 (1986)]. However, if an attendance record includes reference to the nature of an individual's illness or medical condition, that information could in my opinion justifiably be withheld.

Enclosed are copies of the advisory opinions to which you referred, as well as other materials to which I have previously alluded.

I hope that the foregoing serves to clarify the provisions of the Freedom of Information Law and the functions and resources of the Committee. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5507

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

March 14, 1989

Mr. Steven Levine
Press & Sun-Bulletin
Vestal Parkway East
P.O. Box 1270
Binghamton, NY 13902

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

Dear Mr. Levine:

I have received your letter of March 6, as well as the materials attached to it.

By way of background, on February 22, you submitted a request under the Freedom of Information Law to Kevin I. McLaughlin, the City of Binghamton's Director of Economic Development. In a response dated March 1, Mr. McLaughlin acknowledged the receipt of your request and wrote that "due to the present workload" in his department, he would be unable to answer "until on/or before March 15". He asked that you contact him at that time to discuss the matter with you. Soon after, you wrote to Mr. McLaughlin and stated that his response constituted neither "an approval nor a denial and therefore is in violation of the state Public Officers Law". You added that "While federal courts have on rare occasion exempted certain agencies from the five-day time limit for FOIL approval or denial, no such exemption has been granted to the City of Binghamton. Since [Mr. McLaughlin had] not approved this application within the allotted time, [you] will consider [his] response a denial without grounds and follow the appeal procedure outlined in state law."

In this regard, I offer the following comments.

First, since you referred to federal courts, I point out that those courts generally do not interpret the New York Freedom of Information Law. Federal courts have jurisdiction concerning issues arising under the federal Freedom of Information Act (5 U.S.C. section 552), which is applicable to records maintained by federal agencies. Issues litigated concerning the New York Freedom of Information Law are commenced in state supreme court under Article 78 of the Civil Practice Law and Rules.

Second, 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 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 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, sections 1401.5(d) and 1401.7(c)].

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, by acknowledging the receipt of your request of February 22 within five business days, Mr. McLaughlin could extend the time for granting or denying your request up to ten business days from the date of the acknoweldgement of the receipt of your request. I do not believe, however, that at the expiration of that period, a discussion of the matter would be appropriate. On the contrary, within that period, the

records should be made available or denied, rather than discussed, which might further delay the resolution of your request. Further, since Mr. McLaughlin acknowledged the receipt of your request within five business days, your appeal was, in my view, premature. As indicated earlier, if the agency neither makes records available nor denies a request in writing within ten business days of the acknowledgement of receipt of a request, the applicant may consider the request to have been denied and may appeal. In this instance, however, the City appropriately extended the time to approve or deny your request by acknowledging its receipt within five business days.

I hope that the foregoing serves to clarify the City's responsibilities under the Freedom of Information Law. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Kevin I. McLaughlin
Robert Behnke

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5508

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

March 14, 1989

Mr. Raul Rivera
82-A-5177
Eastern Correctional Facility
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. Rivera:

I have received your letter of March 7 in which you requested advice concerning the Freedom of Information Law.

You wrote that you are interested in verifying whether the "radio assistance received" by two named police officers assigned to the 50th precinct in New York City "was conducted as a result of a burglary alarm". You indicated that on September 29, 1982, the New York Daily News published an article to the effect that the officers responded to a burglary alarm.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law provides in part that an agency is not required to prepare any record that it does not possess or maintain. Since the incident occurred several years ago, it is questionable whether any records exist that would "verify" whether the response was due to a burglar alarm. If the records no longer exist, the Department would not be obliged to create a new record on your behalf, and the Freedom of Information Law would not be applicable.

Second, assuming that a record containing the information sought exists, the Freedom of Information Law would apply. I point out that 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...in any physical form whatsoever...". As such, the Freedom of Information Law includes within its scope paper records, as well as tape recordings, for example.

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.

I am unaware of the contents of any record that might exist containing the information in which you are interested. However, several of the grounds for denial might be relevant. For instance, section 87(2)(e) permits an agency to withhold "records compiled for law enforcement purposes" under certain circumstances. The record might identify an individual or individuals, in which case section 87(2)(b) might be relevant. That provision permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy". Internal communications might, depending upon their contents, be withheld pursuant to section 87(2)(g). This is not to suggest that the aforementioned grounds for denial would justify a denial in this instance; rather, my intent is to suggest that there may be a basis for withholding. I point out, too, that there is a judicial decision in which the court, based upon the facts in that case, found that tape recordings of certain communications broadcast over police radio were available [Buffalo Broadcasting, Inc. v. City of Buffalo, 126 AD 2d 983 (1987)].

Lastly, a request for records of the New York City Police Department may be directed to Ms. Eneta McAlister, Records Access Officer, Public Information Section, New York City Police Department, 1 Police Plaza, New York, NY 10038. The Freedom of Information Law requires that an applicant "reasonably describe" the record sought. Therefore, a request should include sufficient detail to enable agency officials to locate the record.

Enclosed is a copy of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5509

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

March 15, 1989

Mr. Joel A. Schipski
89-A-1225 A-1-21
Washington Correctional Facility
Lock 11 Road
P.O. Box 180
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. Schipski:

I have received your letter of March 6 in which you requested assistance.

You wrote that you are interested in obtaining information concerning the "duties and functions or responsibilities of the Superintendent, D.S. of security, counselors, and institutional parole officers". In addition, you would like to obtain "'secretive reports' filed by the D.A., the counselor in Downstate, the Counselor here in Washington and any and all parole summaries". You also indicated that you are involved in litigation in federal district court "under a theory in 'absolute liability'", and that you would like information concerning that issue.

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 Law. The Committee is not empowered to compel an agency to grant or deny access to records. Further, insofar as your inquiry pertains to litigation before a federal court, it appears to be unrelated to the Freedom of Information Law and outside the jurisdiction or expertise of this office. In short, this office has no information concerning the "theory of absolute liability".

Second, to the extent that your letter pertains to access to records, I point out that, 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 the functions and duties of persons holding certain positions, I believe that in most instances, a record in the nature of a job description is prepared. A job description would likely contain characteristics of the functions and duties of a position and would, in my view, be available. I point out, too, that various provisions of the Correction Law specify the duties of a superintendent. Further, section 259-f of the Executive Law includes provisions concerning the eligibility of persons performing duties as parole officers.

With regard to the records characterized as "secretive reports" and parole summaries, there may be several grounds for withholding those records in whole or in part. Since the records involve communications between agency officials, 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits 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. As such, records that are evaluative in nature or which contain advice, opinions or recommendations could be withheld.

To the extent that the records identify others, section 87(2)(b) might be relevant. That provision permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy".

Although I am unaware of the nature of the reports, also potentially relevant is section 87(2)(e), which enables an agency to withhold records "compiled for law enforcement purposes" under certain circumstances.

Lastly, pursuant to regulations promulgated by the Department of Correctional Services under the Freedom of Information Law, a request for records kept at a correctional facility may be directed to the facility superintendent. With respect to records kept at the Department's Albany offices, the regulations indicate that a request may be made to the Deputy Commissioner for Administration.

Enclosed is a copy of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5510

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

March 15, 1989

Mr. H. George Fisk
City Assessor
City of Watertown
Room 201
Watertown Municipal Building
245 Washington Street
Watertown, NY 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, unless otherwise indicated.

Dear Mr. Fisk:

I have received your letter of March 7, which pertains to access to EA-5217 Real Property Transfer Reports.

You wrote that, in your capacity as assessor for the City of Watertown, each month you receive from the County Clerk's office "copies of deeds recorded along with the EA 5217 Real Property Transfer forms which accompany them". You wrote that "All information on the EA 5217 is considered confidential", citing section 574(5) of the Real Property Tax Law, which states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

Once in receipt of the records, you indicated that: "The deeds are processed and the information from the EA 5217 is recorded on the exterior face of the property record folder, on the property record card, and entered in various valuation inventory files".

In conjunction with the foregoing, you raised the following question: "Once the information is transferred from the EA 5217 to these various sources, is it public information?"

In this regard, I offer the following comments.

First, to give effect to section 574(5) of the Real Property Tax Law, I believe that information derived from EA 5217 forms that is transferred to other records should be considered confidential to the same extent as that statute confers confidentiality with respect to the forms. Any different result would, in my opinion, essentially nullify the direction given in section 574(5). Further, while the Freedom of Information Law grants broad rights of access to records, the first ground for denial, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". In this instance, section 574(5) of the Real Property Tax Law, a statute, would exempt the forms or reports from disclosure, except as otherwise provided.

Second, the fact that information contained in the 5217 forms may be transferred to other records does not require that those records be kept confidential in their entirety. Records containing information derived from the forms might include a variety of other kinds of information, which, in my opinion, would be available to the extent required by the Freedom of Information Law. For instance, a record might include the key aspect of the EA 5217, the sale price of real property, as well as other items of information that were not transferred from the EA 5217. In that circumstance, the sale price would be deleted from the record, while the remainder might be available.

Third, EA 5217 forms are not confidential in every situation in which they may be requested. As specified in section 574(5) of the Real Property Tax Law, the forms are confidential, "except for purposes of administrative or judicial review of assessments". Therefore, if the forms or other records containing information derived from the forms are requested in conjunction with a grievance (i.e., the administrative review of an assessment), the confidentiality restrictions otherwise imposed by section 574(5) would not apply. In that kind of case, I believe that the information contained in the form would be accessible.

Lastly, I have contacted the Division of Equalization and Assessment to discuss your inquiry. While I believe that my advice is consistent with the opinions tentatively expressed by a representative of the Office of Counsel at the Division, I was informed that you will receive a separate response from that office.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Steven Harrison, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5511

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

March 15, 1989

Ms. Ann Smutok
[redacted]

Dear Ms. Smutok:

I have received your letter of February 27 in which you referred to an advisory opinion rendered on February 23, as well as your efforts in obtaining records concerning [redacted]

Although you allege that the State Department of Health has attempted to "restrict access" to the record you seek, I do not believe that there is any attempt to do so, nor do I believe that the "record" in which you are interested exists. Having spoken with various representatives of the Department on your behalf, I have been informed that you have received all of the accessible records that you have requested.

One of the problems apparently involves your belief that the Department is withholding records that simply do not exist. As you know, under section 2803-d of the Public Health Law, reports of abuses of persons receiving care in residential health care facilities are submitted to and investigated by the Department. If, following an investigation, there is no finding of abuse, the records relating to an investigation are purged. Specifically, section 2803-d(6)(c) of the Public Health Law states in relevant part that:

> "All information relating to any allegation which the commissioner has determined would not be sustained shall be expunged one hundred twenty days following notification of such determination to the person who made the report..."

As I understand the matter, there was no finding of abuse, and the records relating to any report of abuse no longer exist. If that is so, the records in which you are interested do not exist and the Freedom of Information law would not be applicable. It is noted, too, that section 89(3) of the Freedom of Information Law states that an agency is not required to "prepare any record not possessed or maintained" by the agency. As such, the Health Department would not be obliged to create a record in response to a request made under the Freedom of Information Law.

In sum, based upon the information given to me, you have not been denied access to records; rather, the information sought apparently does not exist.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5512

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

March 16, 1989

Mr. Clarence Lester Hoffman
[redacted]

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

Dear Mr. Hoffman:

I have received your letter of March 8, as well as the materials attached to it.

Your inquiry pertains to a "failure...to honor" your request dated February 17 for a payroll list of all officers and employees of the Three Village Central School District. The request specified that you want the record required to be maintained pursuant to "Section 87-'3'-'b' of the Public Officers Law". In response to the request, Ms. Maureen Pluto, District Clerk, contacted you by phone to ask whether you wanted information regarding "part timers", as well as full time employees. You answered affirmatively, and Ms. Pluto said that she would be "in touch with you". Thereafter, you received a letter dated March 1 from Richard Seidell, Assistant Superintendent for Business Services. Mr. Seidell acknowledged the receipt of your request of February 17 and indicated that District policy required "the completion of an application to examine public records", a copy of which was included. He also wrote that "Additional charges may be assessed for searches and inspections".

In this regard, I offer the following comments.

First, I believe that the information sought is clearly accessible under the Freedom of Information Law. One of the few instances in the Law in which an agency is required to prepare a record involves the payroll list in which you are interested. Specifically, section 87(3) states in relevant part that:

"Each agency shall maintain...

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

As such, the District is, in my view, required to prepare and maintain on an ongoing basis a payroll list containing the information specified in section 87(3)(b) of the Freedom of Information Law. Moreover, based upon the language of the Law and its judicial interpretation, I believe that a payroll list is clearly available.

Second, it appears that the District failed to respond to your request within the requisite time. 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 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, sections 1401.5(d) and 1401.7(c)].

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, there is nothing in the Freedom of Information Law that requires an applicant to complete a form prescribed by an agency. The Law and the Committee's regulations 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. It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response to 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 writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that the agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, 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, a 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 government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

Lastly, I do not believe that a fee may be imposed by the District for inspection of or search for records. 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 promul-

> gated 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."

The regulations promulgated by the Committee state 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 this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specifically indicate that no fee may be charged for inspection of or search for records, except as otherwise prescribed by a statute, an enactment of the State Legislature.

In an effort to enhance compliance with the Law, copies of this opinion will be sent to the District.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Maureen Pluto, District Clerk
Richard Seidell, Assistant Superintendent for Business Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5513

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

March 17, 1989

Mr. Hubert Delancey
147-88-2581
Brooklyn Correctional Facility
136 Flushing Avenue
Brooklyn, New York 11205

Dear Mr. Delancey:

I have received your letter of March 9, as well as the materials attached to it.

According to your letter, under the Freedom of Information Law, you would like "to obtain a document with the Court seal on it, from the Court [you] got acquitted from". You indicated that your rap sheet continues to refer to the arrest and that you have written to the court clerk several times concerning the matter.

In this regard, I offer the following comments.

First, the Freedom of Information Law does not apply to the courts or court records. That statute is applicable to records of an "agency", a term defined in section 86(3) of the Freedom of Information Law to include:

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

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 court records are often available under other provisions of law, those records are outside the scope of the Freedom of Information Law.

Second, I point out that the agency that serves as the repository of criminal history data is the Division of Criminal Justice Services. I have enclosed a copy of the Division's regulations that deal with an individual's right to review criminal history data pertaining to him. Under those regulations, an individual may obtain a copy of criminal history data and, on submission of the appropriate forms, challenge the completeness or accuracy criminal history data. It is suggested that you carefully review the regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 5514

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

March 21, 1989

Mr. T. Wright
85-B-0980 SHU-C-5-A
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

Dear Mr. Wright:

I have received your letter of March 11, which reached this office on March 20.

You have requested a "book or pamphlet" prepared by the Department of Correctional Services entitled "Descriptive language of the employee manual" pursuant to the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not maintain possession of records generally, and this office is not empowered to compel an agency to grant or deny access to records. In short, I cannot provide the record in which you are interested, because this office does not possess that record. Nevertheless, I offer the following comments.

First, a request for a record should be directed to the agency that maintains the record. Under the circumstances, it appears that a request should be directed to the Department of Correctional Services.

Second, the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that, in the case of records kept at a correctional facility, a request may be made to the superintendent of the facility. With respect to records kept at the Department's Albany offices, a request may be directed to the Deputy Commissioner for Administration. Due to the nature of the manual in which you are interested, it is suggested that a request be made to the superintendent at the facility.

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-5515

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

March 23, 1989

Mr. Jimmy Burton
83-A-6492
P.O. Box 51
Comstock, NY 12821

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

Dear Mr. Burton:

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

According to your letter, you sent a request on November 10 to the New York City Police Department for records relating to arrests made in 1982. The request was denied on November 23 on the ground that disclosure would result in an unwarranted invasion of personal privacy and on the basis of section 87(2)(e) of the Freedom of Information Law, which permits an agency to withhold records compiled for law enforcement purposes under certain circumstances. You appealed the denial on November 29, and in a response dated January 17, Assistant Deputy Commissioner Thomas E. Slade wrote:

> "Your appeal does not reasonably describe the records sought inasmuch it does not contain a Complaint Number, Precinct, and date of occurrence. Furthermore, if such records were prepared and could be located they would be exempt from disclosure on privacy grounds [Public Officers Law s98 [sic] (2)(b)], confidential information grounds [s87 (2)(f)] and intra-agency grounds [s87 (2)(g)]."

Based on that response, you wrote to Mr. Slade on February 1 and asked that he accept your letter of that date "as a renewal" of your appeal. In that letter, you provided some of the information to which Mr. Slade referred, including the date of the arrests, the precinct in which the arrests were made and other details that did not appear in your initial request.

You wore that you were later told by persons at your facility that it was "too late to file an Article 78 proceeding". As such, you have requested advice "as to how [you] may continue [your] efforts in obtaining the documents".

In this regard, I offer the following comments.

First, as Mr. Slade suggested, the Freedom of Information Law requires that an applicant "reasonably describe" the records sought [see section 89(3)]. Based upon judicial interpretations, a request meets that standard when it includes sufficient detail to enable agency officials to locate and identify the records. Your initial request apparently did not include to sufficient information to permit the Department to locate the records.

Second, while it is possible that your letter of February 1 might contain sufficient additional detail to "reasonably describe" the records sought, I do not believe that the Department would be required to accept a second or "renewed" appeal. Under the circumstances, it is suggested that you submit a new request containing the additional information to the records access officer, Ms. McAlister.

Third, for future reference, an Article 78 proceeding must generally be commenced within four months after an agency's final determination (see Civil Practice Law and Rules, section 217). Therefore, if a determination to deny access to records is made in response to an appeal, i.e., if one's administrative remedies have been exhausted, the person denied access has up to four months to initiate an Article 78 proceeding.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5516

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

March 23, 1989

Mr. Dwight Hendy
87-T-1156
Clinton Correctional Facility
Box 367-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. Hendy:

I have received your letter of March 13 in which you referred to an opinion sent to you on March 6.

In that opinion, it was advised that an agency is not required to prepare a separate "subject matter list" pursuant to section 87(3)(c) of the Freedom of Information Law concerning the records it maintains about a particular individual. Rather, it was suggested that a subject matter list must make reference, in reasonable detail, to the categories of records maintained by an agency. Notwithstanding my response, you wrote that it is your understanding that the Freedom of Information Law permits "each individual to obtain access to his/her personal record". You asked how you can know what to request or "what, if anything, the agency [has] on the particular individual". In addition, you asked whether you "can bring this matter to court" premised on my opinion of March 6.

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. As such, many records pertaining to an individual would, in my opinion, be accessible to that individual. However, there may be instances in which records about an individual could justifiably be withheld. For instance, records compiled for law enforcement

purposes may be withheld under circumstances specified in section 87(2)(e) of the Freedom of Information Law. Records prepared by the staff of an agency relating to an individual might, depending upon their contents, be deniable pursuant to section 87(2)(g) of the Freedom of Information Law. In short, while the Freedom of Information Law provides broad rights of access, it does not necessarily require disclosure to an individual of all records or every aspect of those records to that individual. Since you are currently confined in a state correctional facility, I point out that the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law contain provisions dealing with the examination of inmate records by the inmate (see enclosed regulations, section 5.20).

Second, although a subject matter list is not prepared with respect to records pertaining to a single individual, such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested. Once again, I direct your attention to the regulations promulgated by the Department of Correctional Services, which in section 5.13 state that:

> "(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in his possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office.
>
> (b) Each subject matter list and the master index shall be sufficiently detailed to permit identification of the file category of the record sought.
>
> (c) The master index shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list. Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such list shall be mailed or delivered."

By reviewing a subject matter list, you can ascertain the kinds of records maintained by an agency and thereafter, request records based upon your review of the list.

Lastly, with respect to your bringing the matter to court, at this juncture, it is difficult to envision what the issue to be reviewed by a court might be. Moreover, I could not advise that you should or should not initiate a lawsuit concerning a particular issue.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1599
FOIL-AO-5517

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

March 27, 1989

Ms. Theresa C. Lonergan
[redacted]

The staff of the Committee on 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. Lonergan:

I have received your letters of March 12 and 13.

Your initial inquiry concerns a "hypothetical question" concerning minutes of meetings. Under your description of the facts, a public body meets on the first day of the month, the clerk prepares the appropriate minutes and discloses the minutes within the proper time. The minutes are then approved or modified at the next regular meeting, which is held on the first day of the following month. You have asked whether the minutes made available prior to their approval must be signed or certified by the clerk.

In this regard, there is nothing in the Open Meetings Law that requires that minutes of meetings, approved or otherwise, must be signed or certified by a clerk or any other official. Further, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. If minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes of open meetings be prepared and made available within two weeks as required be section 106(3) of the Law, and that if they have not been approved, they may be marked "unapproved", "draft" or "non-final"; for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

The second issue involves fees for copies of records. According to your letter, in response to a request for a copy of neighboring town's ordinance, which consisted of three pages, you were informed that the town "requires a fee of $5.00 for a copy of any law or ordinance". You wrote that a fee of $5.00 "would be a bargain if that law or ordinance was 20 sheets or more" but that "$5.00 is no bargain for 3 8 1/2 x 11 sheets".

In this regard, by way of background, section 87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation, for instance, establishing a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, or a fee that exceeds the actual cost of reproducing records that cannot be photocopied. Moreover, a recent decision confirmed that a fee of more than twenty-five cents per photocopy may be assessed only pursuant to authority conferred by a statute, an act of the State Legislature [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Consequently, unless an act of the State Legislature authorizes the fees in question, a town, in my opinion, cannot charge more than twenty-five cents per photocopy.

Under the circumstances that you described, a town could, in my opinion, assess a fee of $5.00 for copies of laws or ordinances that are 20 or more pages. However, the fee for photocopying a local law or ordinance of less than 20 pages could not, in my view, 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5518

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

March 27, 1989

Mr. Jerry Steinman
Beer Marketer's Insights
51 Virginia Avenue
West Nyack, NY 10994

Dear Mr. Steinman:

I have received your letter of March 21.

You wrote that you are interested in obtaining records "showing the barrels of beer that were shipped into New York State" by various brewing companies, as well as data indicating sales of various beer distributors in the state. As such, you raised questions concerning the forms that must be filled out to obtain the data.

In this regard, I offer the following comments.

First, the vehicle for requesting government records is the New York Freedom of Information Law. That statute does not refer to or prescribe any particular form that must be used for the purpose of requesting records. An agency can, however, require that an applicant request records in writing. Further, section 89(3) of the Freedom of Information Law "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate the records.

Second, a request should be directed to the records access officer at the agency or agencies that maintain the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests for records.

Third, having contacted the State Liquor Authority on your behalf, I was informed that it does not maintain the kinds of records in which you are interested. I also contacted the Department of Taxation and Finance. As I understand the situation, the tax is assessed on a per gallon basis and is paid by beer distributors. Consequently, it is questionable whether that

Department maintains the kind of information that you seek. I point out, too, that the Freedom of Information Law pertains to existing records. Stated differently, an agency is not required to prepare or create new records in response to a request [see Freedom of Information Law, section 89(3)].

If you wish to make requests, the records access officer for the State Liquor Authority is Richard Chernela, whose address is 250 Broadway, New York, NY 10007; the records access officer at the Department of Taxation and Finance is Karl Felsen, whose office is located at the Tax and Finance Building, State Campus, Albany, NY 12227.

I hope that I 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-5519

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

March 27, 1989

Mr. Billy Billups
80-A-1328
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. Billups:

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

According to your letter, you recently directed a request for your daughter's school records to a public school in New York City. You were advised that those records are exempt from the Freedom of Information Law and that rights of access to those records are governed by the federal Family Educational Rights and Privacy Act (FERPA). You were sent a copy of section A-820 of the regulations of the Chancellor which in subdivision (7) deals with disclosure of education records to "estranged, separated or divorced parents ". The regulations state in paragraph (b) that:

> "For requests by a parent with whom the child does not reside to see the child's records, the principal will notify the parent or institution with whom the child does reside of the request. The notice will tell the custodian of the child that the request has been made, the name of the person making the request, and the date on which the request was made. Whenever practical, the notice shall be written in the primary language of the student's home. A sample Notice of Request for Access by Non-Custodial Parent appears as Form I of this Regulation.

> "The parent making the request shall be notified at the time of the request that an investigation is being conducted to ascertain whether a binding instrument, or court order bars the school from giving the parent access to the records, and if no such document has been found within forty-five calendar days, the records will be made available to the parent."

It is your view that the regulations discriminate against a non-custodial parent. As such, you asked whether student records maintained by a New York City school are subject to the Freedom of Information Law, whether the Chancellor's regulations can abridge rights granted by the Freedom of Information Law, and whether the FERPA prohibits you from gaining access to your daughter's records because you are a non-custodial parent.

In this regard, I offer the following comments.

First, although the Freedom of Information Law confers broad rights of access to records, the first ground for denial, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute. The FERPA (20 USC section 1232g), a federal statute, states that, as a general rule, education records pertaining to a particular student or students are confidential with respect to third parties, unless confidentiality is waived by a parent of a student under eighteen years or age. As such, the records in question are specifically exempted from disclosure pursuant to a federal statute. FERPA also states that education records pertaining to a particular student under the age of eighteen are accessible to the parents of the student. As such, rights of access under the circumstances are conferred by FERPA rather than the Freedom of Information Law.

Second, even though a parent might not have custody of a child, that factor alone is not determinative of rights of access. The term "parent" is defined in the regulations adopted pursuant to the FERPA by the United States Department of Education to mean "a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian" (32 CFR 99.3). Further, 34 CFR 99.4 states that:

> "An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order,

> State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes those rights."

Based on the foregoing, in the case of divorce or separation, a school district must, in my view, provide access to both natural parents, custodial and non-custodial, unless there is a legally binding document that specifically removes a parent's rights under FERPA. I believe that a legally binding document would include a court order or other legal paper that prohibits access to educational records, or removes the parent's rights to have knowledge about his or her child's education. I point out that it has been held judicially that a non-custodial parent enjoys rights conferred by FERPA, even though the custodial parent signed a statement indicating that she did not authorize a school district to transmit records to the natural father [Page v. Rotterdam-Mohonasen Central School District, 441 NYS 2d 323 (1981)]. The court specified that the natural parent has rights under FERPA "unless such access is barred by state law, court order or legally binding instrument", none of which were present in that case (id. at 325).

Lastly, with respect to the time within which an educational agency must respond to a request, 34 CFR 99.10(b) states that:

> "The educational agency or institution shall comply with a request for access within a reasonable period of time, but in no case more than 45 days after it has received the request."

In sum, student records are not subject to the Freedom of Information Law, but rather to FERPA, a federal statute. Further, it appears that the Chancellor's regulations are consistent with FERPA and the regulations promulgated under the Act.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5520

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

March 27, 1989

Mr. Theodore Howard
76-A-2921
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. Howard:

I have received your letter of March 16 in which you raised questions concerning rights of access to your pre-sentence report.

In this regard, I offer the following comments.

First, 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, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Second, section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or 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 per-

> mitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in section 390.50 of the Criminal Procedure Law [see Matter of Thomas 131 AD 2d 488 (1987)].

I hope that I 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-5521

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

March 28, 1989

Mr. Janusz Muszak
[redacted]

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

Dear Mr. Muszak:

As you are aware, your letter of March 14 addressed to the Department of Law has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the New York Freedom of Information Law.

According to your letter, some time ago, you asked that your insurance company "conduct an investigation of the insurance fraud". Following your request to see the results of its investigation, the insurance company apparently refused to provide you with any documentation. You asked whether you can "obtain such documents under the Freedom of Information Act".

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an agency, and section 86(3) of the Law defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government; it would not apply to records maintained by an insurance company.

Second, although I have no knowledge of the nature of the investigation that has been conducted, I point out that the New York State Insurance Department regulates the insurance industry and maintains records concerning insurance companies. Those records would be subject to rights conferred by the Freedom of Information Law. If you have a specific inquiry or complaint, or if you want to determine whether the Insurance Department can help you, it is suggested that you contact its Bureau of Consumer Services. That office can be reached toll-free at 1-800-342-3736.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5522

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

March 28, 1989

Mr. John Anthony
[redacted]

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

Dear Mr. Anthony:

I have received a copy of your letter of March 15 addressed to Mr. William Rawn, on which you requested that I advise.

According to the letter, Mr. Rawn was apparently hired as a consultant by the Village of Croton in relation to "the destruction of five municipal homes at Black Rock...". You referred to requests for copies of documents concerning "the circumstances leading to the retention of [Mr. Rawn's] architectural consulting services" by the Village and "the list of suitable sites for the affordable housing that [Mr. Rawn has] been retained to consider as consulting architect for the Village of Croton". You added that the Village's Records Access Officer has constructively denied these requests.

In this regard, I offer the following comments.

First, the New York Freedom of Information Law is applicable to agency records, 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."

Therefore, as a general matter, the Freedom of Information Law applies to records of entities of state and local government in New York.

Second, 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, documents produced for an agency would in my view constitute "records" subject to rights of access conferred by the Freedom of Information Law.

Third, a private firm, such as Rawn Associates, would not be subject to the Freedom of Information Law; it is not an agency, and its offices are located outside of New York. However, it has been held that reports prepared for an agency by a consultant should be treated as "intra-agency" materials that fall within the scope of section 87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

In a discussion of the issue of consultant reports, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional material, prepared to assist an agency decision maker***in arriving at his decision' (Matter of McAulay v Board of Educ., 61 AD2d 1048, affd 48 NY2d 659). Such material is exempt 'to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD2d 546, 549).
>
> "In connection with their deliberative process agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v Stubing, 82 AD2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v Hennessy, 82 AD2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY2d 131, 132-133 (1985)].

The Court, however, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held 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 or 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 the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

Lastly, I do not believe that Mr. Rawn is obliged to to respond to your request. Rather, the duty of coordinating an agency's response to requests for records is imposed upon the agency's records access officer. The records access officer would have the duty to locate and grant or deny access to requested records. If indeed your request has been "constructively denied", you may appeal such a denial in accordance with section 89(4)(a) of the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Rawn, III
Richard Herbek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1600
FOIL-AO-5523

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

March 28, 1989

Mr. Louis F. Barnas
[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 Mr. Barnas:

I have received your letter of March 16 in which you raised questions concerning minutes of meetings of a board of assessment review.

You asked whether minutes are required to be taken at those meetings, whether any such minutes must be available for public inspection, and what the minutes must include. You added that you have been informed that "the minutes contain nothing more than the name of the complainant, the property SBC number, the challenged assessment amount, and the final decision of the board. In your view, minutes of that nature are incomplete.

In this regard, I offer the following comments.

First, section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies and prescribes what may be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 states in part that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

Based upon the foregoing, it is clear that minutes need not consist of a verbatim transcript of the entire discussion at a meeting, but rather only "a record or summary" of "motions, proposals, resolutions and any other matter formally voted upon...". Similarly, minutes do not have to refer to those who may have spoken during a discussion or the nature of their comments. Further, minutes of executive sessions are required to be prepared only when action is taken during an executive session. If a public body discusses an issue during an executive session, but takes no action, there is no requirement that minutes of the executive session be prepared.

Second, minutes of meetings must be made available pursuant to subdivision (3) of section 106 of the Open Meetings Law. That provision states that:

> 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 meetings 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 reflective of determinations of a board of assessment review must be prepared and made available for inspection and copying.

Lastly, I point out that, in addition to the Open Meetings Law, the Freedom of Information Law has, since its enactment in 1974, contained what may be considered an "open vote" provision. Section 87(3) states in relevant part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Therefore, when a final vote is taken by a public body, such as a board of assessment review, a record, presumably minutes, must be prepared that indicates the manner in which each member cast his or her vote. Further, unless a vote is unanimous, the minutes should include reference to each member's vote as affirmative or negative 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5524

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

March 28, 1989

Mr. Dominic Bretti
80-C-0511
Box 700
Wallkill, NY 12589

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

Dear Mr. Bretti:

I have received your letter of March 6, as well as the materials attached to it.

The materials consist of requests made under the Freedom of Information Law for records of the Organized Crime Task Force and the Oneida County District Attorney's Office. You have requested "input" from this office regarding those requests.

Having contacted Mr. Steven Chananie, Records Access Officer for the Organized Crime Task Force, I was informed that that office does not maintain any records that fall within the scope of your request.

The request to the Office of the District Attorney involves:

> "any and all documents pertaining to the deals entered into with the District Attorney's Office, Angelo Grillo and Michael E. Daley, Esq. formerly an Assistant Deputy Attorney General who headed the Organized Crime Task Force in the Oneida and Herkimer County areas and who was the prosecutor at the trial in Herkimer County."

In this regard, I have contacted the Office of the District Attorney on your behalf and was informed that there was no such agreement, understanding or "deal" concerning the matter. As such, the information that you are seeking does not exist.

I point out, too, that the Freedom of Information Law pertains to existing records. Section 89(3) states in part that "Nothing in [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity...". In short, since the Office of the District Attorney does not maintain the information sought in the form of a record or records, it can neither approve nor deny your request. Under the circumstances, the Freedom of Information Law would appear to be inapplicable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5525

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

March 28, 1989

Ms. Theresa C. Lonergan
[redacted]

The staff of the Committee on 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. Lonergan:

I have received your letter of March 21.

Having recently requested a lengthy document, you were informed that, in addition to payment of a fee for photocopying, you would be required to pay the cost of postage. As such, you asked whether a municipality is "able to charge for postage if records are mailed".

In this regard, the Freedom of Information Law requires that accessible records be made available for inspection and copying. No fee may be assessed for the inspection of accessible records, and inspection likely occurs at the offices of an agency. When copies of records are requested, 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 for records up to nine by fourteen inches, unless a statute other than the Freedom of Information Law permits an agency to charge a higher fee.

When an applicant requests copies of records, the records may be reproduced in the presence of an applicant, the applicant can physically present himself or herself at an agency's offices to obtain copies, or copies can be mailed to the applicant.

There is nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) that deals with the cost of or the assessment of charges for postage in the event that copies are mailed to an applicant. However, I do not believe that the Freedom of Information Law would prohibit an agency from charging for postage.

In my view, mailing copies of records to an applicant represents an additional service provided by an agency that is separate from the duties imposed by the Freedom of Information Law. An agency must, in my opinion, mail copies of records to an applicant upon payment of the appropriate fees for copying and postage. Nevertheless, I believe that an agency may charge for postage if it so chooses.

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-5526

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

March 29, 1989

Mr. Leslie J. Kyser
86-C-0109
135 State Street
Auburn, NY 13022

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

Dear Mr. Kyser:

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

According to your letter, you have unsuccessfully attempted to obtain a copy of your college transcript from the State University College at Buffalo. You explained that the transcript is needed by Syracuse University in order to enable to you enroll in courses offered by that institution.

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, such as the State University, and many private educational institutions, including Syracuse University. 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. Concurrently, parents of students under the age of eighteen or students eighteen years of age or older who attend institutions of higher education generally have rights of access to education records pertaining to those students. As such, I believe that you would generally have the right to obtain education records pertaining to you that are maintained by the State University College at Buffalo.

Second, in an effort to assist you, I have contacted the State University on your behalf. I was informed that it has no record of having received your request. It was suggested that you resubmit your request to:

Mr. Mark Bausili
Registrar
SUNY College at Buffalo
1300 Elmwood Avenue
Buffalo, NY 14222

The fee for a copy of a transcript is $3.00. If you are aware of the name and address of the person at Syracuse University who should receive the transcript, a copy can be sent directly to that person. In order to establish your identity, I was also informed that your request should include your student identification number, which is the social security number used at the time when you were enrolled at 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5527

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

March 29, 1989

Mr. John Anthony
[redacted]

The staff of the Committee 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. Anthony:

I have received a copy of your letter addressed to the records access officer at the regional office of the Department of Environmental Conservation on which you requested advice concerning "items 2 & 3" of that letter.

Item 2 refers to a request for records whose receipt was acknowledged by letter. On the letter of acknowledgement appeared a handwritten note, which, according to earlier correspondence that you forwarded to this office, indicates that "Law Enforcement records are not filed by municipality, so I cannot give you great hope of our locating records for 1987, 1988 & 1989". Since you have received no further response, you asked whether your request has been denied.

In this regard, you provided no indication of the nature of your request. However, on the basis of the response as you described it, the request likely did not reasonably describe the records sought as required by section 89(3) of the Freedom of Information Law. As I have advised on several occasions, a request "reasonably describes" the records sought if it contains sufficient detail to enable agency officials to locate and identify the records. Assuming that the records access officer cannot locate and identify the records that you requested, I do not believe that you have been denied access to records in the context of the Freedom of Information Law. However, if my assumption is accurate, i.e., that the request did not reasonably describe the records, I believe that the records access officer should have so informed you.

In item 3 you referred to a request made to the records access officer "by Staples-Strom" on February 11. Since there was apparently no response to the request, you asked whether the absence of a response constitutes a "constructive denial". Again, I am unfamiliar with the request. Nevertheless, section 89(3) of the Freedom of Information Law requires that an agency:

> "within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If none of those steps is taken, the regulations promulgated by the Committee on Open Government indicate that the request would have been constructively denied, and that the applicant may appeal the denial on that basis [see 21 NYCRR 1401.5(d) and 7(c)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5528

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

March 29, 1989

[redacted]

The staff of the Committee 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.

[redacted]

I have received your recent letter, which reached this office on March 22.

You have requested an advisory opinion concerning rights of access to records maintained by the Bureau of Labor Relations at the Department of Correctional Services. According to your letter, you made a request for records regarding alleged incidents of misconduct occurring on December 13 and that have been used as the basis for the initiation of disciplinary action against you. You indicated that the records falling within the scope of your request would have been prepared by officials of the Department or the Commission of Correction.

Your initial request was denied, and the denial was affirmed following an appeal. As required by section 89(4)(a) of the Freedom of Information Law, the Department forwarded a copy of the determination on appeal to this office. You were advised in the determination:

> "that Public Officers Law Section 87(2) exempts from disclosure records which are evaluative and records which are not final agency policy or determinations. The materials requested by Appellant fall within these two categories. Investigation into this appeal has revealed that disciplinary action is still pending. Accordingly, these documents are exempt from disclosure."

It is your view, however, that the records sought "are not evaluative in nature", but rather that they "are prepared as part of a routine procedure in all Department of Correctional Services (DOCS) disciplinary action". In conjunction with that contention, you suggested that records may be evaluative prior to the initiation of disciplinary action, but that, once disciplinary action is taken, "the documentation ceases to be evaluative and becomes evidence which should be available to [you] to defend [yourself]". You also referred to provisions of a collective bargaining agreement and contended "that in order for the Department to establish 'just cause' it must produce the records". In addition, you contend that the records sought "are in the nature of factual or alleged factual and determinant material in which the Agency relied on in carrying out its duty to maintain discipline and enforce departmental regulations". On those grounds, you believe that the records should be made available.

In this regard, I offer the following comments.

First, I believe that whatever rights you may have under a collective bargaining agreement on in conjunction with claims of due process are separate and distinct from rights that you may enjoy under the Freedom of Information Law. When rights are conferred under a collective bargaining agreement or in conjunction with considerations of due process, those rights are accorded due to one's status as a party to an agreement or proceeding. The Freedom of Information Law confers rights of access upon the public generally, and the status or interest of an applicant for records under that statute are largely irrelevant to rights of access.

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

Third, in view of your request and the Department's response to it, although I am unfamiliar with the contents of the records, it would appear that one of the grounds for denial may be particularly relevant. Specifically, section 87(2)(g) of the Freedom of Information Law pertains to communications prepared by agency officials and transmitted to others in the agency or to a different agency. 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;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless another basis for denial may be asserted. 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. To the extent that records are "evaluative in nature", I believe that they would be reflective of an opinion, for example, regarding a person's performance or activities. However, to the extent that records consist of "factual...data", they would, in my view, be available under section 87(2)(g)(i), unless a different ground for denial applies.

Further, it has been held that statistics and facts that may be "intertwined" with opinions, for instance, should be available. Specifically, 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 statistical or factual information may be "intertwined" with opinions, for instance, the statistical or factual portions should in my opinion be disclosed, unless different grounds for denial 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

Robert J. Freeman
Executive Director

RJF:jm

cc: J.W. Hernandez-Cuebas

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5529

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

March 29, 1989

Mr. Joel Schipski
89-A-1225 A-1-21
Washington Correctional Facility
Lock 11 Road
P.O. Box 180
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. Schipski:

I have received your letter of March 17.

Despite your familiarity with a variety of state and federal laws, it appears that you do not understand the Freedom of Information Law. As I understand your comments, it seems that you feel that denials of requests for records sought under the Freedom of Information Law are inconsistent with and diminish your rights under state and federal discovery statutes.

In my view, your rights, as well as an agency's authority to withhold records under the Freedom of Information Law, are separate and distinct from rights that you might enjoy under discovery provisions. The Freedom of Information Law is a vehicle that can be used by any person who seeks agency records. As a general matter, the status or interest of an applicant for records sought under the Freedom of Information Law would be irrelevant to rights of access. Discovery provisions, on the other hand, are applicable to a litigant, a person involved in some sort of proceeding. A person who seeks records through discovery does so in that person's capacity as a litigant or a party to a proceeding.

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. In general, if a record is accessible under the Freedom of Information Law, it should be made available to any person. The authority to withhold records under the Freedom of Information Law is based solely upon the assertion of the grounds for denial listed in that statute. Rights conferred by discovery statutes are based upon a different premise, i.e., that a party to a proceeding may have rights due to that person's status as a party.

While I am unfamiliar with the records in which you are interested, one of the grounds for denial in the Freedom of Information Law appears to be particularly relevant. That provision pertains to records that are prepared by agency officials and are transmitted within the agency or to another agency. 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits 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. As such, opinions concerning your performance or activities or recommendations regarding your treatment could, in my opinion, be withheld.

Lastly, since you referred to "missing documents", when in response to a request for a record, the agency indicates that it cannot locate the record, the agency, on request, "shall certify that it does not have possession of such record or that such record cannot be found after diligent search" [see Freedom of Information Law, section 89(3)].

I hope that the foregoing clarifies the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5530

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

March 29, 1989

Mr. George C. Weimer, 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. Weimer:

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

According to your letter, you are "trying to understand the basis for the decision of the Home Insurance Company for not defending the Village in the Matter of Patricia Zecchine, Plaintiff, against the Incorporated Village of Nissequogue and the officials of the Village". Having requested records concerning the matter from the Village, the Clerk disclosed certain records, including a letter sent by the Home Insurance Company to the Village Attorney, Joseph Attonito, a copy of which you enclosed. That letter, which is dated August 27, 1986, refers to an earlier letter dated June 16, 1986 sent to the Village or its attorney by the insurance company that "details the basis for our initial conclusions [those of the insurance company] as well as for those presented herein in response to your request [the Village's request] for reconsideration". You added that: "It is precisely the basis for their conclusion that the Home Insurance Company policy did not protect the Village in the claim (Zecchine) that [you] are trying to understand".

As of the date of your letter sent to this office, the Village has refused to permit you to view the letter in question. In this regard, 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" 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."

Based on the foregoing, a letter or similar documentation sent by an insurance company to the Village or its attorney would, in my view, constitute "information kept [or] held...by..or for an agency", and, therefore, would be a "record" subject to rights of access 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.

Under the circumstances, I do not believe that any of the grounds for denial would be applicable. If that is so, the record in question should be disclosed. I point out that records pertaining to litigation may often be exempt from disclosure. Material prepared solely for litigation, the work product of an attorney, or communications between an attorney and a client may be confidential [see e.g., Civil Practice Law and Rules, sections 3101 and 4503]. However, the documentation sent by the insurance company to the Village attorney would not, in my opinion and based upon the information that you provided, fall within the scope of those exceptions.

I hope that I have 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. Warren Riis, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-553 1

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

March 31, 1989

Mrs. Pearl Michaels
[redacted]

Dear Mrs. Michaels:

I have received your letter of March 22, which reached this office today. You have requested a copy of the "Standard Operating Procedures Manual for Financial Management Centers". Reference to the manual appears in an agenda of a meeting held by a Community School Board 19 in Brooklyn, a copy of which is attached to your letter.

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 records, nor is it empowered to compel an agency to grant or deny access to records. In short, I cannot provide a copy of the manual, because this office does not possess it. Nevertheless, I offer the following comments.

First, a request for records should be made to the agency that you believe maintains the records. Under the circumstances, it would appear that the document in which you are interested would be maintained by Community Board 19 and/or the New York City Board of Education.

Second, such a request should be directed to the agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests made under the Freedom of Information Law.

Third, I point out that an agency may charge a fee for photocopying. In general, the fee cannot exceed twenty-five cents per photocopy.

Enclosed is "Your Right to Know", which describes the Freedom of Information Law in detail.

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-5532

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

April 3, 1989

Mr. Lawrence Sweeney
Taxpayers Watchdog Committee
127 Pineneck Avenue
East Patchogue, NY 11772

Dear Mr. Sweeney:

I have received your recent letter and the materials attached to it, which reached this office on March 24.

On behalf of the Taxpayers Watchdog Committee, you wrote that, "as taxpayers", you "should know where all [your] tax money is going". You indicated that, despite your requests, you "cannot get any worthwhile information from the Law Department of Brookhaven Town". As such, you "demand an investigation now".

In this regard, I point out that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to "investigate" or to compel an agency to grant or deny access to records.

Further, having reviewed your requests, it appears that you misunderstand the Freedom of Information Law. For example, in one request, you asked "What does the word 'freeholder' mean?"; in another you asked "Why property tax raised by Suffolk County?". In other instances, you requested records that apparently do not exist, i.e. "Total cost of movement of Town offices..." or "Cost of utilities for Town-1987".

It is emphasized that the Freedom of Information Law is a vehicle that enables the public to request existing records maintained by an agency. That statute does not require agency officials to answer questions, to define particular terms or to create records in response to requests. Section 89(3) of the Freedom of Information Law specifies that "Nothing in [the Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity...". As such, although agency officials may respond to questions, the Freedom of Information Law does not require them to do so. Similarly, if there

is no record indicating the "total cost" of a particular project or activity, an agency would not be obliged by the Freedom of Information Law to prepare or make a compilation of a "total" on behalf of an applicant. In short, the title of the Law may be misleading, for it is a statute that requires agencies to disclose existing records in accordance with rights conferred by that statute; it does not, however, oblige agency officials to provide "information" that does not exist in the form of a record or records.

I hope that the foregoing serves to clarify the scope and utility of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5533

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

April 4, 1989

Mr. Jesus Rosario
87-A-0465 22/28
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. Rosario:

I have received your letter of March 20 in which you requested assistance in obtaining copies of your "trial transcript, sentencing minutes, and also the Suppressing of the Huntley Hearing".

In this regard, I offer the following comments.

First, assuming that the records in question are maintained by a court, the Freedom of Information Law would not be applicable. That statute includes within its coverage records of an agency. Section 86(3) of the Freedom of Information Law defines the term "agency" to include:

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

In turn, section 86(1) defines "judiciary" to mean:

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

Based on the foregoing, the courts and court records fall outside the scope of the Freedom of Information Law.

Second, although the Freedom of Information Law is inapplicable to court records, other statutes may grant access to those records (i.e., Judiciary Law, section 255), and it is suggested that a request be directed to the clerk of the court that maintains the records.

Third, to the extent that the records are maintained by an entity other than a court, such as the office of a district attorney, which is subject to the Freedom of Information Law, it is suggested that a request be made to that agency. Such a request should be directed to the agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests made under the Freedom of Information Law. It is noted 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 and identify 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-5539

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

April 3, 1989

Ms. Debbie J. Damone
President
P.A.V.E.
P.O. Box 692M
Bay Shore, NY 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, except as otherwise indicated.

Dear Ms. Damone:

I have received your letter of March 17 and the materials attached to it, which reached this office on March 24.

You have requested assistance concerning a series of requests for records directed to the Brentwood School District. In some instances, the District Superintendent indicated that the request was "too broad and not specific enough to allow for a reasonable response". In another in which you requested a list of materials, you were informed that no such list exists. In a third instance in which you requested copies of letters sent to the District by the Long Island Council of Churches and by a clergyman, you were informed that the letters are not District records and, therefore, are not subject to the Freedom of Information Law.

In this regard, I offer the following comments.

First, it is emphasized that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Based upon judicial determinations concerning that standard, an applicant meets the requirement of reasonably describing the records when, based upon the terms of a request, agency officials can locate and identify the records sought [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. In the cases indicating that your requests were too broad and not sufficiently specific, I believe that those responses were appropriate. For example, in one of the requests, you asked for

"all materials (used in all the Jr. High's in Brentwood) that deal with health". A request of that nature would, in my opinion, be so broad or vague that District officials could not locate and identify the records in which you may be interested.

Second, the Freedom of Information Law pertains to existing records maintained by an agency. I point out that section 89(3) of the Law states that an agency is not required to create or prepare a record in response to a request. Therefore, in the context of your request for a list of materials used in health classes, if no such list exists, the Freedom of Information Law would not oblige school district officials to create such a list on your behalf.

Third, with respect to the letters that were denied on the ground that "they are not District records", I respectfully disagree with that response. Having spoken with District officials concerning the matter, it is my understanding that one or perhaps both of the letters were directed to the President of the Board of Education and read at an open meeting. Even though the letter might have emanated from outside the District, it was apparently sent to a member of the Board of Education in his capacity as a representative of the District. In my opinion, once the District maintains a document such as a letter, I believe that such a document would constitute a "record" that falls within the scope of the Freedom of Information Law. Section 86(4) of the Freedom of Information Law defines 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."

Since the letters consist of "information kept, held [or] filed...by, with or for..." the School District, I believe that they would constitute "records" subject to rights of access conferred by the Freedom of Information Law.

Lastly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appear-

ing in section 87(2)(a) through (i) of the Law. Under the circumstances, particularly since the letter was read at an open meeting, I do not believe that any of the ground for denial could justifiably be asserted to withhold that document.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank A. Mauro, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5535

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

April 4, 1989

Mr. Eugene H. Goldberg
Sitomer & Drexler, P.C.
Attorneys at Law
185 Madison Avenue
New York, NY 10016

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

Dear Mr. Goldberg:

I have received your letter of March 23 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, some years ago, a client requested "certain clearly designated non-privileged records". In response to the request, records were made available "and nothing was stated to be withheld". Nevertheless, approximately a year and a half later, you discovered that the agency "had erred", for there were "other non-privileged documents which should have been produced".

You have asked whether there is any penalty that may be imposed against an agency for failing to produce accessible records in response to a request made under the Freedom of Information Law. In a related vein, you also asked whether the penalties, if any, "vary according to whether the withholding was accidental, negligent, reckless or intentional".

In this regard, I offer the following comments.

First, I do not believe that the Freedom of Information Law, as it currently exists, envisions the kind of situation that you described. As a general matter, when an agency receives a request it must either grant or deny the request in whole on in part. In the event of a denial, section 89(3) of the Law requires that a denial be made in writing. I point out that, in a situation in which an agency does not maintain or cannot locate a record, the agency, on request, "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". If the applicant desires to appeal a denial, an appeal may be made pursuant to section 89(4)(a) of the Freedom of Information Law. If a denial is sustained following an appeal, the applicant may seek review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. Should such a proceeding be commenced, a court, in its discretion, may award attorney's fees to the petitioner when certain conditions specified in section 89(4)(c) are met. As such, the only "penalty" to which the Freedom of Information Law specifically alludes would involve an award of attorney's fees.

Second, legislation has been introduced that might, if enacted, apply to the kind of situation that you described. The bill, S. 2263 - A. 3402, would amend the Freedom of Information Law and section 175.20 of the Penal Law, which pertains to tampering with public records in the second degree. That provision currently states that:

> "A person is guilty of tampering with public records in the second degree when, knowing that he does not have the authority of anyone entitled to grant it, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant.
>
> "Tampering with public records in the second degree is a Class A misdemeanor."

I am not an expert with respect to the Penal Law, and I know of no judicial decision that deals with the "concealment" of records sought under the Freedom of Information Law. It is possible that the situation you described might be viewed as tampering with public records, depending upon the circumstances, the presence of an intent to conceal, and the applicability of the Penal Law. The legislation, a copy of which is enclosed, would, if enacted, deal with the issue.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5536

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

April 4, 1989

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, except as otherwise indicated.

Dear Mr. Mondshein:

I have received your letter of March 24 in which you requested advice concerning your requests to the New York City Law Department for a grievance file that "is alleged to be lost".

In conjunction with the foregoing, you wrote:

> "1. That the Records Appeals Officer had subject file on January 10, 1989 for purposes of making an appeal determination, and claimed that the requested material could not be located in the file.
>
> 2. That, similarly, the Records Access Officer had stated prior to January 10, 1989 that he could not locate the specific documents from grievant's file.
>
> 3. That the Records Access Officer, since January 10, 1989, claims that he can not locate the very same file which the Records Appeals Officer had on that day, to wit: January 10, 1989."

Based upon a review of related correspondence, it appears that your statement that the Records Appeals Officer "had subject file on January 10, 1989" is inaccurate. In response to an appeal, the Appeals Officer, Jeffrey D. Friedlander, specified on

January 10 that "the records to which you seek access cannot be located in the files of the Law Department". Similarly, with regard to a request for the "Ligansky File", which, you suggest, must have been reviewed to reach the conclusion offered on January 10, your assertion is, in my view, also inaccurate. On February 13, you were informed that the Department could not locate "Mr. Ligansky's original litigation file and therefore can not locate any documents responsive to your F.O.I.L. request". It was specified that the file had been inspected in the past, but that "after each such inspection the file was returned to either Mr. Ligansky or sent to archives as a closed case". You were also informed that Mr. Ligansky left the employ of the Law Department in June 1987. As such, the most recent inspection of the file apparently occurred long before January of 1989.

In short, your conclusions do not appear to be based upon the facts, and the facts are that the records in which you are interested cannot be found. That being so, I believe that the responses by the Law Department to your requests are entirely appropriate.

You also asked whether it is proper to ask the Records Appeals Officer for:

> "A. Any signatures received, in the form of memos, receipts, and documents from any person to whom the Records Appeals Officer had sent the aforesaid file on or after January 10, 1989.
>
> B. Any document or memo sent out on this alleged lost file."

The Appeals Officer wrote that the items specified above constitute new requests for records. As such, he forwarded that request to the Records Access Officer. In my opinion, since original requests for records should be directed to and determined by the Department's records access officer, I believe that Mr. Friedlander acted properly. To do otherwise would have negated your right to appeal a possible denial of access to records.

Lastly, you asked whether "any remedial legislation is necessary to cover A and B". It is unclear what "remedy" you envision, and I do not believe that any "remedial legislation" is necessary. The Freedom of Information law includes within its scope all agency records, including any existing records that

might fall within the scope of "A and B". The extent to which any such records would be available would be dependent on their contents. Further, as you are aware, the Freedom of Information Law pertains to existing records, and it does not require an agency to create a record in response to a request.

Under the circumstances, I do not believe that I can provide any further assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey D. Friedlander
Laurence A. Levy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 5537

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

April 5, 1989

Mr. Lawrence A. Stringfellow
84-A-2224
P.O. Box 367-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. Stringfellow:

I have received your letter of March 23 in which you requested guidance concerning your capacity to obtain a copy of an inspector general's report. The report in question was apparently prepared by the inspector general at the Department of Correctional Services.

In this regard, I offer the following comments.

First, in terms of procedure, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that, for records kept at a correctional facility, a request may be directed to the facility superintendent. For records kept at the Department's Albany offices, a request may be made to the Deputy Commissioner for Administration. It is noted, too, that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the record sought. Therefore, when making a request, you should include sufficient detail to enable agency officials to locate and identify the record.

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. It is noted, too, 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. The phrase quoted in the preceding sentence indicates that a

single record might be both available or deniable in whole or in part. That phrase, in my view, also indicates that agency officials must review the records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, while I am unfamiliar with the contents of the report in which you are interested, several of the grounds for denial may be relevant.

For example, 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..."

The language quoted above indicates that records compiled for law enforcement purposes may be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e).

Also potentially relevant 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;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Reports or other records prepared by agency officials could be characterized as "intra-agency" materials. However, their specific contents, as well as the capacity to withhold records based on other grounds for denial [i.e., section 87(2)(e)], would determine the extent to which those materials would be accessible or deniable.

Since I am not familiar with the contents of the records sought, I am unaware of the extent to which they might contain personally identifiable details concerning persons other than yourself. However, I point out that 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".

In short, the specific contents of the report and the effects of disclosure would determine the extent to which the report is available or deniable under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5538

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

April 5, 1989

Mr. John 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 March 28, as well as the materials attached to it.

According to the correspondence, on March 8, you directed a request under the Freedom of Information Law to Ms. Eneta McAlister, Records Access Officer for the New York City Police Department. You specified that you were not requesting copies of the records sought, but rather the opportunity to inspect records. Ms. McAlister acknowledged the receipt of your request on March 14, indicating that the request was "under review". However, you wrote that in "ensuing discussions with Ms. McAlister, she has stated that the department will make a final determination on [your] request 'in 30 to 60 days'". It is your view that the Freedom of Information Law and the regulations promulgated thereunder provide "no basis for imposing this long a waiting period". Further, since ten business days transpired since Ms. McAlister's acknowledgement of the receipt of your request, and the request had neither been approved nor denied, you wrote that you considered your request to have been denied. As such, you appealed on that basis.

You have asked for an advisory opinion concerning whether the Police Department has "30 to 60 days to respond to [your] request".

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 aspects of the Law (see attached 21 NYCRR Park 1401). In turn, section 87(1) requires each agency to adopt regulations "pursuant to such general rules as may be promulgated by the committee on open government in conformity with the provisions of this article" (the Freedom of Information Law).

Second, the Freedom of Information Law and the Committee's regulations provide guidance concerning the procedural requirements 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

Based on the foregoing and an assumption that the Committee's regulations are binding upon agencies with respect to the time limits for response. I do not believe that the Police Department may appropriately extend the time to determine to grant or deny access to records to "30 to 60 days".

It is noted, too, that the "Uniform Rules and Regulations Pertaining to the Administration of the Freedom of Information Law" promulgated by Mayor Koch are consistent with those adopted by the Committee on Open Government. The Mayor's regulations, which became effective in 1979, state in part in section 5(d):

> "If because of unusual circumstances, an agency is unable to determine within five days whether to grant, deny or otherwise respond to a request for inspection and copying, the records access officer shall, within such five day period, acknowledge receipt of the request in writing to the requesting party, stating the approximate date, not to exceed ten business days from the date of the acknowledgement, by which a determination with respect to the request will be made. If the agency does not make a determination with respect to the request within ten days from the date of such acknowledgement, the request may be deemed denied and an appeal may be taken to the person or body designated in the agency to hear appeals."

As such, the Mayor's regulations applicable to agencies within the jurisdiction of his office, including the Police Department, in my view specify the time limits for responding to requests and indicate that your appeal was, under the circumstances, proper.

The foregoing should be construed to pertain to the issue that you raised; it is not intended to deal with rights of access to the records sought or to suggest that all of the requested records exist or can be found.

As you requested, a copy of this letter will be sent to Ms. McAlister.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eneta McAlister, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5539

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

April 5, 1989

Mr. Bruce A. Benson
[redacted]

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

Dear Mr. Benson:

I have received your letter of March 30, as well as the correspondence attached to it.

According to your letter, you and your wife:

> "attended a meeting with Dr. Irene Nowell (Assistant Superintendent for Instruction and Elementary Education), Ronald Levine (administrator for Special Education), and Gerald Klafter (Accompsett Elementary Principal) in Dr. Nowell's office on 2/9/89 regarding [your] children's school records."

You added that Dr. Nowell "took notes throughout this meeting". Thereafter, you requested from the District "complete records" concerning your three children, as well as the notes prepared by Dr. Nowell. You indicated, however, that Mr. Martin J. Crowley, the attorney for the District, informed you that you have no right to view those notes.

You have requested an advisory opinion concerning the matter. In this regard, I offer the following comments.

From my perspective, two statutes, the New York Freedom of Information Law and the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. section 1232g, are likely relevant to your inquiry.

FERPA is applicable to all educational agencies or institutions that participate in federal educational funding programs. As such, it applies to virtually all public educational institutions, such as public school districts. In brief, FERPA confers rights of access to "education records" pertaining to a student or students under the age of eighteen to the parents of the students. Concurrently, it generally requires that education records be kept confidential, unless the parents waive the right to confidentiality.

In my view, the initial issue in terms of FERPA is whether Dr. Nowell's notes constitute "education records". The regulations promulgated by the U.S. Department of Education pursuant to FERPA define the phrase "education records" in relevant part to mean:

> "those records that are -
> [1] Directly related to a student; and
> [2] Maintained by an educational agency or institution or by a party acting for the agency or institution.
> [b] The term does not include -
> [1] Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record..." (34 CFR 99.3).

Based on the foregoing, if the notes or other records identifiable to your children are revealed to a person other than a "temporary substitute", those documents would, in my opinion, constitute "education records" that must be made available to you as the parents of the students. On the other hand, if the documents are kept solely by their "maker" and are not revealed to any person except a temporary substitute, they would not be "education records" and there would be no right to those records under FERPA.

Assuming that the latter is the case, that FERPA does not apply, I believe that the Freedom of Information Law would be applicable. The Freedom of Information Law pertains to all records of an agency, which would include a school district, and section 86(4) of that statute 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."

Various judicial decisions indicate that the provision quoted above is as broad as its language suggests [see e.g., Capital Newspapers v. Whalen, 69 NY 2d 246 (1987); Washington Post v. Insurance Department, 61 NY 2d 557 (1984)]. As such, notes and other documents maintained by the District and its employees would, in my opinion, be "records" subject to rights conferred by the Freedom of Information Law.

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.

From my perspective, there is likely one ground for denial of relevance. That provision, section 87(2)(g), states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

I believe that notes, for example, could be characterized as "intra-agency materials". Based upon judicial interpretations of the Law, to the extent that notes consist of a factual rendition of what transpired at a meeting, they would be available under section 87(2)(g)(i), for they would consist of "factual... data" [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. However, to the extent that they consist of opinions, suggestions or impressions, for instance, I believe that they could be withheld.

Copies of this opinion will be sent to District officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Irene Nowell, Assistant Superintendent
Martin J. Crowley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5540

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

April 6, 1989

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 31, as well as the correspondence attached to it.

Your inquiry concerns requests directed to the City of Yonkers for records pertaining to several named individuals. In each instance, you provided the name of the individual, that person's social security number, date of birth and his or her last known address and requested the following information pertaining to the individual:

"1) Copies of any and all blotter entries.

2) Copies of any reports, including but not limited [to] accident reports, incident reports, arrest reports.

3) Copies of any arrest information.

4) Copies of any and all criminal and/or vehicle and traffic summonses, citations, etc.

5) Any and all other documents current in your agency's files relating to the above subject or the subject's relatives (if known)."

In response to the request, you were informed that the City does not maintain a police blotter, that disclosure would constitute an unwarranted invasion of personal privacy pursuant to sections 87(2)(b) and 89(2)(b) of the Freedom of Information Law, that the request "is vague and overly broad in that it does not specify any dates, times or locations or any other way in which to identify the records" and that disclosure would violate dissemination agreements between the City and the Division of Criminal Justice Services and the FBI.

You have contended that "if the agency...lack[s] the ability to search on a given name, then [you are] entitled to such a statement".

You have requested my views on the matter. In this regard, I offer the following comments.

First, based upon the responses to your requests, the City did provide the kind of "statement" to which you referred. As indicated earlier, the response to your requests states that the requests are vague and do not provide a means of identifying the records requested.

Second, in a related vein, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. In interpreting that standard, the Court of Appeals has held that a request reasonably describes the records when the terms of an applicant's request permits the agency to locate and identify the records [see Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)]. The Court also indicated that in some instances, an agency's ability to locate records may be dependent upon its system of filing and indexing records. In citing a plausible claim of nonidentifiability arising in a case brought under the federal Freedom of Information Act, the Court referred to a situation in which an "agency's indexing system was such that the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency" (id. at 250).

Based upon the terms of your request, and as indicated in the response to your request, it appears that the City cannot, perhaps with certain exceptions, locate records pertaining to the individuals in question without more specific identifying details. If that is so, much of your request would not have "reasonably described" the records.

Some aspects of the request involve arrest or arrest related information. I point out that those kinds of records may often be sealed. Under section 160.50 of the Criminal Procedure Law, if criminal charges against an accused are dismissed in favor of the accused, the records relating to the charges may be sealed. In those instances, the records would, in my view, be specifically exempted from disclosure by statute pursuant to section 87(2)(a) of the Freedom of Information Law.

Lastly, the response to your request suggests that the City is precluded from disclosing certain arrest or conviction data based upon dissemination agreements with the Division of Criminal Justice Services and the FBI. While the issue of access to that data, which is kept and shared by a repository of the data, has not been determined by New York courts, I point out that the U.S. Supreme Court recently held that a request for criminal history data maintained by the FBI could be withheld as an unwarranted invasion of personal privacy under the federal Freedom of Information Act (see U.S. Department of Justice v. Reporters Committee for Freedom of the Press, ___ U.S. ___, decided March 22, 1989).

I hope that the foregoing serves to clarify the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James E. Walker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 5541

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

April 6, 1989

Mr. Billy Pernell
88-B-2357
I-2-23 Housing Unit
Box 500
Elmira, NY 14902-0500

Dear Mr. Pernell:

I have received your letter of March 31, in which you requested under the Freedom of Information Law certain indictment papers, grand jury minutes and transcripts of pre-trial proceedings.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee generally does not maintain records or serve as a repository of records. In short, I cannot provide the records to you, for the Committee does not have possession of those records.

Further, it is unlikely, in my view, that the records sought would fall within the scope of the Freedom of Information Law. The Freedom of Information Law pertains to records of an agency, and 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."

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. It appears that the records in question would be maintained by a court.

Although the Freedom of Information Law does not apply to the courts and court records, other provisions of law provide rights of access to many records. Therefore, it is suggested that a request be made to the clerk of the court that maintains the records. Such a request should include sufficient detail to permit the location and identification of the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 5542

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

April 6, 1989

Mr. William Rickom
[redacted]

Dear Mr. Rickom:

You may recall that we spoke on March 31 following your call to the Department of State Hotline concerning a request for records of the City of Watertown.

As you described the situation, the City has prepared a list identifying property owners whose sidewalks are in need of repair. As a contractor, you requested the list, but the request was denied. You added that the list is published in a newspaper and suggested that I contact Mr. Eugene Hayes, who maintains the list. I did speak with Mr. Hayes and thereafter attempted to reach you without success.

As I understand the situation, the list that you requested is different from the list that is published. An initial list is prepared identifying property owners whose sidewalks need repair, and I believe that those people are so informed by the City. If they do not make the appropriate repairs within a certain period of time, they are found to be in violation of a city code or ordinance. I believe that the list of those found to be in violation, rather than the initial list of those whose sidewalks need repair, is published.

In terms of your request, as indicated during our conversation, 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". Further, section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, one of which involves:

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

Under the circumstances, it appears that the denial of your request for the list in question was proper.

I hope that the foregoing has clarified the matter. If you have any questions, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eugene Hayes, City of Watertown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5543

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

April 7, 1989

Mr. Warren J. Solfiell
[redacted]

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

Dear Mr. Solfiell:

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

You have asked for an advisory opinion concerning a denial of your request for "budget worksheets" maintained by the Union Springs School District. Based upon your review of "A Handbook for New School Board Members", it is your belief that the worksheets should be disclosed. You also indicated that despite having made both written and oral requests, you had not, as of the date of your letter to this office, received any written denial of your requests.

In this regard, I offer the following comments.

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

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

As such, although documents might be characterized as "drafts" or worksheets, for example, I believe that they constitute "records" as defined by the Freedom of Information Law. Further, it has been held that "work papers", notes and similar materials are "records" subject to rights of access granted by the Freedom of Information Law [see e.g., Polansky v. Regan, 440 NYS 2d 356, 81 AD 2d 102 (1981); Steele v. NYS Department of Health, 464 NYS 2d 925 (1983)].

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. It is also noted 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. The phrase quoted in the preceding sentence indicates that a single record may be accessible or deniable in whole or in part. That phrase, in my view, 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, even though some aspects of a record may be withheld, the remainder would be available.

Third, in my view, two of the grounds for denial may be relevant with respect to the records in question.

Section 87(2)(c) provides that records may be withheld to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, it would appear that those portions of the work papers could be withheld.

The other ground for denial of relevance is section 87(2)(g), which, due to its structure, often requires disclosure. 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

In a case involving similar records, so-called "budget worksheets" maintained by the State Division of the Budget, it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, section 88(1)(d)]. Currently, section 87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

> "[I]t is readily apparent that the language 'statistical or factual' tabulation was meant to be something other than an expression of opinion or make argument for or against a certain position. The present record contains the form used for work sheets and it apparently was designed to accomplish a statistical or factual presentation of data

> primarily in tabulation form. In view of the broad policy of public access expressed in section 85 the work sheets have not been shown by the appellants as being not a record made available in section 88" (54 AD 2d 446, 448).

The Court was also aware of the fact that the records were used in the deliberative process, stating that:

> "The mere fact that the document is a part of the 'deliberative' process is irrelevant in New York State because section 88 clearly makes the back-up factual or statistical information to a final decision available to the public. This necessarily means that the deliberative process is to be a subject of examination although limited to tabulations. In particular, there is not statutory requirements that such data be limited to 'objective' information and there is no apparent necessity for such a limitation" (id. at 449).

Based upon the language of the determination quoted above, which was affirmed by the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible under the freedom of Information Law.

Further, it has been held that statistics and facts that may be "intertwined" with opinions, for instance, should be available. Specifically, 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 statistical or factual information may be "intertwined" with opinions, for instance, the statistical or factual portions should in my opinion be disclosed, unless different grounds for denial apply.

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) provide guidance with respect to the time and manner in 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, sections 1401.5(d) and 1401.7(c)].

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 with the Freedom of Information Law, a copy of this opinion will be sent to the Board of Education.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education, Union Springs School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5544

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

April 7, 1989

Mr. Richard P. Bunyan
[redacted]

The staff of the Committee 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. Bunyan:

I have received your letter of March 22, as well as the correspondence attached to it.

Your inquiry relates to a dispute concerning your eligibility to take a promotional civil service exam. Following a rejection of your application to take the exam, you obtained a court order which enabled you to do so. Nevertheless, after taking the exam, it was held judicially that you were not qualified to take the exam. Consequently, when the sergeant list was established, your name did not appear. You then requested your grade from the Westchester County Personnel Department. In response to the request, the Records Access Officer for the Department, Ms. Mary Ann Mikulsky, denied access, citing Westchester County Civil Service Rule 7.10, which states that:

> "After a candidate's rating has been determined, he shall be notified of such rating, unless he has otherwise been disqualified."

Ms. Mikulsky added that "These rules are promulgated pursuant to New York State Civil Service Law".

You have requested an advisory opinion concerning the denial. In this regard, I offer the following comments.

I have contacted the State Department of Civil Service to learn more about the issue. The County's rule cited above duplicates 4 NYCRR section 3.5(b) of State Civil Service Rules for the Classified Service. I was informed that the situation that you described ordinarily does not arise. Ordinarily, if a person is not eligible to take an exam, that person cannot participate in the exam. Similarly, if a person is found to be ineligible after taking an exam, the exam is not graded. In those instances, there is no record containing a grade.

If in this instance there is a record maintained by the County Personnel Department that contains the grade, for the reasons described below, I believe that it should be made available under the Freedom of Information Law. On the other hand, if no such record exists, the Department would not be required to create the record on your behalf [see Freedom of Information Law, section 89(3)].

The County rule, as interpreted by Ms. Mikulsky, serves to permit the Department to withhold a candidate's rating from the candidate if that person has been disqualified. Nevertheless, a rule or regulation, for example, could not, in my view, require or confer confidentiality.

The Freedom of Information Law requires that all agency records be made available, except when one or more among the grounds for denial appearing in paragraphs (a) through (j) of section 87(2) may properly be asserted. The first ground for denial, section 87(2)(a), refers to records that may be characterized as confidential. That provision enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute". While the rules and regulations promulgated by the State and the County indicate that a candidate shall be notified of his rating unless he has been disqualified, those provisions are not "statutes". A statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or Congress [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)], and it has been found that agencies' regulations are not the equivalent of statutes for purposes of section 87(2)(a) of the Freedom of Information Law [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); 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)]. As such, it is my view that the rule upon which the County has relied to withhold your grade could not serve as a basis for a denial.

Further, the Freedom of Information Law includes provisions that enable an agency to withhold records which, if disclosed, would constitute "an unwarranted invasion of personal privacy" [see sections 87(2)(b) and 89(2)(b)]. Irrespective of the State and County rules, I believe that a record indicating the grade of a person who has been disqualified could be withheld

from third parties under those provisions. However, section 89(2)(c)(iii) of the Freedom of Information Law states that, unless a different ground for denial can be asserted, disclosure would not result in an unwarranted invasion of personal privacy "when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him".

In sum, assuming that a record exists that contains your grade, I believe that the grade must be disclosed to you, for none of the grounds for denial in the Freedom of Information Law could be appropriately asserted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mary Ann Mikulsky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5545

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

April 7, 1989

Mr. Wallace S. Nolen
[redacted]

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

Dear Mr. Nolen:

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

As I understand the matter, you requested real property data from the Dutchess County Real Property Tax Service Agency. Although your request was granted, subject to the condition that you supply three blank computer tapes and pay a fee of $122.50. You have requested an advisory opinion concerning the propriety of the fee.

In this regard, I offer the following comments.

First, in the case of a request for records that cannot be photocopied, section 87(1)(b)(iii) of the Freedom of Information Law states that an agency may assess a fee based upon the actual cost of reproduction, unless a statute other than the Freedom of Information Law permits the assessment of a different fee. The response to your request indicates that $122.50 represents "the actual cost of producing the requested records".

Second, as you are aware, I lack expertise concerning computer technology and electronic information systems. Consequently, I contacted Mr. Edward Imperatore, who heads the County's data processing department and who arrived at the fee in question.

According to Mr. Imperatore, in order to reproduce the data, it was necessary to go through a complex series of action, including the writing of new programs to retrieve and create the data. If that is so, it would appear that, in an effort to accommodate you, the County took steps beyond those required by the Freedom of Information Law. Section 89(3) of the Freedom of Information Law states in part that an agency need not create a record in response to a request. When data can be retrieved based upon existing programs, a request for the data would not, in my view, involve the creation of a new record. However, if new programs must be prepared to retrieve or reproduce data stored in a computer, I believe that the acts of programming or reprogramming result in the creation of a new record, acts which the Freedom of Information Law does not require to be performed.

I was also informed that the fee was based upon the cost of processing, i.e., computer time, and that it was derived from information regarding actual costs incurred by the County. Mr. Imperatore added that the fee is based upon data reflective of the lowest possible costs incurred by the County.

Based on the foregoing and the information provided to me by the County, it does not appear that the fee was improper.

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: George Carlquist

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5546

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

April 10, 1989

Mr. Andrew Como
[redacted]

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

Dear Mr. Como:

I have received your letter of March 30, as well as the materials attached to it.

Your correspondence pertains to difficulties that you have encountered in your attempts to obtain records from the Brentwood Union Free School District.

The first issue involves a request for the District's "subject matter list". Based upon the response to the request that you enclosed, the District asserted that the record in question does not exist. In this regard, with certain exceptions, the Freedom of Information Law does not require an agency, such as a school district, to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

The provision concerning the subject matter list is found in "subdivision three of section eighty-seven" of the Law. Specifically, that provision states that:

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

As such, the subject matter list is one of the few records that an agency must maintain.

In terms of it contents, it is clear that a subject matter list is not required to consist of an index of each and every record maintained by an agency. Rather, I believe that it is intended to consist of a list, by category, of the kinds of records maintained by an agency, whether or not the records are accessible to the public under the Law. Further, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, provide in part that "The subject matter list shall be sufficiently detailed to permit the identification of the category of the record sought" [21 NYCRR section 1401.6(b)].

The second issue involves tape recordings of meetings of the Board of Education. Rather than providing the tape recordings on cassettes, which are commonly used, you wrote that the tapes are being made available on "reel to reel tapes", which are rarely used. As such, the tapes may be essentially worthless. You have asked for a suggestion to remedy the problem.

Instead of requesting a copy of the tape, you might record the proceedings on your own tape recorder by placing it near the District's tape recorder. In the alternative, various judicial decisions indicate that you may use a tape recorder at open meetings of the Board of Education [see People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979); Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)] and prepare your own tape recordings.

The final issue involves a request for "Names of all school Dist. Consultants that are paid by the District, their Fee and their Job Description". In response to the request, you were informed that it was "too broad and not specific enough to allow for a reasonable response". In addition, it was recommended "that you refine your inquiry to include specific names in order to locate the records in question". However, you wrote that "if [you] knew their names [you] would have asked for it that way".

In my opinion, the District's response is inappropriate. By way of background, when the Freedom of Information Law was enacted in 1974, it required that an applicant request "identifiable" records. That standard resulted in the kind of difficulty that you are facing. If the applicant could not specify a requested record, the request would not have identified the record sought. However, the Freedom of Information Law was repealed and replaced with the current law in 1978. Section 89(3) of the Law now requires that an applicant "reasonably describe" the records sought. Judicial decisions interpreting that standard indicate that a request reasonably describes the records when the agency, based upon the terms of a request, can locate the records. Assuming that the District can locate records identifying "consultants that are paid by the District", I believe that your request would have met the standard of reasonably describing the records. It is noted, too, that regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law and have the force of law, state that the records access officer is responsible for assuring that agency personnel "Assist the requester in identifying requesting records, if necessary".

Lastly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. If records exist that identify consultants paid by the District, their fees, and a description of their duties, I believe that those records would be available, for none of the grounds for denial would be applicable.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the District.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer
Frank A. Mauro, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1603
FOIL-AO- 5547

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

April 10, 1989

Ms. Susan L. Garlock
The Citizen
25 Dill Street
Auburn, NY 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 Ms. Garlock:

I have received your letter of April 4, as well as the materials attached to it.

By way of background, the Auburn City Council recently agreed to settle a substantial personal injury claim against the City. You indicated that on March 27, the City Manager released an agenda for an upcoming Council meeting, "along with a claims list detailing the bills the council would be asked to approve". On the list was an entry concerning a settlement in the amount of $60,000. When you asked for legal papers relating to the judgment or settlement, you were referred to the City's assistant corporation counsel, who said that "he would not likely ever release papers concerning the case, claiming 'attorney-client privilege'". The assistant corporation counsel admitted that the City Council did vote to approve the settlement. Thereafter, you asked for copies of minutes of executive sessions during which the City Council discussed the settlement, and you were told that the Council "has no minutes of an executive sessions - ever - though the council meets behind closed doors each week". You added that "Even after the council's approval of the settlement, Mr. McKeon [the assistant corporation counsel] told [you] that he would not likely release any of the legal papers, including the summons and complaint, again because of 'attorney-client privilege'."

In view of the foregoing, you have requested my opinion concerning the following items:

" - Is the city obligated to keep minutes of any actions taken in executive session?...

- Is the city obligated to release notices of claims and summons and complaints regarding any lawsuits?

- Is the city obligated to release depositions and correspondence in relation to lawsuits after they have been settled?

- To what extent may the city's counsel claim 'attorney-client' privilege? What may he keep secret under that label?

- Just who is the city attorney's client?"

You asked that I describe the authority to offer opinions and the "weight" the opinions carry.

In this regard, I offer the following comments.

First, with respect to the Committee's authority to advise, section 89(1)(b)(ii) of the Public Officers Law states that the Committee on Open Government "shall...furnish to any person advisory opinions or other appropriate information regarding..." the Freedom of Information Law. Section 109 of the Public Officers Law provides that the Committee "shall issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the open meetings law". Further, as indicated at the beginning of this letter, the staff of the Committee has been authorized to advise on behalf of the Committee. There is nothing in either statute that pertains to the weight of an advisory opinion prepared by the Committee, and a recipient of an advisory opinion may ignore it. Nevertheless, advisory opinions have been cited often in judicial decisions, and some courts have suggested that advisory opinions rendered by the Committee on Open Government should be upheld if not irrational [see e.g., Sheehan v. City of Binghamton, 59 Ad 2d 808 (1977); Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979)].

Second, with regard to the obligation to maintain minutes of executive sessions, section 106(2) of the Open Meetings Law states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

Based on the foregoing, when an issue is discussed during an executive session but no action is taken, there is no requirement that minutes of the executive session be prepared. However, if, for example, the City Council votes to approve a settlement during an executive session, I believe that the Law requires that minutes must be prepared indicating the nature of its action, the date and the vote of its members. It is noted, too, that a record must exist, ordinarily in the form of minutes, that identifies Council members who voted and the manner in which they cast their votes. Specifically, section 87(3)(a) of the Freedom of Information Law states that each agency, which includes a city council, shall maintain "a record of the final vote of each member in every proceeding in which the member votes".

Third, your questions relating to access to notices of claim, summonses and complaints and the attorney-client privilege are, in my view, related.

By way of background, 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 first basis for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". For nearly a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 753 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under section 4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also been found that records may be withheld when the attorney-client privilege can

appropriately be asserted when the attorney-client privilege is read in conjunction with section 87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)].

Nevertheless, the provision embodying the attorney-client privilege, section 4503 of the Civil Practice Law and Rules, is in my view, limited and specific. That provision states in relevant part that:

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

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assis-

> tance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been waived, and that records consist of legal advice provided by counsel to the client, the records would be confidential pursuant to section 4503 of the Civil Practice Law and Rules and, therefore, section 87(2)(a) of the Freedom of Information Law. I point out, however, that a recent decision stressed that the attorney-client privilege should be narrowly applied. Specifically, in Williams & Connolly v. Axelrod, it was held that:

> "To invoke the privilege, the party asserting it must demonstrate that an attorney-client relationship was established and that the information sought to be withhold was a confidential communication made to the attorney to obtain legal advice or services...Since this privilege is an 'obstacle' to the truth-finding process, it should be cautiously applied..." [527 NYS 2d 113, 115; ___ AD 2d ___ (1988)].

From my perspective, the attorney-client privilege only applies to communications between an attorney and a client. Once records are disclosed to anyone other than a client, the privilege does not apply.

In the case of a notice of claim, such a record might be prepared by an attorney for a client. However, once it is served or filed on the City, it would not be privileged. Obviously, a notice of claim served upon the City would not have been prepared by the City or its attorney and would not involve a communication between City officials and their attorney. Consequently, I cannot envision how the City could claim that it is confidential.

Similarly, if correspondence, depositions and related materials have been shared by the parties, the City and the claimant, those records could not, in my view, be characterized as "privileged", for they would have been communicated to persons other than city officials and their legal counsel.

Other related records would in my opinion be available or confidential based upon a similar analysis. For example, the work product of an attorney may be withheld under section 3101(c) of the Civil Practice Law and Rules; material prepared solely for litigation would also be confidential under section 3101(d). However, I believe that those materials remain confidential so

long as they are not disclosed to an adversary. Materials that are served upon or shared with an adversary, such as a notice of claim, a summons or complaint, motion papers and the like would not in my opinion be privileged. In this instance, to the extent that those kinds of documents are maintained by the City, an agency subject to the Freedom of Information Law, I believe that they would be available, for none of the grounds for denial would apparently be applicable.

Lastly, you asked who is the City Attorney's client. That issue does not deal directly with either the Freedom of Information Law or the Open Meetings Law. As such, I do not believe that I can appropriately address the issue.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Counsel
Michael McKeon, Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5548

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

April 11, 1989

Mr. Dominic Bretti
80-C-0511
P.O. Box 700
Wallkill, NY 12589

The staff of the Committee 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. Bretti:

I have received your letter of March 30, as well as the materials attached to it.

Once again, your letter deals with your attempts to obtain from the Organized Crime Task Force (OCTF) and the Oneida County District Attorney records concerning "'deals' between Angelo Grillo and members of the OCTF in exchange for his testimony against [you] and [your] co-defendants". You have requested "that some type of investigation be ordered immediately so that all of the truth may come to light in this matter". In addition, you have sought my advice concerning the issues that you have raised.

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. As such, the Committee cannot compel an agency to grant or deny access to records. Further, this office has neither the authority nor the resources to conduct an "investigation" into the matter.

Second, as specified in my letter to you of March 28, the Freedom of Information Law pertains to existing records; it does not require an agency to create a record in response to a request. To reiterate, section 89(3) states in relevant part that: "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity...".

While I have no personal knowledge concerning the nature or content of records relating to your case, I recently received a copy of letter dated April 6 sent to you by Ronald Goldstock, Director of OCTF. Mr. Goldstock indicated that: "To the extent that the Task Force has any documents within the terms of your requests, they have been given to you". Similarly, as stated in my letter to you of March 28, I was informed by a representative of the District Attorney that there was no such agreement or deal. In short, it appears that the information in which you are interested does not exist. If that is so, the Freedom of Information Law would not apply.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Ronald Goldstock
Barry M. Donalty

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5549

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

April 11, 1989

Ms. Janice E. Figel
[redacted]

The staff of the Committee on 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. Figel:

I have received your letter of April 4 concerning requests for records of the Albany City School District, as well as the correspondence attached to it.

According to your letter:

> "On October 31, 1988, [you] wrote to Bruce Venter, the Records Access Officer, and asked for all reports concerning the health and safety inspections done at Hackett Middle School from 1983 to the present as required by Education Law (Article 19, Sec. 906) and the Regulations of the Commissioner of Education (Part 136 Commissioner's Regulations)."

You added that:

> "That request was denied, but at the same time Mr. Venter indicated that he would pursue [your] inquiry. Mr. Venter indicated to [you] in a phone conversation that Section 906 of the Education Law dealt with contagious or infectious diseases and that to release information of that nature would possibly betray a confidential record. However, he gave [you] no reason why the second half of that request, pertaining to the Commis-

> sioner's Regulations, Part 136, would not be forthcoming. Indeed, his letter led [you] to believe that it would be. Therefore, [you] did not appeal this denial."

On January 12, since you had not yet heard from Mr. Venter, you submitted a new request "on the officially designated form". Although you later discussed the matter with Mr. Venter, you received no further response. Consequently, on March 3, you appealed Mr. Venter's constructive denial of your request to David Brown, Superintendent of Schools. As of the date of your letter to this office, you had not receive any response to your appeal.

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 on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, prescribe time limits within which agencies 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, sections 1401.5(d) and 1401.7(c)].

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, since your correspondence refers to an "officially designated form", I point out that the Freedom of Information Law does not make reference to any particular form. Section 89(3) of the Law enables an agency to require that a request be made in writing. That provision also states that an applicant must "reasonably describe" the records sought. As such, I believe that any written request that reasonably describes the records sought should suffice. Further, it has consistently been advised that a failure to complete a form prescribed by an agency cannot validly serve to delay a response or deny access to records.

Third, in terms of rights of the 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.

The first aspect of your request involves investigations made pursuant to section 906 of the Education Law. That statute states that:

> "Whenever upon investigation a pupil in the public school shows symptoms of any contagious or infectious disease reportable under the public health law, he shall be excluded from school and sent to his home immediately, in a safe and proper conveyance, and the health officer of the city or town shall be immediately notified of the existence of such disease. The medical inspector shall examine each pupil returning to a school without a certificate from the health officer of the city or town, or the family physician, after absence on account of illness or from unknown cause.
>
> "Such medical inspectors may make such examinations of teachers, janitors, other school employees and school buildings and premises as in their opinion the protection of the health of the pupils and teachers may require."

In my view, three of the grounds for denial are relevant to rights of access to the records prepared pursuant to section 906. Section 87(2)(a) of the Freedom of Information Law enables an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". One such statute is the Family Educational Rights and Privacy Act (20 USC section 1232g). In brief, that statute requires that educational agencies withhold any "education record", a term that is broadly

defined, to the extent that disclosure would personally identify a student, unless the parents of the student consent in writing to disclosure. The regulations promulgated by the U.S. Department of Education define "personally identifiable information" to include the student's name or the name of a student's parent, as well as any other information "that would make the student's identity easily traceable" (see 34 CFR 99.3). As such, the District could not disclose records or portions thereof that would permit the identification of a student. If, however, identifying details can be deleted from records and adequately protect privacy, the remainder of the records pertaining to students could, in my view, be disclosed.

Also relevant, particularly with respect to records identifiable to employees of the District, are sections 87(2)(b) and 89(2) of the Freedom of Information Law. Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", and section 89(2)(b)(i) states that an unwarranted invasion of personal privacy includes the disclosure of "medical histories". Section 89(2)(a) provides that an agency may delete identifying details to protect privacy. Therefore, as in the case of student records, identifying details concerning the subjects of the records may be withheld.

A third potentially significant basis for withholding is section 87(2)(g) of the Freedom of Information Law, which permits an agency to 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. 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. Records prepared by District officials could be characterized as "intra-agency" materials. Records communicated between the District and another agency, such as a county health department, would consist of "inter-agency" materials. As such, to the extent that an investigative report includes an opinion or recommendation, I believe that it may be withheld.

As I understand your correspondence, the remaining aspect of your request concerns the duty imposed by 8 NYCRR 136.3(12) upon school boards "to provide suitable inspections and supervision of the health and safety aspects of the school plant". Records prepared by District officials in conjunction with that provision would, in my view, also consist of intra-agency materials and would be accessible or deniable in conjunction with section 87(2)(g) of the Freedom of Information Law, unless a statute other than the Freedom of Information Law provides specific direction to the contrary.

I hope that I have 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. Bruce Venter
Dr. David Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5550

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

April 11, 1989

Mr. Dwight Hendy
87-T-1156
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. Hendy:

I have received your letter of April 5.

Based upon your comments, it appears that you continue to misunderstand the requirements of the Freedom of Information Law concerning the subject matter list. You wrote that the list you want "is for an arrest by N.Y.P.D. which occurred August 18, 1986". You specified further that "All [you] want from the N.Y.P.D. is a list (subject matter list) of the names of the documents that have [your] name on them for the arrest of August 18, 1986".

As indicated in previous correspondence, the provision of the Freedom of Information Law dealing with the subject matter list, section 87(3)(c), states that each agency shall maintain:

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

Once again, the subject matter list must refer to the categories of records maintained by an agency. There is no requirement that such a list be prepared with respect to records regarding a particular person or incident. Further, section 89(3) of the Freedom of Information Law states that, unless specific direction

is provided to the contrary, an agency is not required to create a record in response to a request. Therefore, if the Department has no list of documents that name you pertaining to the arrest, it would not be obliged to prepare such a list.

Since you asked "where do [you] go from here", I point out that a request need not specify or identify each and every record in which you may be interested. Section 89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. As such, a request should contain sufficient detail, i.e., names, dates, identification numbers, descriptions of events, etc., to enable agency officials to locate the records sought.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5551

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

April 18, 1989

Mr. Thomas J. Costello
Personnel Officer
County of Ulster
Personnel Department
244 Fair Street
Box 1800
Kingston, NY 12401

Dear Mr. Costello:

I have received your letter of April 6 in which you requested that I review Ulster County's Standard Operating Procedure concerning the Freedom of Information Law.

From my perspective, the Procedure is generally appropriate. However, I would like to offer the following technical comments concerning its contents.

First, in section 4 of the Procedure, there is a requirement that requests be made on a specific form. In this regard, the Freedom of Information Law does not indicate that any particular form must be used for the purpose of making a request. Section 89(3) of the Law states that an agency may require that a request be made in writing. The same provision requires that an applicant must "reasonably describe" the records sought. As such, it has consistently been advised that any written request that reasonably describes the records sought should suffice. If an applicant makes a request in person, I do not believe that it would be inappropriate to require that he or she complete the County's prescribed form. However, in other instances, as in cases where requests are made by mail, I do not believe that a failure to complete a prescribed from can be validly cited as a basis for denying a request or delaying a response to a request.

Second, the provision concerning fees properly states that the fee for photocopies is twenty-five cents per copy. It also states that "Unless and until otherwise provided by law", no fee would be assessed for the inspection or search for records or any certification made in conjunction with the Freedom of Information Law. The specific language of the Freedom of Information Law,

section 87(1)(b)(iii), states that an agency can charge up to twenty-five cents per photocopy, unless a different fee is otherwise prescribed by a "statute". It has been held that a statute, for purposes of the Freedom of Information Law, is an act of Congress or the State Legislature [see e.g., Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. As such, if a local law called for a fee of more than twenty-five cents per photocopy or a search fee, for instance, such a provision would be invalid because it would not be based upon a "statute".

Third, at the bottom of page 4 reference is made to a "complete list of all records in Ulster County". It is assumed that the reference pertains to the subject matter list required to be compiled pursuant to section 87(3)(c) of the Freedom of Information Law. That provision states that each agency shall maintain:

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

Based upon the foregoing, it is clear in my opinion that a subject matter list need not consist of an index that identifies each and every record maintained by an agency. Rather, I believe that a subject matter list should include reference, in reasonable detail, to the categories of records maintained by an agency.

Lastly, under "GUIDELINES FOR AVAILABILITY", there is a list of grounds for withholding records. That list is not up to date. Section 7 pertains to section 87(2)(g) of the Freedom of Information Law, which currently states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

Further, a relatively new subdivision (2)(i) has been added, which permits an agency to withhold computer access codes.

Enclosed are copies of the Freedom of Information Law and model regulations prepared by this office.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5552

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

April 19, 1989

Mr. Robert Martinez
Reg. No. 11493-004
Box 1000 I-3
Lewisburg, PA 17837

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

Dear Mr. Martinez:

I have received your letter of March 31, as well as the materials attached to it.

You have sought assistance concerning a request made under the Freedom of Information Law for records directed to the Bronx County Criminal Court for records pertaining to a proceeding in which you were involved. In response to the request, the Principal Court Clerk indicated that you did not provide sufficiently specific information to locate the records and asked that you include indictment numbers. You wrote, however, that you do not know whether "an indictment was ever handed down".

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an agency, and section 86(3) of the Law defines the term "agency" to include:

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

In turn, section 86(1) defines "judiciary" to mean:

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

Based on the foregoing, the Freedom of Information Law would not be applicable to the courts or court records.

Second, under the circumstances, all that I can suggest is that you resubmit the request, including as much detail as possible, specifying that you are unaware of whether there was an indictment. Perhaps with additional identifying details, court officials will be able 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-5553

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

April 19, 1989

Mr. Joseph Bruno
86-A-6155
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Bruno:

I have received your letter of April 3 in which you requested advice concerning access to records.

Specifically, you wrote that you are interested in obtaining records from Wycoff Hospital in New York City concerning the treatment afforded you, the name of the doctor who treated you, and the services billed under medicaid.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an agency, and section 86(3) of the Law defines the term "agency" to mean:

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

Having contacted the New York City Health and Hospitals Corporation on your behalf, I was informed that the hospital in question is private and is not operated by New York City. If that is so, neither the hospital nor its records would be subject to the Freedom of Information Law.

Second, however, section 18 of the Public Health Law generally grants rights of access to medical records to the subject of the records. It is noted, too, that section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of inability to pay."

To obtain additional information concerning access to medical records, you may write to:

> Access to Patient Information Coordinator
> New York State Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> Empire State Plaza
> Albany, New York 12237

Enclosed is a pamphlet dealing with access to patient records prepared by the State Health Department.

Lastly, with respect to medicaid billing records, a request may be made to Paul Elisha, Public Information Officer, Department of Social Services, 40 North Pearl Street, Albany, NY 12243. In such a request, it is suggested that you provide 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
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5554

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

April 19, 1989

Mr. Gary Armstead
85-A-7266
Eastern Correctional Facility
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. Armstead:

I have received your letter of April 4.

As I understand your comments, you have unsuccessfully attempted to obtain various records, including investigative reports, from the New York City Police Department. You have requested assistance in the matter.

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 "reasonably describe" the records sought. Therefore, when making a request, you should include sufficient detail to permit agency officials to locate and identify the records. On the basis of your letter, it is unclear whether your requests included adequate detail to enable agency officials to locate the records in which you are interested.

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. It is noted, too, 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.

The phrase quoted in the preceding sentence indicates that a single record might be both available or deniable in whole or in part. That phrase, in my view, also indicates that agency officials must review the records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, while I am unfamiliar with the contents of the report in which you are interested, several of the grounds for denial may be relevant.

For example, 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..."

The language quoted above indicates that records compiled for law enforcement purposes may be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e).

Also potentially relevant 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;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Reports or other records prepared by agency officials could be characterized as "intra-agency" materials. However, their specific contents, as well as the capacity to withhold records based on other grounds for denial [i.e., section 87(2)(e)], would determine the extent to which those materials would be accessible or deniable.

Since I am not familiar with the contents of the records sought, I am unaware of the extent to which they might contain personally identifiable details concerning persons other than yourself. However, I point out that 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".

In short, the specific contents of the records and the effects of disclosure would determine the extent to which they are available or deniable under the Freedom of Information Law.

Lastly, if the records have been denied, the Freedom of Information Law permits an applicant to appeal. Section 89(4)(a) states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within 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 believe that the appeals officer for the New York City Police Department is Thomas Slade, Assistant Commissioner for Legal Matters.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5555

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

April 19, 1989

Mr. Harry Gaillard
84-B-2346
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. Gaillard:

I have received your letter of April 3, as well as the correspondence attached to it.

You have requested an advisory opinion concerning a request for a record indicating the name, public office address, title and salary of every officer and employee of the Clinton Correctional Facility. The request was denied by Rodney Moody, Inmate Records Coordinator at the Facility, on the ground that disclosure "would constitute an unwarranted invasion of privacy".

In this regard, I offer the following comments.

First and perhaps most important under the circumstances is section 87(3)(b) of the Freedom of Information Law, which states that each agency shall maintain:

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

The language quoted above represents one of the few instances in the Freedom of Information Law in which an agency is required to create a record. Consequently, a record reflective of the names, public office addresses, titles an salaries of all employees of an agency, including the Department of Correctional Services and its components, must be compiled and should exist on an ongoing basis.

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.

From my perspective, there is but one ground for denial that might conceivably be cited to withhold portions of a payroll listing.

Specifically, section 87(2)(f) provides that an agency may withhold records or portions thereof which "if disclosed would endanger the life or safety of any person". As a general matter, it is unlikely in my view that the disclosure of the name and title of a public employee could result in endangerment. However, in the rare situation in which an employee may be hired as an "undercover" agent, for example, it is possible that disclosure of his or her identity might result in endangering his or her safety. Even in that type of situation, since section 87(2) enables an agency to withhold portions of records, the Department could in my view delete only those portions of a record which could result in endangerment. For instance, identifying details regarding an agent might be deleted, while the remainder of the record would be accessible.

Third, with respect to privacy, it is true that section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". However, payroll information has been found by the courts to be available under the Freedom of Information Law, and prior to the enactment of that statute [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, as a general rule, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal

privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2dd 292, aff'd 67 NY 2d 562 (1986); Steinmetz v. Board of Education, East Morhiches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In sum, I disagree with the denial. Further, I believe that the record sought should be made available, except to the extent that disclosure of a name might endanger that person's life or safety. For reasons expressed earlier, such a deletion in my opinion could be justified only in unusual circumstances.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rodney Moody

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5556

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

April 24, 1989

Hon. Sandra R. Galef
Minority Leader
Westchester County Board of Legislators
800 Michaelian Office Building
148 Martine Avenue
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 Ms. Galef:

I have received your letter of April 5 and the correspondence attached to it.

Although you are a member of the Westchester County Board of Legislators, you wrote that, as a citizen, you have directed several requests for records under the Freedom of Information Law to County departments. However, you wrote that:

> "Instead of responding to [you] with the information [you] have requested, the department head or the County Executive's Legislative Liaison has sent the requested information to the Chairman of the Budget Committee of the Board of Legislators and not to [you]. The Budget Chairman had not requested the information nor was it information that was unavailable from the department [you] made the request of."

In addition, you included a copy of a request made on February 23 to the records access officer for the County Personnel Department for a record including the name, public office address, title and salary of every officer and employee of the General Services Department. The receipt of your request was

acknowledged on March 3, when you were informed that the Department "is compiling the information requested". As of the date of your letter to this office, you had not yet received the records sought.

You have requested an advisory opinion for the purpose of clarifying the County's responsibilities under the Freedom of Information Law and its duty to respond to requests in a timely manner, whether the requests are made "by an elected official or any member of the public."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law does not distinguish among applicants for records. Any person may request records for any reason or no reason at all, and it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., 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 (1976)]. Therefore, assuming that you made requests in your capacity as a member of the public, I believe that County officials should afford you the same treatment as it would any other member of the public.

Second, by way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see attached regulations, 21 NYCRR Part 1401). In turn, section 87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

As such, an agency's regulations should be consistent with those promulgated by the Committee.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, section 1401.2 of the regulations provides in relevant part that:

"(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more personas as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.

(b) The records access officer is responsible for assuring that agency personnel:

(1) Maintain an up-to-date subject matter list.
(2) Assist the requester in identifying requested records, if necessary.
(3) Upon locating the records, take one of the following actions:

(i) make records promptly available for inspection; or
(ii) deny access to the records in whole or in part and explain in writing the reasons therefore.

(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 request to copy those records..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests.

Third, the Freedom of Information Law and the Committee's regulations provide guidance concerning the manner and time 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

It is my understanding that, under the County's rules, a records access officer has been designated for each agency of County government.

Lastly, with regard to your request directed to the Personnel Department, I point out that an agency is generally not required to create or compile a record in response to a request. Section 89(3) of the Freedom of Information Law states in part that: "Nothing in this article [the Freedom of Information Law] 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...". In this instance, the information sought is a record specified in "subdivision three of section eighty-seven". Specifically, section 87(3)(b) states that:

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

Based on the foregoing, I believe that the record that you requested should exist and be "maintained" on an ongoing basis.

I hope that I 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: Mary Ann Mikulsky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5557

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

April 24, 1989

Ms. Theresa Lonergan
[redacted]

The staff of the Committee on 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. Lonergan:

I have received your letter of April 11, which pertains to a request for a draft of the Town of Ticonderoga's comprehensive development plan.

By way of background, some time ago, the Town hired a consultant, an attorney, to prepare the plan. Although a portion of it was made available to you, you were informed that the remainder had not yet been completed. You were also told that it would be made available when the Town received it. Most recently, the same record was requested by another citizen, who was informed that it would be made available "on a one-to-one basis" in Town offices. In a related area, you have contended that a realtor who serves on the Planning Board is involved in "an outrageous conflict here or breach of ethics".

In this regard, I offer the following comments.

First, assuming that the record in question can or will be made available for inspection at Town offices, I believe that the record must also be made available for copying. Further, as I have advised in previous correspondence, an agency must in my opinion mail copies of available records to an applicant upon payment of the requisite fees for copying and postage. So long as those charges are paid, I do not believe that an applicant can be required to travel to a government office for the purpose of inspecting a record.

Second, as you are aware, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. As such, this office has neither the jurisdiction nor the expertise to comment regarding allegations of conflicts of interest.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk, Town of Ticonderoga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5558

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

April 24, 1989

Mr. John Anthony
[redacted]

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

Dear Mr. Anthony:

I have received your letter of April 19.

You referred to requests made to the "Governor's Committee on Motion Picture and Television Development" that were unanswered. As such, you asked whether that agency is exempt from the Freedom of Information Law "as is the Commission on Government Integrity". You also asked: "Just how much of Governor Cuomo's government IS exempt from the NYS FOI Law" (emphasis yours), and you requested "the list of NYS FOI Exempt agencies and entities".

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and section 86(3) of the Law defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law is applicable to all entities of state and local government in New York, except the judiciary (the courts). The State Legislature, although subject to the Freedom of Information Law, is treated specifically in section 88 of the Law.

Second, this office maintains no list of agencies that are exempt from the Freedom of Information Law, and, in view of the definition of "agency", I would conjecture that no such list exists.

Third, while the Freedom of Information Law applies to all agencies, in some instances statutes other than the Freedom of Information Law specifically exempt records from disclosure [see Freedom of Information Law, section 87(2)(a)]. With respect to the Commission on Government Integrity, for example, that agency, which deals with inquiries "into matters concerning the public peace, public safety and public justice", operates pursuant to section 63 of the Executive Law. Subdivision (8) of section 63 states in part that:

> "Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the governor or the attorney-general the name of any witness examined or any information obtained upon such inquiry, except as directed by the governor or the attorney-general, shall be guilty of a misdemeanor."

Consequently, certain records of the Commission are specifically exempted from disclosure by statute. Moreover, having contacted the Commission, I was informed that it has no records that fall within the scope of your requests.

Lastly, the Governor's office, the Executive Chamber, is subject to the Freedom of Information Law. The records access officer for the Executive Chamber is Mr. Harold Iselin, whose office is located at the Capitol, Albany, NY 12224.

I believe that the foregoing is responsive to your questions.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5559

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

April 24, 1989

Mr. Lawrence Levine
[redacted]

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

Dear Mr. Levine:

I have received your letter of April 8, as well as the materials attached to it.

Your inquiry pertains to a request for records relating to a medical examination, a psychiatric interview and an evaluation of those reports, which pertain to you, by the New York City Board of Education's Medical Bureau. You indicated that the records are maintained by the Medical Bureau. In response to the request, you were advised that "it is the policy and practice of the Medical Bureau, pursuant to the collective bargaining agreement between the Board and United Federation of Teachers, that medical records be provided to an individual's doctor upon that individual's written authorization". You wrote that Article 21G4(b) of the collective bargaining agreement states that: "Upon the teacher's request to the Medical Division, his physician shall have the right to examine his medical file".

You have asked whether the collective bargaining agreement "proscribe[s] a teacher's access to his own medical file". Further, if the agreement does prohibit disclosure, you asked whether "said proscription provide[s] a ground of denial, as defined by [section] 87(2)(a) through (i)" of the Freedom of Information Law.

In this regard, I offer the following comments.

First, I do not believe that the terms of a collective bargaining agreement can abridge rights of access to records conferred by a statute, such as the Freedom of Information Law. A contract between a public employer and a public employee union could not, in my view, include provisions that effectively conflict with a statute passed by the State Legislature and signed by the Governor.

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 only instance in which records must be withheld would involve a situation in which a statute other than the Freedom of Information Law prohibits the disclosure of records. In such instances, section 87(2)(a) of the Freedom of Information Law would apply. That provision pertains to records that are "specifically exempted from disclosure by state or federal statute". A collective bargaining agreement would not constitute a statute, and, again, I do not believe that its terms could serve to diminish rights conferred by a statute. Moreover, it has been held that the public policy concerning access to records of government is fixed by the Freedom of Information Law. Unless records may be withheld in accordance with one or more of the grounds for denial appearing in that statute, records must, according to the Court of Appeals, be disclosed [see Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Third, I believe that one of the grounds for denial may, under the circumstances, be relevant, depending upon the nature of the records sought and the function of the Medical Bureau. Since the records in question were prepared by or for the Medical Bureau and communicated within the Board of Education, they could, in my opinion, be characterized as "intra-agency materials". Those kinds of records fall within the scope of 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;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

If the records sought are intra-agency materials, they would be available or deniable depending upon their contents. Those portions consisting of factual information, such as laboratory test results and the like would, in my view, be available to you. However, those portions reflective of medical or psychiatric opinions could be withheld under section 87(2)(g).

You alluded to section 89(2)(c), which states that disclosure would not constitute "an unwarranted invasion of personal privacy" when a person seeks records pertaining to himself, unless a different ground for denial may appropriately be asserted. In this instance, a different ground for denial, section 87(2)(g), might be applicable as a basis for withholding the records in whole or in part, depending upon their contents.

Lastly, section 89(6) of the Freedom of Information Law states that nothing in that statute "shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records". In this regard, another statute, section 18 of the Public Health Law, generally grants patients rights of access to medical records pertaining to them relating to their examination or treatment from a health care provider or treating physician. If the records in question could be characterized as patient information, it appears that rights conferred by section 18 of the Public Health Law would provide rights in excess of those granted by the Freedom of Information Law. If, however, section 18 of the Public Health Law does not apply, rights of access would, in my opinion, be governed by the Freedom of Information Law. Having contacted the Board's Office of Legal Services on your behalf to discuss the functions of the Medical Bureau, it appears that the Medical Bureau is not a provider of medical treatment. If that is so, the Freedom of Information Law, rather than section 18 of the Public Health Law, would govern rights of access to the records in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Deborah King

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5560

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

April 24, 1989

Mr. Joseph Shaw
84-A-3862
P.O. Box 149
Attica, NY 14011

Dear Mr. Shaw:

I have received your letter of April 14 and the materials attached to it, which reached this office on April 21.

By way of background, you have requested various records from the New York City Police Department, some of which have been made available, while others have not been disclosed. You have "appealed" to the Committee on Open Government concerning the denial.

In this regard, I offer the following comments.

First, the Committee on Open Government is not empowered to render a determination following an appeal. This office may advise with respect to the Freedom of Information Law. It has no authority, however, to enforce the Law or to compel an agency to grant or deny access to records.

Second, having reviewed the correspondence, it appears that the issue involves your request for records indicating whether certain named police officers "ever applied for a search warrant since becoming officers - up until the year 1984". In response to that request, you were informed that "your request is denied as it fails to reasonably describe the identity of the documents you are seeking". You were also informed of your right to appeal the denial. The receipt of your ensuing appeal was acknowledged on February 16, and you were informed that efforts would be made to provide an "expeditious reply". Further, you wrote that in a letter dated April 5, the appeals officer, Mr. Thomas E. Slade, wrote that "the Police Department does not possess a specific record cumulatively showing the search warrants requested by a particular police officer". Your other requests involved records indicating the procedure for applying for a search warrant. Those records were made available.

In my opinion, the issue relates to the requirement in section 89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. According to judicial decisions, to "reasonably describe" the records, an applicant must include sufficient detail to enable agency officials to locate and identify the requested records [see e.g., Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. Although your request might have been specific, the Department apparently does not maintain its records in a manner that permits the location or retrieval of warrants for which an individual police officer applied. Often an agency's capacity to locate records is dependent upon the nature of its filing system. If, in this instance, the Department does not file the records sought in a manner that permits their retrieval, it would appear that your request would have not reasonably described the records.

Further, although in response to your request you were informed that the records were not reasonably described and that you could appeal, it is questionable in my view whether a response of that nature is a denial that can be appealed. In my view, if an agency cannot locate records, it can neither grant nor deny access to those records. As such, I do not believe that a response indicating that a request did not reasonably describe the records sought could be characterized as a denial that may be appealed.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5561

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

April 25, 1989

Mr. Dominic Bretti
80-C-0511
P.O. Box 700
Wallkill, NY 12589

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

Dear Mr. Bretti:

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

Having been informed by the Organized Crime Task Force that it had no records falling within the scope of your requests, you recently received a letter indicating that "a file which contains documents that may fall within the terms of your requests has been discovered". You were also informed that you would be contacted for the purpose of letting you know whether any portions of the file fall within the scope of your requests and, if so, whether those documents must be disclosed under the Freedom of Information Law.

In conjunction with the foregoing, you asked whether it would be "proper" to request "the release of an index reflecting upon any and all files, records, documents and tapes pertaining to [you], [your] co-defendants and any prosecution witnesses who testified against [you]."

In this regard, I offer the following comments.

The only "index" that is required to be prepared under the Freedom of Information Law is the "subject matter list", which is required to be maintained pursuant to section 87(3)(c) of the Law. That provision states that:

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

Based on the foregoing, a subject matter list must include reference, in reasonable detail, to the categories of records maintained by an agency. There is no requirement, however, that a similar or equivalent list be prepared with respect to a particular person or incident.

It is also noted that section 89(3) of the Freedom of Information Law states that, unless specific direction is provided to the contrary, an agency is not required to create a record in response to a request. Therefore, if the Organized Crime Task Force does not maintain an index or list containing the information to which you referred, it would not be obliged to prepare such an index in response to a request made under the Freedom of Information Law.

In short, although you could request the index that you described, if no such record exists, the Freedom of Information Law, in my view, would not be applicable, and the agency would not be required to prepare such an index on your behalf.

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-5562

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

April 25, 1989

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 April 12, as well as the materials attached to it.

According to the correspondence, you directed an appeal to the Superintendent of the Lakeland School District for:

> "1) A complete list of the full names, titles, salaries, (etc.) of each and every employee. (NYS Public Officers Law Section 87(3)(b)!
>
> 2) A reasonably detailed and current list of all the documents both accessible and exempt under Freedom of Information Act. (NYS Public Officers Law Section 87(3)(c)."

The appeal was made following a denial of your initial request by the District's Records Access Officer. The application form indicates that the denial was based on two grounds, that disclosure would result in "an unwarranted invasion of personal privacy" and because the record or records are not maintained by the agency.

You have requested an advisory opinion concerning the matter. In this regard, I offer the following comments.

First, with certain exceptions, the Freedom of Information Law does not require an agency, such as a school district, to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, the provisions concerning the records that you requested are found in "subdivision three of section eighty-seven" of the Law. Specifically, that provision 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; 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 payroll record and the subject matter list described in paragraphs (b) and (c) of section 87(3) respectively are among the few records that an agency must maintain to comply with the Freedom of Information Law.

Second, with respect to the payroll record and the protection of privacy, it is true that section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". However, payroll information has been found by the courts to be available under the Freedom of Information Law, and prior to the enactment of that statute [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, as a general rule, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986);

Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In sum, I disagree with the denial of your request for the payroll record. Moreover, based on the language of the Freedom of Information Law and its judicial interpretation, I believe that the record sought should be made available.

Third, with regard to the subject matter list, in terms of it contents, it is clear that a subject matter list is not required to consist of an index of each and every record maintained by an agency. Rather, I believe that it is intended to consist of a list, by category, of the kinds of records maintained by an agency, whether or not the records are accessible to the public under the Law. Further, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, provide in part that "The subject matter list shall be sufficiently detailed to permit the identification of the category of the record sought" [21 NYCRR section 1401.6(b)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent of Schools
William D. Spinelli, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5563

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

April 25, 1989

Mr. John J. Pionzio
Superintendent
Limestone Union Free School
100 Main Street
Limestone, NY 14753

Dear Mr. Pionzio:

I have received your letter of April 14 in which you requested a recapitulation of our recent conversation concerning records used and prepared in the process leading to the adoption of a budget.

In this regard, I offer the following comments.

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

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

As such, although documents might be characterized as "drafts" or worksheets, for example, I believe that they constitute "records" as defined by the Freedom of Information Law. Further, it has been held that "work papers", notes and similar materials are "records" subject to rights of access granted by the Freedom of Information Law [see e.g., Polansky v. Regan, 440 NYS 2d 356, 81 AD 2d 102 (1981); Steele v. NYS Department of Health, 464 NYS 2d 925 (1983)].

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. It is also noted 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. The phrase quoted in the preceding sentence indicates that a single record may be accessible or deniable in whole or in part. That phrase, in my view, 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, even though some aspects of a record may be withheld, the remainder would be available.

Third, in my view, two of the grounds for denial may be relevant with respect to the records in question.

Section 87(2)(c) provides that records may be withheld to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, it would appear that those portions of the work papers could be withheld.

The other ground for denial of relevance is section 87(2)(g), which, due to its structure, often requires disclosure. 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

In a case involving so-called "budget worksheets" maintained by the State Division of the Budget, it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, section 88(1)(d)]. Currently, section 87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

> "[I]t is readily apparent that the language 'statistical or factual' tabulation was meant to be something other than an expression of opinion or make argument for or against a certain position. The present record contains the form used for work sheets and it apparently was designed to accomplish a statistical or factual presentation of data primarily in tabulation form. In view of the broad policy of public access expressed in section 85 the work sheets have not been shown by the appellants as being not a record made available in section 88" (54 AD 2d 446, 448).

The Court was also aware of the fact that the records were used in the deliberative process, stating that:

> "The mere fact that the document is a part of the 'deliberative' process is irrelevant in New York State because section 88 clearly makes the back-up factual or statistical information to a final decision available to the public. This necessarily means that the deliberative process is to be a subject of examination although limited to tabulations. In particular, there is not statutory requirements that such data be limited to 'objective' information and there is no apparent necessity for such a limitation" (id. at 449).

Based upon the language of the determination quoted above, which was affirmed by the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible under the freedom of Information Law.

Further, it has been held that statistics and facts that may be "intertwined" with opinions, for instance, should be available. Specifically, 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 statistical or factual information may be "intertwined" with opinions, for instance, the statistical or factual portions should in my opinion be disclosed, unless different grounds for denial 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5564

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

April 25, 1989

Mr. Michael W. Galloway
88-A-4055 18-M-6
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 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. Galloway:

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

According to your letter, you were recently denied participation in the Temporary Release Program. The rules of the Department of Correctional Services adopted in conjunction with the program, under the circumstances, require that the sentencing judge be contacted to submit a recommendation concerning an inmate's participation in the program. Since you were informed that the judge's response was negative, you requested copies of the correspondence to and from the judge "to substantiate the alleged negative response". The request was denied, and you have requested an opinion concerning rights of access to the records in question.

In this regard, I offer the following comments.

Ordinarily, communications between or among government officials would fall within the scope of section 87(2)(g) of the Freedom of Information Law, which pertains to "inter-agency and intra-agency materials". Under that provision, those aspects of inter-agency or intra-agency materials reflective of advice, opinions, recommendations and the like may, in my view, justifiably be withheld.

Nevertheless, in this instance, I do not believe that section 87(2)(g) would serve as a basis for denial, because the courts are not agencies for purposes of the Freedom of Information Law. Section 86(3) of that statute defines the term "agency" to include:

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

In turn, section 86(1) defines "judiciary" to mean:

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

Since the courts are not agencies, and records produced by the courts are not agency records, correspondence between the Department and the judge would not in my opinion constitute inter-agency materials.

Without knowledge of the contents of the correspondence, I could not conjecture as to whether any of the other grounds for denial appearing in section 87(2) of the Freedom of Information Law could appropriately be asserted. Assuming that none of those grounds for denial could be applied, it would appear that the correspondence should be disclosed.

I point out that a denial of a request may be appealed 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."

The regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that an appeal may be made to Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5565

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

May 1, 1989

Mr. Dwight Hendy
87-T-1156
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. Hendy:

I have received your letter of April 17, in which you referred to my opinion of April 11.

In your letter, you wrote that you "cannot know what to request 'if' [you] do not know what are the names of the documents that, in which [your] name appear". As such, you again expressed a desire to obtain the "subject matter list which refer to the categories of records maintained by the N.Y.P.D. in which [your] name appear, for the arrest of August 18, 1986". You also asked whether you can "bring this matter to court using" the opinion of April 11.

In this regard, having reviewed my opinion of April 11, it appears that you failed to understand its contents or read it carefully. To reiterate my comments, the subject matter list required to be maintained pursuant to section 87(3)(c) of the Freedom of Information Law must refer, in reasonable detail, to the categories of records maintained by an agency. The Freedom of Information Law does not require that a subject matter list be prepared with respect to records relating to a particular person or incident. Therefore, the Department is not required to maintain such a list concerning the categories of records it maintains in relation to your arrest.

I also pointed out that the Freedom of Information Law does not require you to know the "names of the documents" in which your name appears in order to make a request. By way of background, when the Freedom of Information Law was enacted in 1974, it required an applicant to request "identifiable" records. That standard in some instances precluded applicants from effectively requesting records if they could not "identify" the records. The Freedom of Information Law, however, was replaced and repealed in 1978. The current standard for making requests, section 89(3), requires that an applicant "reasonably describe" the records sought. Under that standard, an applicant is not required to identify or name the records in which he is interested. Rather, a request should merely include sufficient detail to enable agency officials to locate the records.

Lastly, I cannot tell you whether you should bring the matter to court on the basis of my earlier opinion. However, I would conjecture that such an attempt, for reasons described herein and earlier, would fail. Rather than initiating a judicial proceeding or continuing to request a "subject matter list" of records pertaining to you and your arrest, it is suggested that you submit a new request that "reasonably describes" the records that you seek. Such a request should include as much detail as possible in order that Department staff can locate the records.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 5566

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

May 1, 1989

Mr. Curtis Flowers
87-A-3754
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. Flowers:

I have received your letter of April 12.

You described situations in which an agency fails to respond to a request within five business days of the receipt of a request, and you asked what recourse, if any, there might be.

In this regard, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Parte 1401), which govern the procedural aspects of the Law, provide guidance. 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, sections 1401.5(d) and 1401.7(c)].

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 requested information concerning "a general definition of 'Intra-Agency & Inter Agency' materials". In brief, inter-agency materials would consist of records transmitted between or among agencies. Intra-agency materials would consist of records transmitted between or among officials within an agency.

Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government in New York.

Lastly, as you may be aware, section 87(2)(g) deals specifically with inter-agency and intra-agency materials and states that an agency may withhold records that:

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

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

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 5567

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

May 1, 1989

Mr. Brian M. Thomas
80-B-2002 B-1-20
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. Thomas:

I have received your letter of April 14, as well as the correspondence attached to it.

According to the materials, you requested an "IG-64 form" from the head clerk at your facility. That form is an inventory of an inmate's property that is stored for him. You wrote that the request "was denied on the ground that no I-64 form existed for the requested date (Aug. 1988)...". You have since appealed to the Office of Counsel

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Therefore, if the record sought does not exist, the Department would not be obliged to create such a record on your behalf [see Freedom of Information Law, section 89(3)]. Further, assuming that the record sought does not exist, the Department could neither grant nor deny access to it. As such, the response to your request could not likely be characterized as a denial.

Second, to the extent that records do 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, having discussed the matter with a Department official, it was agreed that an I-64 form pertaining to an inmate's property should be disclosed to the inmate [see Freedom of Information Law, sections 87(2)(g)(i) and 89(2)(c)].

Third, the problem may be that your request was too specific. The form in question, if it exists, might not be dated "August 1988". Rather than specifying the month, it might be worthwhile to resubmit your request, and that you seek any I-64 form pertaining to you prepared from July of 1988 to the end of that year.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5568

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

May 1, 1989

Mr. Daniel Braz
[redacted]

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

Dear Mr. Braz:

I have received your letter of March 28, which reached this office on April 18.

According to your letter, following a request for a particular marriage record directed to the office of the City Clerk of the City of New York, Ms. Katherine Timon, General Counsel, wrote that: "Marriage licenses are not public records and are not subject to the Freedom of Information Act". You appealed the denial, which was affirmed, also by Ms. Timon.

You have asked whether "marriage (and divorce) records" are public. In addition, you asked whether the City Clerk should have an appeals officer.

In this regard, I offer the following comments.

First, although the Freedom of Information Law generally pertains to agency records, other statutes deal with the records in question. Section 19 of the Domestic Relations Law, entitled "Records to be kept by town and city clerks", pertains to marriage records. As I understand that provision, the names of persons receiving marriage licenses are available to the public. This is not to suggest that all records concerning marriages in possession of town and city clerks are available, for some records pertaining to marriages might in my view justifiably be withheld.

More specifically, the first sentence of section 19(1) of the Domestic Relations Law states that:

> "[E]ach town and city clerk hereby empowered to issue marriage licenses shall keep a book supplied by the state department of health in which such clerk shall record and index such information as is required therein, which book shall be kept and preserved as a part of the public records of his office."

The fifth sentence, which pertains to related records, states that:

> "All such affidavits, statements and consents, immediately upon the taking or receiving of the same by the town or city clerk, shall be recorded and indexed as provided herein and shall be public records and open to public inspection whenever the same may be necessary or required for judicial or other proper purposes."

Further, section 19 makes specific reference to marriage records kept by New York City, stating that:

> "Whenever an application is made for a search of such records in the city of New York, the city clerk of the city of New York may make such search and furnish a certificate of the result to the applicant upon the payment of a fee of five dollars for a search of one year and a further fee of one dollar for the second year for which search is requested and fifty cents each additional year thereafter."

In view of the foregoing, I believe that the names of persons who receive marriage licenses are available to any person, notwithstanding the purpose for which a request is made. The related materials to which reference is made in the fifth sentence are, however, available in my opinion only "when necessary or required for judicial or other proper purposes".

Consequently, I believe that section 19(1) of the Domestic Relations Law provides a distinction in terms of rights of access between the book kept by a clerk that identifies the recipients of marriage licenses, which is accessible, and the related information, i.e., affidavits, statements and consents, which are available only on a limited basis.

Viewing the issue from a different vantage point, licenses or permits are in my opinion and have long been generally available to the public, for they enable the public to know whether a person is qualified to engage in a particular activity, i.e., to drive an automobile, sell real estate, engage in the professions of cosmetology, medicine, teaching, law or even to own a firearm [see Penal law, section 400.00(5) and its interpretation by the Court of Appeals in Kwitny v. McGuire, 422 NYS 2d 867, aff'd 77 AD 2d 839, aff'd 53 NY 2d 968 (1981)]. In terms of the Freedom of Information Law, it is my view that records identifying licensees would generally result in a permissible, rather than an unwarranted invasion of personal privacy. Further, while licenses and similar records are generally available, often related materials may justifiably be withheld due to considerations of privacy [see e.g., Penal Law, section 400.00].

Second, with respect to divorce records, subdivision (1) of section 235 of the Domestic Relations Law states that:

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

As such, as a general matter, the details of a divorce proceeding, for example, are considered confidential.

However, subdivision (3) of section 235 states that:

> "Upon the application of any person to county clerk or other officer in charge of public records within a county for evidence of disposition, judgment or order with respect to a matrimonial action, the clerk or other such officer shall issue a 'certificate of disposition', duly certifying the nature and effect of such disposition, judgment or

> order and shall in no manner evidence the subject matter of the pleadings, testimony, findings of fact, conclusions of law or judgment of dissolution derived in any such action."

Therefore, any person may request a "certification of disposition" which indicates that a divorce has been granted.

As such, unless you are a party to a divorce proceeding, records concerning a divorce proceeding are generally considered confidential, except with respect to the certificate of disposition described earlier.

Third, with respect to the responses to your request and appeal by the same person, 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 (21 NYCRR Part 1401). In turn, section 87(1) requires each agency to adopt regulations consistent with the Law and the Committee's regulations. Section 1401.7(a) of the Committee's regulations requires the designation of a person or body to determine appeals. Further, section 1401.8(b) states in part that "The records access officer shall not be the appeals officer". Therefore, in my view, Ms. Timon should not have considered both your initial request and your appeal.

Lastly, since you asked what your "next step" should be, a copy of this opinion will be sent to Ms. Timon in the hope that it will be persuasive. If it is not, your recourse would involve the initiation of a judicial proceeding under Article 78 of the Civil Practice Law and Rules.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Katherine Timon, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5569

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

May 1, 1989

Mr. Erwin Richt
[redacted]

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

Dear Mr. Richt:

I have received your letter of April 17.

You wrote that you are aware of rights conferred by the Social Services Law concerning records relating to reports of child abuse. However, you asked whether those records would be available under the Freedom of Information Law.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to all records of an agency and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more 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 422 of the Social Services Law deals with reports of child abuse maintained by the State Department of Social Services and local departments. Subdivision 4.(A) of that statute provides in relevant part that: "Reports made pursuant to this title as well as any other information obtained, reports written or photographs taken concerning such reports in the possession of the department or local departments shall be confidential and shall only be made available to..." persons or entities specifically designated in the re-

mainder of that provision. As such, it is my view that reports and related records concerning child abuse are specifically exempted from disclosure by statute, and the Freedom of Information Law would not provide public rights of access to those records. Similarly, I believe that any rights of access to the records in question are conferred by the Social Services Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1609
FOIL-AO-5520

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

May 1, 1989

Ms. Pauline M. Salmon
[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. Salmon:

I have received your letter of April 15.

You have requested an opinion concerning the contents of minutes and the amount of detail that should be included in minutes of meetings.

In this regard, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings 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 foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting. Further, although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken.

With respect to executive sessions, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law section 105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to section 106(2). It is noted that under section 106(3) of the Open Meetings Law minutes of both open meetings and executive sessions are available in accordance with the Freedom of Information Law. Nevertheless, various interpretations of the Education Law, section 1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive (see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County 7AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157 aff'd 58 NY 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session. Further, if no action is taken in an executive session, minutes of the executive session need not be prepared.

Lastly, since its enactment in 1974, the Freedom of Information Law has contained an "open meetings" requirement with regard to voting by members of public bodies. 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."

Consequently, when a school board takes action, a record must be prepared that indicates the manner in which each member cast his or her vote. That record ordinarily should, in my opinion, be included as part of the minutes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5571

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

May 1, 1989

Mr. Nathan E. Rudd
[redacted]

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

Dear Mr. Rudd:

I have received your letter of April 17 in which you described difficulties in obtaining information concerning the costs associated with the installation and construction of a water project in the Village of Asharoken. The project was carried out by the Suffolk County Water Authority and apparently involved funding from various sources, including the Village.

Having reviewed your letter and the correspondence attached to it, I offer the following comments.

First, it is noted that the title of the Freedom of Information Law may be somewhat misleading, for that statute pertains to existing records of an agency; it does not require agency officials to answer questions or explain the contents of the records. 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.

Second, to the extent that records exist, they are subject to rights of access. Section 86(4) of the Freedom of Information Law 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."

Therefore, if an agency, such as the Village, maintains books of accounts, vouchers, checks, contracts or other information in some physical form, those documents would, in my opinion, constitute "records" that fall within the scope of the Freedom of Information Law.

Third, section 89(3) of the Freedom of Information Law states that, when making a request, an applicant must "reasonably describe" the records sought. As such, although an applicant need not specify the records in which he is interested, a request must include sufficient detail to enable agency officials to locate the records sought.

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.

Based upon your letter and the response to your request prepared by the Clerk, it appears that one provision may be particularly relevant. Although that provision is one of the grounds for denial, due to its structure, it often 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Many of the records in which you are interested were likely prepared by an agency, such as the Village or the Water Authority. However, much of the documentation likely consists of "statistical or factual tabulations or data" that must be disclosed pursuant to section 87(2)(g)(i).

Lastly, while some of the records sought are apparently not maintained by the Village, they may be in the possession of the Water Authority. Therefore, it may be worthwhile to seek records from the Authority, again, reasonably describing 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

cc: Dorothy Aiello, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5572

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

May 2, 1989

Mr. Devine Hushie
87-a-1266
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

Dear Mr. Hushie:

I have received your letter of April 24.

According to your letter, you directed a request under the Freedom of Information Law to Mr. Edwin Douglas, Chief Court Reporter in Queens County Criminal Court, to obtain transcripts of your arraignment proceedings. You were informed that the request could not be honored, for the reporters who may have prepared the transcripts are now retired and "are not in New York State jurisdiction". As such, you requested "than an Order be issue[d]" to Mr. Douglas to compel the production of the records in question.

In this regard, I offer the following comments.

First, the Committee on Open Government has no authority to issue a subpoena or compel the production of records.

Second, the Committee is responsible for advising with respect to the Freedom of Information law. In this instance, I do not believe that the Freedom of Information Law is applicable.

That statute pertains to records of an agency, and section 86(3) of the Law defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a

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

In turn, 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 foregoing provisions, the Freedom of Information Law does not apply to the courts or court records. As such, under the circumstances, I do not believe that I can offer assistance to you.

I hope, however, that my comments have served to clarify the duties of the office and the scope of the Freedom of Information Law.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5573

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

May 2, 1989

Mr. David A. Nicholas
88-A-9566
Clinton Correctional Facility
Box 367B
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. Nicholas:

I have received your letter of April 18.

You wrote that you were assaulted in a courtroom during your trial in September of 1988. In conjunction with the alleged assault, you asked how you can obtain statements under the Freedom of Information Law from three county corrections officers, as well as hospital records and "minutes" of your trial. You also indicated, that having requested copies from the County Jail for your "visitation records, mental and medical record, phone records (incoming and outgoing - legal and personal)" and the records of your arrest and booking, you received no response. Further, you asked whether, under the Freedom of Information Law, you can "write to any possible witness" to ask whether "they would write a sworn statement out for [you] on what they saw".

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing agency records; it is not a vehicle that enables you to have a person make a statement. Therefore, if the correction officers or witnesses have not prepared statements, the Freedom of Information Law would not require those persons to make or prepare statements on your behalf.

Second, the Freedom of Information Law is applicable to records of an agency, and section 86(3) of the Law defines the term "agency" to include:

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

In turn, 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 generally applies to records maintained by entities of state and local government, such as a county jail, for example. However, it does not apply to the courts or court records, or to records of a private hospital.

Third, medical records are generally available to a person who received treatment from a hospital or physician pursuant to section 18 of the Public Health Law. Further, although court records are not subject to the Freedom of Information Law, they are often available under other provisions of law, and it is suggested that a request for court records be directed to the clerk of the appropriate court.

Fourth, 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 contain sufficient detail to enable agency officials to locate the records.

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. I believe that your arrest and booking records should be available. Similarly, assuming that logs or similar records are kept concerning visitation or telephone use, and that the agency can locate those portions of such records pertaining to your visitors or phone calls, I believe that those records would be available. In the case of phone calls, unless a log or similar record is kept, it would be doubtful, in my view, that records of incoming or outgoing calls pertaining to you could be located.

Lastly, with respect to procedure, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force of law, require that each agency designate a "records access officer". The records access officer has the

duty of coordinating an agency's response to requests, and a request should be directed to that person. In addition, the Freedom of Information Law and the regulations provide direction concerning the manner and time 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 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, sections 1401.5(d) and 1401.7(c)].

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 an explanatory pamphlet that describes the Freedom of Information Law more fully.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5574

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

May 2, 1989

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 April 11, as well as the correspondence attached to it.

Your inquiry pertains to the fee imposed by Dutchess County in response to a request for computer tapes generated by the County's Real Property Tax Department. Although the County Attorney determined that the fee in question is based upon the actual cost of reproduction and you acknowledged my professed lack of expertise concerning computer technology, you asked that I "confirm" a "line of thought" that you described concerning the issue.

Due to my lack of expertise regarding the technology, I do not fully understand the "steps" that you described in your "line of thought". Therefore, I choose not to offer an opinion based upon what would be conjecture on my part.

You also asked whether an agency can:

> "come up with a formula based solely on the number of pages that is printed out specifically for the requestor, that the 'actual costs' of reproduction of the electronic media' (not the printing of the hard copy pages) is based on 25 [cents] times the number of imagined pages".

Assuming that I understand your question correctly, I believe that the answer would be in the negative. In its provisions concerning fees, section 87(1)(b)(iii) of the Freedom of Information Law states an agency's rules and regulations must include reference to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

As such, if records are photocopied, an agency may charge up to twenty-five cents per photocopy. If a request involves "other records", i.e., those that cannot be photocopied, the fee must be based upon the actual cost of reproduction. In that circumstance, the portion of section 87(1)(b)(iii) concerning the twenty-five cent fee for photocopies is, in my view, irrelevant.

Similarly, "[i]f the agency admits that it doesn't need an original printout and a printout is specifically made for a requestor", you asked whether the agency can demand twenty-five cents per page. In that kind of situation, as I understand it, the agency would not be making photocopies, but rather would be reproducing, on paper, the contents of a computer tape or disk. If that is so, the fee should in my opinion be based not on the basis of twenty-five cents per copy, but on the basis of the actual cost of reproduction.

Lastly, since your questions refer to the fee imposed by Dutchess County concerning your request for real property tax data, as indicated in my letter to you of April 7, it is reiterated that I was informed by County officials that a variety of actions, including the writing of new programs, were undertaken in an effort to accommodate you. As such, it appears that the County may have engaged in actions not required to be taken under the Freedom of Information Law. Further, I was informed that the fee was not based upon the number of pages or "imagined pages", but rather on the cost of processing.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Ian McDonald, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5526

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

May 3, 1989

Mr. Herbert Washington
83-A-0770 SHU-B-2
135 State Street
Auburn, NY 13021-9000

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. Washington:

I have received your letter of April 18, which reached this office on April 24.

According to your letter, you were found guilty by a jury in a proceeding conducted in 1982. You have alleged, however, that testimony given by witnesses who testified against you was false. As such, you indicated that you would like to obtain records from the office of the district attorney and/or the New York City Police Department. You have asked for assistance, because you "don't know the first step in acquiring this information".

First, 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 a "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and requests should be made to the records access officer. The records access officer for the New York City Police Department is Ms. Eneta McAlister, Public Information Section, 1 Police Plaza, New York, NY 10038. A request may also be directed to the records access officer for the office of the appropriate district attorney.

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.

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. Many of the grounds for denial are based upon the effects of disclosure. As such, the specific contents of the records in which you are interested would constitute the basis for your right to the records or an agency's authority to withhold them.

Enclosed is an explanatory pamphlet concerning the Freedom of Information Law that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5576

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

May 3, 1989

Mr. Terrence E. Mason
87-A-5927 B-1-110
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

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

Dear Mr. Mason:

I have received your letter of April 18, which pertains to the fee assessed for a copy of a medical record.

According to your letter, a radiologist at the Horton Memorial Hospital performed an arthrogram of your left knee. A week later, you submitted a request under the Freedom of Information Law "for this computer print-out that [you] had seen in [your] medical folder when [you] saw the facility doctor". In response to the request, which involved "one sheet of paper", you were informed that the fee for a copy would be 85 cents. When you questioned the fee, you were informed that requests for medical records no longer fall under the Freedom of Information Law, but rather under section 18 of the Public Health Law.

You have requested my views on the matter. In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by the Department of Correctional Services and its facilities. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appear in section 87(2)(a) through (i) of the Law.

With respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personal could be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, on January 1, 1987, a new statute, section 18 of the Public Health Law, became effective. In brief, that statute generally grants rights of access to medical records to the subjects of the records.

With respect to fees, unless another statute permits the assessment of a different fee, records accessible under the Freedom of Information Law may be inspected free of charge, and the agency cannot impose a fee involving personnel costs, for instance. When copies are requested, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing records that cannot be photocopied, unless otherwise provided by a statute other than the Freedom of Information Law. Section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of inability to pay."

Assuming that the Department may assess a fee as a provider pursuant to the Public Health Law, it appears that the fee in question was likely appropriate. It is noted that I discussed the matter with a representative of the State Health Department, who suggested that, in his view, a fee regarding access to medical records could be based upon section 18 of the Public Health Law.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

> Access to Patient Information Coordinator
> New York Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> Empire State Plaza
> Albany, New York 12237

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-5577

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

May 3, 1989

Mr. Edward Feitelberg
[redacted]

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

Dear Mr. Feitelberg:

As you are aware, I have received your letter of April 19 and the correspondence attached to it.

According to the materials, your client on December 11 applied for the position of Director of Social Work Services at the Bellevue Hospital Center. The position was advertised on that date in the New York Times. During the following month, your client received a letter from the Director of Human Resources at the Center indicating that "there was a viable candidate presently working at the hospital and it was decided to promote from within for both morale and economic considerations." Soon thereafter, on behalf of your client, you directed a request under the Freedom of Information Law for a variety of information concerning the person hired to fill the position and related information concerning persons interviewed, the number of letters sent to applicants rejecting their applications, the name or names and title or titles of persons who decided to withdraw public advertising for the position and to promote from within, as well as related materials. In response to that request, certain records were disclosed. However, you were also informed that various aspects of your request did not require a response under the Freedom of Information Law. Having appealed the denial, Mr. John E. Linville of the Office of Legal Affairs for the New York City Health and Hospitals Corporation wrote that the Freedom of Information Law does not require "the creation of new records or responses to interrogatories relating to agency business".

Consequently, Mr. Linville wrote that "matters such as those you raised which go beyond a request for records lie outside the scope of FOIL". After Mr. Linville's issuance of his determination regarding your appeal, you requested a reconsideration, specifically with respect to three aspects of your request. Those three portions of your request involve:

> "4. The names of all persons interviewed for the said position [Director, Social Work Services], the dates of the said interviews, and the number of applications for the said position which you received.
>
> "6. The name or names and title or titles of the person or persons who made the decision to withdraw public advertising for the said position and 'to promote from within for both morale and economic considerations.'
>
> "7. The exact date on which the said decision was made."

You questioned Mr. Linville's rationale for the determination, in that he suggested that a response to your request would require the creation of a new record and that, therefore, the information was outside the scope of the Freedom of Information Law.

You have requested my views concerning the matter. 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: "Nothing in this article [the Freedom of Information Law] shall be construed to require an entity to prepare any record not possessed or maintained by such entity...". As such, the Freedom of Information Law does not require an agency to create a record in response to a request. Assuming that no records exist that fall within the scope of a request, an agency would not in my opinion be required to create record or answer questions. Under the circumstances, if there are no records indicating the names of persons interviewed for the position in question, the dates of those interviews or the number of applications for the position, the Health and Hospitals Corporation would not in my opinion be required to prepare records containing the information sought. Similarly, if there are no records indicating the names and titles of persons who made the decision to withdraw advertising for the position and to promote from within, or indicating the exact date on which the decision was made, I do not believe that the Corporation would be required to create records containing the information that you requested.

Second, in your request for a reconsideration, you suggested that if the records sought do not exist or have never existed, or if they did exist and were destroyed or that they cannot now be found, "responses to that effect would have sufficed and would now in fact suffice". Here I point out that section 89(3) of the Freedom of Information Law also provides that, in a situation in which a record does not exist or cannot be found, 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". It might be worthwhile to request the certification described above pursuant to section 89(3) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John E. Linville, Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1611
FOIL-AO-5578

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

May 4, 1989

Mr. David Zinman
Newsday
Long Island, NY 11747

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

Dear Mr. Zinman:

As you are aware, I have received your recent letter and the materials attached to it.

The materials consists of copies of minutes of executive sessions held between April of 1988 and March of this year by the Board Managers of the Nassau County Medical Center. You have asked that I review the minutes for the purpose of providing an opinion concerning the Board's compliance with the Freedom of Information and Open Meetings Laws. It is noted that you requested an advisory opinion involving similar issues approximately a year ago. Therefore, many of my remarks will represent a reiteration of advice offered in the earlier opinion.

First, by way of background, the Open Meetings Law is applicable to meetings of public bodies. 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."

I believe that the Board of Managers is a "public body" subject to the requirements of the Open Meetings Law. Specifically, the Board consists of at least two members. It is, in my opinion, required to conduct its business by means of a quorum pursuant to section 41 of the General Construction Law. Further, the Board conducts public business and performs a governmental function for a public corporation, Nassau County. I point out, too, that a county board of supervisors is authorized to "establish a public general hospital" and designate the members of a board of managers pursuant to section 127 of the General Municipal Law. The powers and duties of boards of managers are conferred by section 128 of the General Municipal Law.

Second, the Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings of public bodies must be conducted open to the public, except to the extent that an "executive session" may properly be convened. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, an executive session is not separate and distinct from an open meeting; rather it is a portion of an open meeting that enables a public body to consider certain issues in private. A public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of section 105(1) of the Law specify and limit the topics that may appropriately be considered during an executive session.

Having reviewed the minutes of executive sessions, at virtually every executive session, certain "personnel matters" were considered, such as issues involving appointments, leaves of absences, resignations and the like. Those and similar issues, insofar as they involved matters pertaining to a particular person or persons, could in my opinion have been discussed during executive sessions. However, I believe that others relating to personnel generally, and matters of policy, should have been discussed in public.

Because the topics that were considered during executive sessions were discussed under the heading of "personnel matters", I point out by way of background that the so-called "personnel" exception for entry into executive session has been clarified since the original enactment of the Open Meetings 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" generally, tangentially, 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.

To 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 <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).

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.

At this juncture, I will refer to specific executive sessions and comment on their propriety. Some of the issues relate to personnel matters; others, in my view, simply would not have qualified for consideration during executive sessions. Further, based upon my review of the minutes of executive sessions held over the course of a year, it appears that the Board fails to understand its obligations under the Open Meetings Law and that numerous issues involving matters of policy have been discussed in private under the guise of "personnel matters".

<u>Executive Session of March 27, 1989</u>

Item 3 includes reference to a motion approved to send letters of appreciation to persons who retire or leave the Medical Center in good standing after ten or more years of service. Items 4 and 5 respectively involved announcements that the Executive Director of the Center was asked to serve on a HANYS policy committee and a Senate health committee and that a meeting of the Joint Conference Committee would be held during the following month.

None of those discussions would in my opinion have fallen within the scope of section 105(1)(f) or any other provision permitting the holding of an executive session.

Executive Session of February 27, 1989

Item 4 referred to a report by the Executive Director concerning a seminar that he attended and plans to hold a seminar in May or June. Item 6 involved a discussion of financial and other support provided by the Auxiliary. Item 7 concerned a report of the hospital's annual audit.

As I interpret the minutes, none of those items involved "personnel" and should have been considered in public.

Item 5 consisted of an update on the status of search activities for certain positions. To the extent that the discussion focused on particular candidates for those positions, I believe that the executive session was proper. However, if the discussion did not relate to particular persons, but rather described the general progress of search activities, the matter, in my view, should have been considered in public.

Executive Session of January 23, 1989

Under item 4, the Executive Director announced the institution of a hospital-wide no smoking policy. Since the issue clearly involved a matter of policy, I do not believe that any basis for discussion of the issue behind closed doors could justifiably have been asserted.

Item 5 involved a summary of the Center's malpractice experience in 1988 and included a review of the Center's role in the "County litigation process". Assuming that the discussion was general and did not refer to any specific lawsuit, I do not believe that it could properly have been considered in an executive session.

The provision in the Open Meetings Law concerning litigation is found in section 105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been 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 to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). 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 be 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" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors. If litigation strategy in conjunction with a particular lawsuit was not discussed, I do not believe that there would have been a basis for conducting an executive session.

With regard to the sufficiency of a motion to enter into an executive session pursuant to section 105(1)(d), it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

Under item 6, the Executive Director described the reasons "why some physicians did not return their reappointment applications". On the basis of the minutes, it appears that the discussion did not focus upon any particular physicians, but rather on the reasons for their inability to fulfill the requirement. If that was so, I do not believe that the issue could properly have been discussed in the executive session.

Executive Session of December, 19, 1988

Under item 4, a report was given regarding an "executive briefing" concerning a section of regulations of the New York State Health Department. In my view, there was no basis for that discussion to be held in private.

Item 5 involved the placement of residency programs on probationary status, and an appeal of a decision placing the "OB/GYN residency program on probationary status". Assuming that the commentary merely informed the Board of the appeal and did not pertain to "litigation strategy", a subject discussed earlier, I do not believe that the topic qualified for consideration in an executive session.

Item 6 concerned a presentation by two attorneys regarding the Hospital's compliance with a stipulation relative to the "reappointment and credentiating process", as well as the findings of an audit and plans for corrective action. Again, assuming that the discussion did not involve "litigation strategy" relating to an ongoing lawsuit, it does not appear that any basis for entry into an executive session could have been asserted.

A second item 6, which appears to have been erroneously numbered, pertained to the approval of a draft of proposed "Hospital and Governing Body Bylaws". In my view, that issue should clearly have been discussed in public.

Executive Session of November 21, 1988

Part B of item 3 dealt with approval of minutes of a meeting of the Credential Committee. It does not appear that the minutes could have been considered during an executive session.

Part C involved a discussion of a search committee and the necessary criteria that must be met to serve in a position. If those issues involved criteria applicable to any person who might serve in the position, rather than the qualifications of a "particular person", I believe that the issue should have been considered in public.

Part D refers to a motion to establish a search committee to hire a medical director. Again, if the discussion involved the establishment of a committee, rather than the individuals who might serve on the committee or specific candidates for the position of medical director, the issue, in my view, should have been discussed publicly.

Items 4, 5, and 6 dealt respectively with the distribution of articles concerning the responsibilities of hospital governing bodies, an inspection conducted by the Joint Commission on Accreditation, and a draft of proposed changes to the Hospital and Governing Body Bylaws. None of those topics would, in my opinion, have qualified for consideration in executive session.

Executive Session of October 24, 1988

Item 4 involved an announcement that minutes of the Quality Assurance Committee meeting would be discussed at the next Board meeting. I believe that the announcement should have been made during an open meeting.

Executive Sessions of September 26, August 22 and July 25, 1988

Item 4 in the minutes of executive sessions of each meeting refer to the review and discussion of "case specific Quality Assurance materials". If the discussions related to specific cases, i.e., specific patients, it appears that the executive sessions would have been proper, for they likely would have involved the "medical history" of particular persons. If, however, the discussion involved certain kinds of cases or procedures and did not involve specific patients, it does not appear that the executive sessions were properly held.

Executive Sessions of June 27, May 31 and April 25, 1988

Under item 4 of the June 27 minutes, the Board reviewed and discussed minutes of the Administrative and Medical Quality Assurance Committees. The minutes indicate that: "A description of the case specific and physician specific process relative to tracking issues, which is being implemented, was discussed". If the discussion involved the "process" rather than particular cases involving specific patients, I believe that the matter was improperly discussed in executive session.

Similarly, in the May 31 and April 25 minutes, reference was made to minutes of the same two committees, as well as updates concerning progress on a "Plan of Correction". For the reasons described in the preceding paragraph, it does not appear that the issues could have been discussed in private.

In sum, each of the meetings referenced above included executive sessions of questionable validity. Moreover, many of the issues discussed during the executive sessions should clearly, in my opinion, have been discussed in public.

Lastly, as indicated earlier, I believe that the Board properly held executive sessions to discuss appointments, changes of status and proposed resignations of "particular persons". However, the minutes that you enclosed have been redacted; the names of persons who were appointed, whose status was changed or who resigned have been deleted.

In this regard, section 106(3) of the Open Meetings Law states that minutes shall be available to the public in accordance with the Freedom of Information Law.

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

While sections 87(2)(b) and 89(2)(a) of the Freedom of Information Law permit an agency to delete identifying details when disclosure would constitute "an unwarranted invasion of personal privacy", I do not believe that the deletions of the names were proper. On the contrary, I believe that certain aspects of the Freedom of Information Law, as well as its judicial interpretation, indicate that the names must be disclosed.

Section 87(3)(b) of the Freedom of Information Law requires that each agency maintain a record setting forth the name, public office address, title and salary of every officer and employee of the agency. That record, which is accessible, would include reference to persons appointed and those whose status has changed. Moreover, it has been found by the state's highest court that the names of public employees who were terminated due to budget restrictions must be made available, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy [see Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978)]. From my perspective, the identification of those employees who have resigned would result in a lesser invasion of privacy than in the case involving involuntary terminations. As such, I believe that the names that were deleted from the minutes should have been disclosed pursuant to the Freedom of Information Law.

In an effort to enhance compliance with the Freedom of Information Law and the Open Meetings Law, a copy of this opinion will be forwarded to the Board of Managers. In addition, copies of the Open Meetings Law and an explanatory brochure concerning the Freedom of Information Law and the Open Meetings Law will be sent to the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: C. Partricia Meyers, President, Board of Managers
Board of Managers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5529

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

May 4, 1989

Mr. John E. Benson
84-A-1078
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589

Dear Mr. Benson:

I have received your letter of May 2.

You wrote that on April 11 you made requests for records relating to your conviction from the Cohoes Police Department and the Albany County District Attorney. You added that "each party was advised that if [you] received no answer within 10 days that an Appeal would be taken". Since you apparently received no response, you appealed to the Committee on Open Government under section 89(4)(a) of the Freedom of Information Law.

In this regard, the Committee on Open Government has no authority to determine an appeal or otherwise compel an agency to grant or deny access to records. The provision concerning the right to appeal, which you cited, 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. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Although copies of appeals must be sent to the Committee, appeals should be made to the head or governing body of an agency, or the person designated to determine appeals.

I point out that the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law, indicate that if an agency fails to respond to a request within five business days of the receipt of a request, "such failure shall be deemed a denial of access by the agency" that may be appealed [see 21 NYCRR section 1401.7(c)]. Therefore, if you have not received responses to your requests, I believe that you may appeal pursuant to section 89(4)(a) of the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5580

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

May 8, 1989

Mr. Dannie Martin
85-A-5787
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. Martin:

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

According to your letter, you and a co-defendant were arrested in 1984 on burglary and robbery charges. Following the arrests, your co-defendant made "three different statements involving three totally different individual[s], whom he alleged participated with him in a burglary/robbery of July 17, 1984". Your request for copies of the statements has been denied by the Nassau County Police Department. Specifically, the Commissioner of Police wrote that:

> "The disclosure of such statements interferes with valid law enforcement objectives by revealing confidential information and the names of persons who give such information in confidence, to this agency. Further, such disclosure tends to constitute an unwarranted invasion of personal privacy."

You have requested my opinion concerning the propriety of the denial. In this regard, I offer the following comments.

It is emphasized at the outset that I am unfamiliar with the records in question. Nevertheless, it appears that the denial was proper.

Section 87(2)(e) of the Freedom of Information Law permits an agency to withhold records that:

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

I would conjecture that the basis for denial within the provision quoted above is section 87(2)(e)(iii). If indeed the statements would identify confidential sources if disclosed, or if the statements consist of "confidential information relating to a criminal investigation", section 87(2)(e)(iii) would apparently constitute a valid basis for denial.

The other provision upon which the County relied, section 87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute an "unwarranted invasion of personal privacy". Assuming that the individuals named in the statements were not convicted, I believe that disclosure of the identities would result in an unwarranted invasion of personal privacy. If that is so, it appears that the denial was likely appropriate.

If you have additional or contrary information regarding the matter, my opinion might be different. However, if my assumptions are accurate, the denial appears to have been justified.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Samuel J. Rozzi, Commissioner of Polie

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5581

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

May 9, 1989

Mr. Richard B. Lyon
82-C-626
Clinton Correctional Facility
Box 367A (Annex)
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. Lyon:

I have received your letter of April 24, as well as the materials attached to it.

According to your letter, you are a "poor person" and have been repeatedly been denied access to records maintained by a court, a police department and an office of a district attorney. As such, you have requested assistance in obtaining those records.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which is applicable to agency records, and section 86(3) of the Law defines the term "agency" to include:

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

In turn, section 86(1) defines "judiciary" to mean:

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts or court records. However, it is applicable to records of a police department or the office of a district attorney, both of which are "agencies".

Second, although the Freedom of Information Law is inapplicable to the courts, other provisions of law (see e.g., Judiciary Law, section 255) often grant rights of access to court records. A request for any such records should be directed to the clerk of the appropriate court, including sufficient detail to permit the location of the records.

Third, to the extent that records are available under the Freedom of Information Law, agencies may charge up to twenty-five cents per photocopy, unless a different fee may be assessed under a statute other than the Freedom of Information Law [see section 87(1)(b)(iii)]. The Freedom of Information Law does not require that fees be reduced or waived due to one's status as indigent.

Fourth, 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. Since I am unfamiliar with the records in which you are interested, I could not conjecture as to the extent to which they should be disclosed or withheld. Nevertheless, several grounds for denial may be relevant. For instance, section 87(2)(b) permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". To the extent that the records identify others, that provision may be relevant. Section 87(2)(e) enables an agency to withhold records "compiled for law enforcement purposes" under circumstances specified in that provision. Section 87(2)(f) permits the withholding of records when disclosure would "endanger the life or safety of any person". Section 87(2)(g) deals with the authority to withhold "inter-agency or intra-agency materials". In short, the nature and content of records and the effects of their disclosure would determine rights of access to the records in which you are interested.

Lastly, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, each agency should have designated a "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and requests should be directed to that person.

Enclosed is an explanatory brochure that describes the Freedom of Information Law in detail that may be useful to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5582

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

May 9, 1989

Mr. Samuel Johnson
72-A-1165
Clinton Correctional Facility
Box B
Dannemora, NY 12929

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

Dear Mr. Johnson:

I have received your letter of April 25 in which you requested assistance in obtaining the trial court minutes of a proceeding conducted in 1972. You indicated that you have unsuccessfully attempted to obtain the records from 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. That statute is applicable to agency records, and section 86(3) defines the term "agency" to include:

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

In turn, section 86(1) defines "judiciary" to mean:

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

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

Second, although the Freedom of Information Law is inapplicable, other provisions of law often grant rights of access to court records (see e.g., Judiciary Law, section 255). As such, it is suggested that a request be directed to the clerk of the court in which the proceeding was conducted. Any such request should contain sufficient detail (names, dates, docket or indictment numbers, etc.) to enable court officials to locate the records. In addition, it might also be worthwhile to confer with an attorney.

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-5583

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

May 9, 1989

Mr. Neal Eugene Wiesner
87-T-0119
Clinton Correctional Facility
Box 367A
Dannemora, NY 12929

Dear Mr. Wiesner:

I have received a letter of April 24 from your father, Mr. Marcus Wiesner, as well as materials attached to it.

According to his letter, you have had difficulty in attempting to obtain records from the New York City Police Department. Among the items of correspondence enclosed is a request, which identified the proceeding in which you were involved, for "a detailed list of any and all records maintained by [the Department] or any branch of the New York city Police Department under [your] name, the above-cited case or NYSID#". The request was made pursuant to section 87(3)(c) of the Freedom of Information Law. As yet, the Department has apparently not produced the records sought.

In this regard, I offer the following comments.

First, it appears that the request may have based upon a misunderstanding of the Freedom of Information Law. The provision cited in your letter, section 87(3)(c), states that each agency shall maintain:

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

Based on the foregoing, a "subject matter list" must refer to the categories of records maintained by an agency. There is no requirement that such a list be prepared with respect to records regarding a particular person or incident. Further, section

89(3) of the Freedom of Information Law states that, unless specific direction is provided to the contrary, an agency is not required to create a record in response to a request. Therefore, if the Department has no list of documents that identify or pertain to you, it would not be obliged to prepare such a list.

Second, I point out that a request need not specify or identify each and every record in which an applicant may be interested. Section 89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. As such, a request should contain sufficient detail, i.e., names, dates, identification numbers, descriptions of events, etc., to enable agency officials to locate the records sought. It is suggested, therefore, that a new request be made that "reasonably describe" the records.

Lastly, 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. Since many of the grounds for denial are based upon the effects of disclosure, it is likely that specific facts and contents of records would determine the extent to which they must be disclosed or may be withheld.

Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law more fully.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Marcus Wiesner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5584

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

May 9, 1989

Mr. Benjamin Zwirn
[redacted]

The staff of the Committee 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. Zwirn:

I have received your letter of April 25 in which you requested an advisory opinion concerning a request made under the Freedom of Information Law.

You referred in your letter to an appeal that was denied in part by Mr. Owen B. Walsh, Chief Deputy County Attorney and Records Appeals Officer. As required by section 89(4)(a) of the Freedom of Information Law, Mr. Walsh sent copies of your appeal and his determination to the Committee.

According to your appeal, you requested the "complete 1988 car telephone records for the Nassau County Executive". Although statements and bills were disclosed, the telephone numbers called were deleted. In the denial, Mr. Walsh wrote that:

> "Your letter reflects that the telephone numbers were sought in order that you might assure that the calls were 'County related'. However, mere disclosure of the telephone numbers, could not accomplish your stated purpose. Disclosure of these numbers would require that number be called to verify the substance and nature of the call and such disclosure would invite undue intrusion, harassment and an invasion of the privacy of the person called."

As such, Mr. Walsh indicated that disclosure of the phone numbers appearing in the records sought would constitute "an unwarranted invasion of personal privacy". He wrote that:

> "This is so since a number of the telephone calls in question were, or may have been, made to staff or other County employees and disclosure of their telephone numbers would reveal, by use of a Cole's Directory, the name and home address of those employees in violation of subdivision 7 of section 89 of said law. In addition, members of the public who have contacted the County Executive on a confidential basis warrant the protection of their privacy and anonymity.
>
> "The Commissioner is not required to analyze each and every call made to the parties contacted by the County Executive during the course of his duties in order to ascertain whether the parties contacted may have been public employees or may have been recipients of public assistance (whose identities are confidential pursuant to law), or may have been informants in a variety of enforcement proceedings who might be endangered by disclosure of their telephone numbers, or may have been citizens who, with a reasonable expectation of privacy, would not want to be identified publicly and be the subject of inquiries into the nature or content of any personal telephone conversations had with the County Executive. In this connection are such calls regarding inquiries from individuals with unlisted telephone numbers; calls regarding Family Court matters, such as those involving domestic violence; calls concerning mental health assistance where, for example, referral service for psychiatric problems is sought; and calls involving Health Department inquiries respecting services available for, among other things, mammography screening. It should also be noted, in the latter connection, that individuals called have no control over a listing of their telephone numbers on a mobile telephone bill, which information would not be available if the call had been from a telephone in a governmental office in Mineola.

> "Whether disclosure of a private document (and a telephone bill is not a government-generated document) is 'warranted' within the meaning of the Public Officers Law turns upon the nature of the requested document and its relationship to the central purpose of the subject law. The purpose is to disclose to public scrutiny official information that sheds light on an official's performance of his duties. The statutory purpose, in my view, is not fostered by disclosure of information about private citizens, (their telephone numbers and ultimately their names and addresses), which is compiled in a mobile telephone bill but reveals little or nothing about the Official's conduct. Finally, disclosure of phone numbers of individuals generally can chill the efforts of government in seeking to secure information from residents who might not otherwise come forward for fear of notoriety, and disclosure could surely chill the efforts at encouraging 'whistle-blowers' to identify claimed wrongdoers."

In this regard, I offer the following comments.

First, although Mr. Walsh characterized a telephone bill as a "private document", I believe that the documents that you seek, once maintained by the County, are "records" subject to rights conferred by the Freedom of Information Law. Section 86(4) of the Freedom of Information 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."

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such 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)] and found that the documents constituted "records". 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).

In addition, the language of another, more recent decision of the Court of Appeals provides a description of the intent and utility of the Freedom of Information Law in a manner that may be pertinent to the documents in question. 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 pro-

> viding 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)].

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 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 my opinion, the phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part. I believe that the quoted phrase 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, telephone bills, with rare exceptions, must, in my view, be disclosed. In general, I believe that bills, vouchers, contracts and similar records involving payments to or expenditures by public employees are accessible. When a public employee uses a telephone and the agency is billed for its use, presumably the calls were made in the performance of one's official duties, particularly when calls are made from a mobile telephone.

Although the standard concerning privacy in the 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 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, 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].

If indeed the County Executive uses a mobile telephone in the course of his official duties, the bills would, in my opinion, be relevant to the performance of his official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to the County Executive, a government official.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended in the past that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call. There are no judicial decisions of which I am aware that pertain specifically to the issue, and it is not clear what the judicial response to the issue might be. From my perspective, however, the numbers called are likely available, for they would not necessarily indicate who in fact was called. Further, an indication of the phone number would not disclose the nature of a conversation. If the numbers were disclosed, nothing in the Freedom of Information Law would require an individual to confirm that a call was made or indicate the nature of a conversation. Therefore, despite privacy considerations, it would be difficult in my opinion to meet the burden of proof when attempting to justify a denial [see Freedom of Information Law, section 89(4)(b)]. It is noted, too, that the Freedom of Information Law has been used to obtain agency phone bills as a means of showing waste and inappropriate use of agency phones (see attached article, New York Post, October, 20, 1988).

As suggested by Mr. Walsh, exceptions to the general rule of disclosure might arise, if, for example, a telephone is used to contact recipients of public assistance, informants in the context of law enforcement, or persons seeking "mammography screening" services. It has been advised in the past that if a government employee contacts those classes of persons as part of the employee's ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance, disclosure of numbers called by a caseworker who phones applicants or recipients of public assistance would identify those who were contacted. In my view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted. Similarly, if an employee routinely contacts persons for the purpose of arranging appointments for mammography screening, the phone numbers could likely be deleted for similar reasons. If a law enforcement official phones informants, disclosure of the numbers might endanger an individual's life or safety, and the numbers might justifiably be deleted pursuant to section 87(2)(f) of the Freedom of Information Law.

I would conjecture that, in the case of the County Executive, phone calls may be made to a great variety of persons in a broad variety of contexts. Unlike the caseworker who routinely phones a class of persons having a particular status (i.e., recipients of public assistance), I would conjecture that the calls made by the County Executive would involve an array of issues and persons who do not fall within any special identifiable class or status. If my assumption is accurate, disclosure of a phone number would not alone signify a personal detail involving the recipient of a call. Further, as indicated previously, disclosure of the number would not necessarily indicate who received the call, nor would it disclose anything about the nature of a conversation.

Mr. Walsh has suggested that disclosure of phone numbers might reveal the names and addresses of public employees "in violation of subdivision 7 of [section] 89" of the Freedom of Information Law. I point out that section 89(7) does not forbid the disclosure of public employees' home addresses; that provision merely states that the Freedom of Information Law does not require disclosure of their home addresses. The bills themselves would not contain or involve disclosure of anyone's home address. Further, other provisions of law may be used to obtain home addresses indirectly or otherwise. For instance, voter registration lists, which include home addresses of registered voters, have long been available to the public pursuant to section 5-604 of the Election Law. Section 87(3)(b) of the Freedom of Information Law requires each agency to maintain a list of its employees by name, public address, title and salary. Nothing would preclude a member of the public from obtaining names of public employees and then using voter registration lists to ascertain the employees' home addresses.

Based on the foregoing, even though it may be possible to ascertain a home addresses through the use of a phone bill, the bill itself would not include home addresses. Moreover, while some calls might be made to person's homes, others are likely made to offices or other places of business, and a review of phone numbers would not specify whether a call is made to a residence or some other location.

In sum, subject to the unusual kinds of exceptions discussed earlier, it appears that the records sought should in my opinion be disclosed 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: Owen B. Walsh, Chief Deputy County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5585

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

May 10, 1989

Mr. Mark J. Phillips
[redacted]

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

Dear Mr. Phillips:

I have received your recent note in which you requested an advisory opinion, and which appears on a response to a request for records made by Mr. Louis J. Patack, Assistant Counsel at the Office of Mental Health.

According to the response, you made a request under the Freedom of Information Law for records concerning "completed investigations into confirmed cases of child abuse" at the Western New York Children's Psychiatric Center, including "investigation summaries and transcripts of interviews with children, suspects and possible witnesses". Mr. Patack denied the request based on section 87(2)(g) of the Freedom of Information Law and section 6527(3) of the Education Law.

Attached to your letter is a copy of an appeal involving Mr. Patack's denial of access to "investigative summaries" and "final reports/findings regarding confirmed cases of child abuse at the facility during January 1, 1986 to present, with names and identifying details of clients deleted".

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, perhaps most significant under the circumstances is section 87(2)(a), which enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute". As Mr. Patack suggested, the statute that appears to exempt particular records from disclosure is section 6527 of the Education Law. Subdivision (3) of that statute states in relevant part that:

> "No individual who serves as a member of...a committee having the responsibility of the investigation of an incident reported pursuant to section 29.29 of the mental hygiene law or the evaluation and improvement of the quality of care rendered in a hospital as defined in article twenty-eight of the public health law or a hospital as defined in subdivision ten of section 1.03 of mental hygiene law...shall be liable in damages to any person for any action taken or recommendations made by him, within the scope of his function in such capacity provided that (a) such individual has taken action or made recommendations within the scope of his function and without malice, and (b) in the reasonable belief that after reasonable investigation that the act or recommendation was warranted, based upon the facts disclosed."

The same provision states that:

> "Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function...nor any report required by the department of health pursuant to section twenty-eight hundred five-l of the public health law described herein, including the investigation of an incident reported pursuant to section 29.29 of the mental hygiene law, shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law."

Section 29.29 of the Mental Hygiene Law describes "incident reporting procedures" that must be followed by the commissioners of the Offices of Mental Health and Mental Retardation and Developmental Disabilities.

You have contended that "The courts have ruled that what records can or cannot be released under CPLR Article 31 have no bearing upon what records can or cannot be released under the FOI or Public Officers Law". While I agree with your statement, I believe that it is unrelated to the issue. The decisions that you cited indicate that a litigant who seeks records under the Freedom of Information Law has the same rights under that statute as any member of the public, and that one's status as a litigant neither enhances nor restricts rights conferred by the Freedom of Information Law. Section 6527(3), on the other hand, states that certain records are not subject to disclosure under Article 31 of the Civil Practice Law and Rules. In my opinion, which is based upon a decision rendered by the Court of Appeals, section 6527(3) is a statute that exempts records from disclosure. In Matter of John P. v. Whalen, the Court construed a section 230 of the Public Health Law, in conjunction with the Freedom of Information Law. That provision contains language similar to that found in section 6527(3) of the Education Law. In its discussion, the Court found that:

> "section 87 (subd 2, par [a]) exempts records that 'are specifically exempted from disclosure by state***statute.' It is suggested that because subdivision 9 of section 230 of the Public Health Law exempts proceedings and records of a committee on professional conduct 'from disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided,' it does not exempt those proceedings and records from disclosure under the Freedom of Information Law. The rule of construction that specific mention of one thing impliedly excludes others is not, however, anything more than an aid to construction and 'must not be utilized to defeat the purpose of an enactment or to override the manifest legislative intent' (Erie County v Whalen, 57 AD2d 281, 284, affd on App Div opn 44 NY2d 817; accord Matter of Auburn Police Local 195 v Helsby, 62 AD2d 12, 16, affd on reasoning of App Div 46 NY2d 1034; McKinney's Cons Laws of NY, Book 1, Statutes, section 240, p 414). As is made clear by both the words 'except as hereinafter provided' in subdivision 9

> of section 230 of the Public Health Law and by the established rules of construction, all parts of section 230 are to be read together and interpreted with reference to the scheme of the entire section (People v. Mobil Oil Corp., 48 NY 2d 192, 199; McKinney's Statutes, op.cit., sections 97, 98, 130). So construed it is clear that the reference in CPLR article 31 (subd 9) was not a tacit exception of Freedom of Information Law requests from the confidentiality provisions of section 230 of the Public Health Law; that is, that section 230 is a State statute exempting information from disclosure within the meaning of section 87 (subd 2, par [a] of the Public Officers Law" [54 NY 2d 89, 96-97 (1981)].

Based upon the foregoing, it appears that the denial was justified. I point out, too, that when a class of records is specifically exempted from disclosure by statute, an agency is not required to delete portions of the records, to protect privacy, for example; rather, the records are considered to be exempt from disclosure in their entirety [see Short v. Board of Managers of Nassau County Medical Center, 57 NY 2d 399 (1982)].

I hope that the foregoing serves to clarify the matter. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Louis J. Patack, Assistant Counsel
Richard C. Surles, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1617
FOIL-AO-5586

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

May 12, 1989

Mrs. Albert F. Kuehn
[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 Mrs. Kuehn:

I have received your recent note and the materials attached to it. You have raised a series of issues concerning the conduct of meetings held by the Fredonia Central School District Board of Education.

First, you enclosed a copy of the Board's policy regarding its "workshop meetings". The policy statement indicates that "public notice and conduct" of those meetings "shall be in compliance with New York State Law" and that:

> "The primary purpose of the Workshop Meeting shall be to discuss philosophy, policy, goals, reports and long range plans of the Board of Education. The Board will also review all significant business matters scheduled for vote at its next regular monthly meeting."

However, you wrote that "this is not done openly".

In this regard, based upon a decision rendered by the Court of Appeals, the state's highest court, there is no distinction between a "formal" meeting and "workshop meeting". In brief, the court held that the term "meeting" includes any gathering of a quorum of a public body held for the purpose of conducting public business, even if there is no 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)].

It is noted that the Court dealt specifically with so-called "work sessions" held solely for purposes of discussion and found that those gatherings constitute "meetings" subject to the Open Meetings Law in all respects.

Second, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings must be conducted open to the public, except to the extent that the subject matter falls within the scope of one or more grounds for entry into executive session appearing in paragraphs (a) through (h) of section 105(1) of the Open Meetings Law. In my view, discussions of "philosophy, policy, goals...long range plans" and similar matters must be discussed in public, for none of the grounds for entry into executive session could justifiably be asserted.

Third, several aspects of your comments involve minutes of meetings. Here I point out that the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings 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 foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting. Further, although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. In addition, even though some public bodies approve their minutes, section 106(3) specifies that minutes must be prepared and made available within two weeks. In cases in which minutes have not been approved within two weeks, to comply with the Law, it has been suggested that such minutes be made available after being marked as "unapproved" or "draft", for example. By so doing, the public can generally learn of what transpired at a meeting. Concurrently, the public is effectively informed that the minutes are subject to change.

With respect to executive sessions, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law section 105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to section 106(2). It is noted that under section 106(3) of the Open Meetings Law minutes of both open meetings and executive sessions are available in accordance with the Freedom of Information Law. Nevertheless, various interpretations of the Education Law, section 1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive (see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County 7AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157 aff'd 58 NY 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session. Further, if no action is taken in an executive session, minutes of the executive session need not be prepared.

It is also noted that, since its enactment in 1974, the Freedom of Information Law has contained an "open meetings" requirement with regard to voting by members of public bodies. 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."

Consequently, when a school board takes action, a record must be prepared that indicates the manner in which each member cast his or her vote. That record ordinarily should, in my opinion, be included as part of the minutes.

Lastly, the Open Meetings Law deals with the extent to which meetings of public bodies must be conducted in public and to which the public may be excluded from those meetings. Nothing in that statute pertains to the length of time that items must be discussed. Further, although legislation has been recommended that would generally require that records to be discussed at meetings be made available prior to or at those meetings, the Open Meetings Law does not contain any requirement to that effect. However, as the materials indicate, the records in question may be requested under the Freedom of Information Law.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be sent to the Board of Education.

I hope that the foregoing serves to clarify the Law. 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-5587

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

May 15, 1989

Ms. Susan R. Rosenberg
Deputy Counsel to the Mayor
City of New York
Office of the Mayor
New York, NY 10007

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

Dear Ms. Rosenberg:

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

You indicated that the Office of the Mayor recently received a request for "time records" of a former employee of the Mayor's office, and that the request covers a seven year period commencing in 1982. In addition to your letter, you enclosed samples of forms used by managerial employees that specify the time charged under sick leave and annual leave, for example, as well as the amount of leave time accrued by those employees.

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 grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, although two of the grounds for denial relate to the kinds of records at issue, based upon the language of the Law and its judicial interpretation, I believe that they are largely accesssible under the Law.

Of 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Attendance and leave records could be characterized as "intra-agency materials". However, it appears that the forms that you attached would consist of "statistical or factual" information accessible under section 87(2)(g)(i).

Also of relevance 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. Nevertheless, in a decision that reached the Court of Appeals that dealt specifically with attendance records requested by a newspaper reporter, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the right of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for

> economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985); aff'd 67 NY 2d 562 (1986)].

Further, in affirming the decision of the Appellate Division, the Court of Appeals held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 79). 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 government officers (Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [citing Public Officers Law section 84]).
>
> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (see, Public Officers Law section 87 [2]; Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY2d 75, 79-80, supra). This presumption specifically extends to intraagency and interagency materials, such as the report sought in this proceeding, comprised of

> 'statistical or factual tabulations or data' (see, Public Officers Law section 87 [2] [g] [i]). Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 80, supra; Matter of Fink v Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566).

On the basis of the decision rendered in Capital Newspapers, supra, and the nature of the forms that you enclosed, with one exception, it is my view that the records should be made available. That exception pertains to the portion of the form indicating an employee's social security number, which in my opinion could be deleted on the ground that disclosure of the social security number would result in an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5588

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

May 16, 1989

Mr. Sylvester Williams
85-A-2244
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, NY 12733

Dear Mr. Williams:

I have received your letter of May 11, which reached this office on May 15. You have requested "data" from this office concerning "electronic viewing machines" used at facilities of 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 maintain records generally, nor it is empowered to compel an agency to grant or deny access to records. In short, I cannot provide the "data" requested, for this office does not maintain the information sought. Nevertheless, I offer the following comments.

First, a request for records should be directed to the agency that maintains the records. According to the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law, a request for records kept at a facility may be directed to the facility superintendent. When records are kept at the Department's Albany offices, a request may be made to the Deputy Commissioner for Administration.

Second, having reviewed your request, you have sought information by asking a variety of questions. Here I point out that the Freedom of Information Law pertains to existing records. That statute does not require agencies to answer questions. 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. Rather than seeking information by raising questions, it is suggested that you request existing records.

I hope that the foregoing serves to clarify the role of this office and the use of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5589

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

May 16, 1989

Mr. Daniel Jenkins
[redacted]

The staff of the Committee 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. Jenkins:

I have received your letter of April 30, as well as the materials attached to it.

You have requested an advisory opinion concerning a denial of access to a record by the Development Authority of North Country. According to the materials, a request was made on March 31 for a record reflective of "Formal guidance from the Army received by the Development Authority of the North Country on May 16, 1988, which specified that the Development Authority will provide all the water to Fort Drum". As I understand the matter, the issue involves providing water to Fort Drum and whether an existing pipeline should be extended to the Fort. The request was initially denied on the grounds that:

> "1) The record is exempt under federal law as predecisional and a part of the deliberative process, and pursuant to F.A.R. 15.411 must be safeguarded from unauthorized disclosure.
>
> 2) The disclosure will impair imminent contract award.
>
> 3) The record is an intra-agency material which is not statistical or factual tabulation or data, instructions to staff affecting the public, a final agency policy or determination or an external audit..."

The denial was sustained following your appeal by the Chairman of the Authority's Board, who wrote that: "Rather than a record kept by the Authority, the document was and remains in the private negotiating file of the Authority negotiations for the Army water service".

In this regard, I offer the following comments.

First, even though the document may not be maintained by the Authority in its files but rather by the Authority's negotiators, I believe that it is subject to the Freedom of Information Law. That statute is applicable to agency records, and section 86(4) 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."

Several decisions rendered by the Court of Appeals, the state's highest court, indicate that the definition quoted above is as broad as its language suggests [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Capital Newspapers v. Whalen, 69 NY 2d 246 (1987)]. Assuming that the document in question consists of "information kept, held...[or] produced... for" the Authority, I believe that is constitutes a "record" that falls within the scope of the Freedom of Information Law.

Second, among the grounds for denial cited in the correspondence, only one is, in my view, clearly relevant.

The initial ground for denial involved "Federal Acquisition Regulations". I believe that those regulations are applicable to federal agencies' purchasing procedures. Based upon conversations with various individuals, those regulations apparently pertain to records maintained by federal agencies, such as the Department of Defense or the Department of the Army. I do not believe that those regulations apply to entities other than federal agencies, or that the regulations serve as a basis for withholding that can be relied upon by the Authority.

The final ground for denial is based on section 87(2)(c) of the Freedom of Information Law, which permits an agency to withhold records when disclosure would "impair present or imminent contract awards...". It is unclear from the materials and conversations held with various persons whether entry into a contractual agreement is "present or imminent". However, the Authority's Report of Operations and Accomplishments indicates that "contract negotiations are in progress". The report also states that "it is anticipated that construction will begin during the second quarter of 1989". It is now the second quarter of 1989, and, to the best of my knowledge, no contract has been signed and construction has not yet begun. It is also unclear what the effect of disclosure of the record in question might be. If indeed contract negotiations are ongoing, and disclosure would "impair" the negotiation process, it appears that a denial would be proper.

In short, although two of the grounds for denial are, in my view, unjustifiable, the remaining assertion, which is based upon section 87(2)(c) of the Freedom of Information Law, might be appropriate, depending upon the effects of disclosure. Since I do not have sufficient knowledge of the facts to gauge the effects of disclosure, I cannot advise with certainty as to the propriety of the denial.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James R. Kanik
Les Deming

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5590

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

May 16, 1989

Mr. Edward Phelps
[redacted]

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

Dear Mr. Phelps:

I have received your letter of May 9 in which you requested materials concerning the Freedom of Information Law. Specifically, you expressed interest in issues such as "fishing expeditions", school district budgets, and salaries of teachers and administrators.

With respect to fishing expeditions, the Freedom of Information Law does not impose restrictions upon the nature or volume of records that may be requested, nor does it distinguish among applicants based upon their status, interest or their need to obtain records. Enclosed are copies of two decisions rendered by the Court of Appeals, the State's highest court, involving what might be characterized as "fishing expeditions". One involved a request made under the Freedom of Information Law by a person involved in litigation against an agency. Although the agency contended that, as a litigant, the applicant could not use the Freedom of Information Law, the Court held that anyone may seek records under that statute, irrespective of the applicant's interest [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. The other involved a request by an inmate for all records kept by the Department of Correctional Services that could be retrieved by means of his name or identification number [see Konigsberg v. Coughlin, 68 NY 2d 245 (1976)]. Although the Department argued that the request was too broad, since the agency could locate the records (some 2,300 pages) based on the terms of the request, the Court found that the request was proper, for it "reasonably described" the records sought.

With regard to salaries, one of the few instances in the Freedom of Information Law that requires the preparation of a record involves payroll information. Specifically, section 87(3) requires that:

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

As such, it is clear that a record identifying public employees and their salaries must be maintained and made available by agencies.

Lastly, enclosed is a copy of a recent advisory opinion concerning records prepared in the budget process. As a general matter, records reflective of appropriations or expenditures of public monies are, in my view, available.

Also enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee on Open Government that govern the procedural aspects of the Law, and "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:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5591

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

May 18, 1989

Mr. Nestor Castano
82-A-2901
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. Castano:

I have received your letter of April 30, which was addressed to Ms. Debra Kahn. Please note that Ms. Kahn is no longer with this office.

You have requested an advisory opinion concerning a request for medical records maintained by a correctional facility and the fee assessed by the facility. As I understand the situation, you requested the records under the Freedom of Information Law, but the response was made pursuant to a different Law.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by the Department of Correctional Services and its facilities. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appear in section 87(2)(a) through (i) of the Law.

With respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personal could be characterized as "intra-agency materials" that

fall within the scope of section 87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, on January 1, 1987, a new statute, section 18 of the Public Health Law, became effective. In brief, that statute generally grants rights of access to medical records to the subjects of the records.

With respect to fees, unless another statute permits the assessment of a different fee, records accessible under the Freedom of Information Law may be inspected free of charge, and the agency cannot impose a fee involving personnel costs, for instance. When copies are requested, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing records that cannot be photocopied, unless otherwise provided by a statute other than the Freedom of Information Law. Section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of inability to pay."

Assuming that the Department may assess a fee as a provider pursuant to the Public Health Law, it appears that the fee in question was likely appropriate. It is noted that I discussed the matter with a representative of the State Health Department, who suggested that, in his view, a fee regarding access to medical records could be based upon section 18 of the Public Health Law.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

> Access to Patient Information Coordinator
> New York Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5592

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

May 18, 1989

Mr. Jose A. Blanco
88-A-4460
Washington Correctional Facility
Lock 11 Road
P.O. Box 180
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. Blanco:

I have received your letter of May 2 in which you requested advice concerning the use of the Freedom of Information Law.

Specifically, you indicated that you would like to know the procedure for requesting certain materials within your correctional file, including personal history data and records reflective of your "correctional supervision history".

In this regard, I offer the following comments.

First, when making a request, 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 and identify the records.

Second, the regulations promulgated by the Department of Correctional Services indicate that a request for records maintained at a correctional facility may be made to the facility superintendent.

Third, enclosed are copies of the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law and an explanatory pamphlet that describes the Freedom of Information Law in detail. I point out that section 5.21(c) of the Department's regulations specifies that: "Information from the personal history portion of an inmate record shall 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,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5593

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

May 18, 1989

Mr. Joseph J. Sheridan
[redacted]

Dear Mr. Sheridan:

Your "hotline" call to the Department of State has been forwarded to the Committee on Open Government, a unit of the Department that oversees the New York Freedom of Information Law. I tried to reach you by phone without success.

The message indicates that you want information concerning the procedure for requesting records from the U.S. government under the federal Freedom of Information Act. Since this office deals with the state law concerning access to records rather than the federal Act, I have no specific information on the subject.

However, to the extent that I am familiar with the Act, I believe that a request should be made to the "freedom of information officer" at the agency that you believe maintains the records in which you are interested. The Act requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate the records. I point out, too, that there are provisions that enable agencies to waive the fees for processing and duplicating the records. Therefore, you should indicate your purpose for making the request.

It is suggested that you contacted the "Federal Information Center", which can be reached in New York City at 264-4464. It is likely that the staff there can inform you of exactly who to call or write at a particular agency for the purpose of making a request or inquiring as to a fee waiver. In addition, the Federal Information Center can take your name and address for the purpose of sending a consumer information catalogue, which includes reference to a guide to the Freedom of Information Act that can be purchased for fifty cents.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5594

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

May 19, 1989

Mr. John M. Spellman
Village Attorney
The Incorporated Village of Mineola
171 Jericho Turnpike
Mineola, New York 11501

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

Dear Mr. Spellman:

I have received your letter of May 1 in which you requested an advisory opinion concerning the Freedom of Information Law.

You asked whether "the identity of complainants in zoning litigation or enforcement activities of the Incorporated Village of Mineola must be disclosed under the Freedom of Information Law". You also questioned "whether the source of a complaint is required during enforcement activities, during litigation, subsequent to judgement or subsequent to the closing of an investigation without litigation". Finally, you requested my views concerning "whether the identity of a confidential course relative to a zoning violation must be disclosed when the source requests confidentiality".

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.

From my perspective, the only basis for denial would be section 87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

With respect to complaints made 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. 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."

In my view, 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. If the deletion of identifying details would not serve to protect the privacy of the complainant, the entire complaint could likely be withheld.

It is noted that section 87(2)(e) permits an agency to withhold records "compiled for law enforcement purposes" under certain circumstances. In my opinion, a complaint made by a member of the public concerning zoning matters could not likely be characterized as a record compiled for law enforcement purposes. Further, in a decision rendered under the Freedom of Information Law as originally enacted, it was held that the predecessor of section 87(2)(e) could not be asserted with respect to records prepared by a building inspector relative to an investigation of code violations [see Young v. Town of Huntington, 388 NYS 2d 978 (1976)]. The same contention might be made with regard to the kind of situation that you described. Again, however, I believe that the identity of a complainant or source could justifiably be denied pursuant to section 87(2)(b).

Second, I do not believe that a litigant would enjoy rights under the Freedom of Information Law in excess of those conferred upon the public generally. As stated by the Court of Appeals: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential

litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is a member of the public, and neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v Kimball, 50 NY2d 575, 581.) 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.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With the goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v Crowell-Collier Pub. Co., 21 NY2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action.'" [see Farbman, supra, at 80).

Based upon the foregoing, the pendency of litigation would not affect either the rights of the public or a litigant under the Freedom of Information Law with respect to the records in question. This is not to suggest that a litigant might not, under appropriate circumstances, obtain such a record via discovery. However, the capacity of a litigant to obtain records through discovery is separate from rights conferred upon the

public under the Freedom of Information Law. Further, if records identifying complainants are used in a judicial proceeding and become part of court records, those records may become available under statutes other than the Freedom of Information Law (see e.g., Judiciary Law, section 255).

Lastly, in my opinion, a request by a complainant or source that his or her identity be kept confidential is irrelevant in terms of rights of access conferred by the Freedom of Information law. In a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference concerning the agency's disclosure of the incident to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold the record based upon the "preference" of the person who reported an offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

> "There is no question that the 'releasable copies' of reports of offenses prepared and maintained by the Genesee County Sheriff's office on the forms currently in use are governmental records under the provisions of the Freedom of Information Law (Public Officers Law art 6) subject, however, to the provisions establishing exemptions (see, Public Officers Law section 87[2]). We reject the contrary contention of respondents and declare that disclosure of a 'releasable copy' of an offense report may not be denied, as a matter of law, pursuant to Public Officers Law section 87(2)(b) as constituting an 'unwarranted invasion of personal privacy' solely because the person reporting the offense initials a box on the form indicating his preference that 'the incident not be released to the media, except for police investigative purposes or following arrest'."

Moreover, although the issue did not involve law enforcement, the Court of Appeals has held that a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557, 567 (1984)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5595

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

May 19, 1989

Mr. Harold Steinberg
[redacted]

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

Dear Mr. Steinberg:

I have received your letter of April 28, as well as the materials attached to it.

According to your letter, you requested and obtained from the Suffolk County Sheriff's Office a copy of the Department's subject matter list. You asked that I review the list, how you can obtain "further FOIL information from [your] department", and whether it is possible that a person other than the undersheriff can be designated as records access officer.

In this regard, I offer the following comments.

First, with respect to the subject matter list, section 87(3)(c) of the Freedom of Information Law requires that each agency shall maintain:

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

In my view, an agency's subject matter list is not required to identify each and every record of an agency. However, it is required to include reference, by category to all records maintained by agency, whether or not the records are available to the public. Further, in my opinion, the purpose of the subject matter list is to enable the public to know of the categories of records maintained by an agency. With that kind of knowledge, requests for records can be made by means of a category of records appearing in the list. As stated in regulations promul-

gated by the Committee on Open Government, which have the force of law: "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [see attached regulations, 21 NYCRR Section 1401.6(b)].

Having reviewed the subject matter list attached to your letter, it appears to be of sufficient detail. However, it is divided into sections that characterize the materials referenced as "Accessible Records" and "Inaccessible Records". As indicated previously, I believe that a subject matter list is intended to refer, by category, to the records maintained by agencies, whether or not the records are "accessible". Moreover, for a variety of reasons, it is often impossible to indicate whether a category of records will always be either accessible or deniable, in whole or in part.

The Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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, many of the grounds for denial are written in terms of the effects of disclosure. For example, section 87(2)(e) permits an agency to withhold records "compiled for law enforcement purposes" under circumstances specified in the Law. While some aspects of "arrest reports", one of the categories of "inaccessible records", might justifiably be withheld for a time, i.e., when an investigation is ongoing, those reports likely are available, at least in part, at some point. Another category of "inaccessible records" according to the list is "personnel information". Some of that information, such as home addresses and social security numbers of employees, could be withheld as "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)]. However, other aspects of "personnel information", including records indicating salary, overtime, attendance and the like must be made available. "Correspondence" is also listed as "inaccessible". Some correspondence might justifiably be withheld, depending upon its contents; other correspondence might, however, be available under the Law.

In short, I believe that the lists attached to your letter are misleading and in some instances are inaccurate, and I do not believe that they should identify categories of records as "accessible" or "inaccessible".

Second, to request records, a written request should be made to the agency's records access officer. It is noted that section 89(3) of the Freedom of Information Law requires that a request must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate the records.

Lastly, according to the Committee's regulations, the head of the agency, the Sheriff, has the authority to designate a records access officer. The records access officer has the duty of coordinating an agency's response to requests (see section 1401.2). As such, I believe that the Sheriff has the authority to designate the Undersheriff, or any other member of staff, as 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information Act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with section 87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work should be duplicated.

In order to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the Town Supervisor and the Town Clerk.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Donald Walzer, Supervisor
Ann Wolfe, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5596

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

May 19, 1989

Mr. Dimitri Jean Baptiste
88-T-0189 loc A-1-4
Franklin Correctional Facility
P.O. Box 10
Malone, New York 12953

Dear Mr. Baptiste:

I have received your letter of May 7 in which you asked whether this office can help you to obtain records from the Nassau County Police Department.

You wrote that you requested "all information pertaining to [you]" from the Department, which acknowledged the receipt of your request and indicated that you "must wait approximately three weeks for a determination". You also wrote that you are indigent and "can not afford to pay for the copies".

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 is not empowered to obtain records on behalf of an applicant or compel an agency to grant or deny access to records.

Second, in view of the breadth of you request, 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 the records. It is unclear on the basis of your letter whether your request reasonably described the records.

Third, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural implementation 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 busi-

ness days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five 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, sections 1401.5(d) and 1401.7(c)].

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, the Freedom of Information Law generally permits an agency to charge up to twenty-five cents per photocopy. Further, the Law contains no requirement that fees be waived, due to indigency, for example.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5599

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

May 19, 1989

Mr. Anibal R. Garcia
87-A-8460 D-1-22
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051

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

Dear Mr. Garcia:

I have received your letter of May 8 in which you requested assistance concerning the use of the Freedom of Information Law.

According to your letter, you have directed requests twice to the Dobbs Ferry Police Department pursuant to "both State and Federal" laws. In neither instance have you received a response.

In this regard, I offer the following comments.

First, since you referred to both state and federal access laws, I point out that the New York Freedom of Information Law is applicable to records maintained by entities of state and local government in New York, including the Village of Dobbs Ferry. The federal Freedom of Information Act is applicable only to records maintained by federal agencies.

Second, a request should generally be directed to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests for records (see 21 NYCRR section 1401.2). The records access officer in most villages is the clerk, because the clerk is the legal custodian of records. As such, it is suggested that you resubmit you request to the clerk, indicating that you made two previous requests to the Police Department, and asking that the request be forwarded to the proper official if the clerk is not authorized to respond to the request. The address for the Village of Dobbs Ferry is 112 Main Street, Dobbs Ferry, NY 10522.

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural implementation 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, sections 1401.5(d) and 1401.7(c)].

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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5598

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

May 22, 1989

Mr. Alonzo Hardy
85-A-3997
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. Hardy:

I have received your letter of May 7 addressed to Ms. Debra Kahn, as well as the correspondence attached to it. Please note that Ms. Kahn is no long with this office.

Your inquiry concerns a request for what was characterized as an "inmate movement log" or a "block log book", insofar as those records pertain to you concerning a certain period, from the Westchester County Jail. In brief, since your request was not answered in a timely manner by the County Commissioner of Correction, you appealed on that basis to the County Attorney. Prior to the receipt of your appeal, the Commissioner wrote that the Department of Correction "does not maintain an inmate movement log". Following the receipt of the Appeal, the County Attorney affirmed the response given by the Commissioner.

You have raised a series of questions concerning the matter and, in this regard, I offer the following comments.

First, it appears, based on the correspondence, that the record sought does not exist. Here I point out that the Freedom of Information Law pertains to existing records, and section 89(3) states that an agency is not required to prepare a record in response to a request. In short, if the information you seek does not exist in the form of a record, the Freedom of Information Law would not, in my view, be applicable.

If such a record exists, and again, it appears that it does not, I believe that those portions pertaining to you would be available to you. 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. I do not believe that any of the grounds for denial could justifiably be asserted to withhold the kind of record that you described should such a record exist.

Lastly, since you raised questions concerning the timeliness of responses, it is noted for future reference 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 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 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, sections 1401.5(d) and 1401.7(c)].

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 the foregoing has served to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Norwood E. Jackson, Commissioner of Correction
Marilyn J. Slaaten, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5599

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

May 22, 1989

Mr. Philip Guinta
88-D-90 B-5-2
Box 367 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. Guinta:

As you are aware, I have received your letter of May 9.

You wrote that you were involved in an automobile accident with your girlfriend, and that you have been unsuccessful in your efforts to obtain medical information pertaining to her "from the drug store and the hospital". The correspondence attached to your letter indicates that your girlfriend was treated by Mercy Hospital in Watertown.

You request advice concerning access to the records. In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law is applicable to agency records, and that section 86(3) of the Law defines the term "agency" to mean:

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

Based upon the foregoing, the Freedom of Information Law generally pertains to records of entities of state and local government. It does not apply to records of a drug store or a private hospital, for example.

Second, when the Freedom of Information Law is applicable, it permits agencies to withhold records when disclosure would result in "an unwarranted invasion of personal privacy" [see sections 87(2)(b) and 89(2)(b)]. Further, section 89(2)(b) states in relevant part that an unwarranted invasion of personal privacy includes:

> "i. disclosure of employment, medical or credit histories of 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..."

Lastly, various provisions of the Public Health Law (see e.g., sections 17 and 18), permit the disclosure of medical records to the subjects of those records or persons authorized by the subjects of the records.

I hope that the foregoing has served to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5600

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

May 22, 1989

Ms. Catherine L. Hunt
Legal Counsel
Information and Privacy
Commissioner/Ontario
80 Bloor Street West
Suite 1700
Toronto, Ontario
M5S 2V1

Dear Ms. Hunt:

I have received your letter of May 10 in which you wrote that you are researching what have become known as "Vaughn index requirements".

In this regard, I offer the following comments.

First, as you are aware, Vaughn v. Rosen [484 F2d 820 (1973)], was rendered under the federal Freedom of Information Act. In brief, that decision required that an index be prepared to provide an analysis of documents withheld by an agency as a means of justifying a denial and ensuring that the burden of proof remains on the agency. However, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, a recent decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by the lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87 (2) (g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87

> (2) (f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 83; Matter of Fink v Lefkowitz, 47 NY2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

The closest that a court has come to requiring the preparation of a Vaughn index involved a decision in which an agency was required to inform the applicant 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."

Second, in terms of procedural requirements in the New York Freedom of Information Law, an initial denial of a request must be made in writing and include the reasons for the denial. Thereafter, a denial may be appealed in conjunction with section 89(4)(a) of the 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."

Based on the foregoing, although a denial following an appeal must "fully explain" the reasons for a further denial, no court yet has imposed a requirement as specific or far-reaching as in Vaughn v. Rosen.

I hope that I have been of some assistance, and I look forward to meeting you in Toronto next month. I hope, too, that you and your colleagues will be armed with an array of questions concerning our experience under the New York Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5601

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

May 23, 1989

Mr. Paul Stephen Beeber
President and General Counsel
NYS Coalition Opposed to Fluoridation, Inc.
P.O. Box 263
Old Bethpage, New York 11804-0263

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

Dear Mr. Beeber:

I have received your letter of May 3, as well as the materials attached to it.

The correspondence indicates that, for several months, you have attempted with minimal success to obtain a variety of information from George Mekenian, Chief of the Sources Division of the New York City Department of Environmental Protection. The information sought relates to the use of fluoridation by New York City for the period of 1965 through the 1987 fiscal year.

Based upon a review of the materials, I offer the following comments.

First, several aspects of your request are phrased as questions or seek figures. For instance, in item 5 of your request, you asked:

> "(a) How many pounds of hydrofluosilicic acid are used daily in New York City (comprising of all the Boroughs)?
>
> (b) If there are variations in the amount used, please state the reason for the variations."

In this regard, I point out that the Freedom of Information Law is a vehicle under which agencies must produce records as required by the Law; however, it does not require agency officials to answer questions. Similarly, it is emphasized that the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, to the extent that your request involves information that has not been prepared in the form of a record or records, the Department would not, in my view, be obliged to compile data or otherwise create new records on your behalf.

Second, section 89(3) of the Law also requires that an applicant "reasonably describe" the records sought. Assuming that existing records falling within the scope of your request can be located, I believe that the request was appropriate.

Third, 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.

To the extent that the information sought exists as records, one of the grounds for denial is, in my opinion, particularly relevant. Nevertheless, that provision, due to its structure, often requires broad disclosure. 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

external audits 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.

It appears that all of the records falling within the scope of your request could be characterized as "intra-agency" materials. However, much if not all of the records would consist of "statistical or factual tabulations or data" accessible under section 87(2)(g)(i) of the Freedom of Information Law.

Lastly, 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 aspects of the Law (see attached 21 NYCRR Park 1401). In turn, section 87(1) requires each agency public to adopt regulations "pursuant to such general rules as may be promulgated by the committee on open government in conformity with the provisions of this article" (the Freedom of Information Law).

Since your request was made months ago, I point out that the Freedom of Information Law and the Committee's regulations provide guidance concerning the procedural requirements 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

Further, the regulations promulgated by Mayor Koch pursuant to the Freedom of Information Law are consistent with those adopted by the Committee on Open Government. The Mayor's regulations, which became effective in 1979, state in part in section 5(d):

> "If because of unusual circumstances, an agency is unable to determine within five days whether to grant, deny or otherwise respond to a request for inspection and copying, the records access officer shall, within such five day period, acknowledge receipt of the request in writing to the requesting party, stating the approximate date, not to exceed ten business days from the date of the acknowledgement, by which a determination with respect to the request will be made. If the agency does not make a determination with respect to the request within ten days from the date of such acknowledgement, the request may be deemed denied and an appeal may be taken to the person or body designated in the agency to hear appeals."

As such, the Mayor's regulations applicable to agencies within the jurisdiction of his office, such as the Department of Environmental Protection, include time limits for responding to requests that are consistent with the Committee's regulations.

In an effort the enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to Mr. Mekenian.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: George Mekenian, P.E.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5602

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

May 24, 1989

Mr. William Spratley
[redacted]

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

Dear Mr. Spratley:

I have received your letter of May 12.

[redacted] and you asked whether you can obtain from a hospital the name of the physician who treated that person and information concerning the seriousness of the wounds. You also requested the addresses for Amnesty International and a human rights office within the United Nations.

In this regard, since you are writing from Virginia, I point out that the Committee on Open Government is authorized to advise with respect to the New York Freedom of Information Law. If the matter that you described occurred outside of New York, I could not advise with respect to rights of access to records in a different jurisdiction.

Second, assuming that the event that you described occurred in New York, first, I point out that the Freedom of Information Law is applicable to agency records, and that section 86(3) of the Law defines the term "agency" to mean:

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

Based upon the foregoing, the Freedom of Information Law generally pertains to records of entities of state and local government. It does not apply to records of a private hospital, for example.

When the Freedom of Information Law is applicable, it permits agencies to withhold records when disclosure would result in "an unwarranted invasion of personal privacy" [see sections 87(2)(b) and 89(2)(b)]. Further, section 89(2)(b) states in relevant part that an unwarranted invasion of personal privacy includes:

> "i. disclosure of employment, medical or credit histories of 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..."

Third, various provisions of the Public Health Law (see e.g., sections 17 and 18), permit the disclosure of medical records to the subjects of those records or persons authorized by the subjects of the records.

In sum, assuming that the event occurred in New York, I believe that the information sought either would not be subject to the Freedom of Information Law or could be withheld as an unwarranted invasion of personal privacy.

Lastly, I could not locate any address for an office of human rights at the United Nations. However, Amnesty International has offices at the United Nations at 777 UN Plaza and at 322 8th Avenue in New York City.

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-5603

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

May 24, 1989

Mr. Richard P. Ragone
84-A-3444
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Ragone:

I have received your letter of May 4, which reached this office on May 17.

According to your letter, you have made several requests for records of the Office of the District Attorney of Saratoga County. You indicated, however, that you have not received responses to those requests.

You have requested assistance in the matter and, in this regard, I offer the following comments.

First, a request should generally be directed to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests for records (see 21 NYCRR section 1401.2).

Second, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural implementation 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, sections 1401.5(d) and 1401.7(c)].

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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1625
FOIL-AO-5604

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

May 24, 1989

Ms. Kathleen Smith
Secretary
Town of Deerpark
Drawer A
Huguenot, NY 12746

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

Dear Ms. Smith:

I have received your letter of May 15 in which you raised questions concerning a request for a record.

You wrote that the Zoning Commission of the Town of Deerpark has received a request for the "most recent working draft of the Town of Deerpark master plan and most recent working draft of revised Town of Deerpark Ordinance". You added that:

> "The Zoning Ordinance is in a stage where changes are being made weekly and the last draft copy is already obsolete. The master plan has been submitted to the Town Board. The draft copy of the Zoning Ordinance has not been submitted to the Planning Board for their review and comments or to the Town Board. The Zoning Commission has not yet held a public hearing because the Ordinance is not at that stage. The Zoning Commission is now working with the master planner on a weekly basis to coordinate the master plan to the Zoning Ordinance. When this is accomplished the ordinance will be retyped with the changes and made available to the public."

Based on the foregoing, you asked the following questions:

> "Is this draft copy of the Zoning Ordinance considered a record at this point? Should it be made available to the public even though the draft is very obsolete? Would this draft be considered intra-agency material?"

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and section 86(4) of the Law defines the term "record" expansively 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."

In view of the breadth of the definition, a draft would, in my opinion, constitute a "record" subject to rights of access, even though it may be "obsolete" or subject to change.

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

Third, as you suggested, a draft could be characterized as "intra-agency material" subject to 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;

> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits 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. I would conjecture that the draft could be withheld, for it would apparently not contain any of the kinds of accessible information described in subparagraphs (i) through (iv) of section 87(2)(g).

Lastly, even though the draft might justifiably be withheld, I point out that the Zoning Commission is a public body subject to the requirements of the Open Meetings Law. Like the Freedom of Information Law, 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 the subject under discussion falls within one or more among eight grounds for entry into an executive session.

Assuming that the Zoning Commission conducts meetings to discuss and revise the zoning ordinance, I believe that those meetings would be required to be conducted in public, for none of the grounds for executive session could justifiably be asserted. If the substance of the draft is or has been effectively disclosed at open meetings, there may be little reason for withholding the draft, despite the authority to do so pursuant to section 87(2)(g) of the Freedom of Information Law.

I hope that the foregoing will be useful to you. 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-1625
FOIL-AO-5604

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

May 24, 1989

Ms. Kathleen Smith
Secretary
Town of Deerpark
Drawer A
Huguenot, NY 12746

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

Dear Ms. Smith:

I have received your letter of May 15 in which you raised questions concerning a request for a record.

You wrote that the Zoning Commission of the Town of Deerpark has received a request for the "most recent working draft of the Town of Deerpark master plan and most recent working draft of revised Town of Deerpark Ordinance". You added that:

> "The Zoning Ordinance is in a stage where changes are being made weekly and the last draft copy is already obsolete. The master plan has been submitted to the Town Board. The draft copy of the Zoning Ordinance has not been submitted to the Planning Board for their review and comments or to the Town Board. The Zoning Commission has not yet held a public hearing because the Ordinance is not at that stage. The Zoning Commission is now working with the master planner on a weekly basis to coordinate the master plan to the Zoning Ordinance. When this is accomplished the ordinance will be retyped with the changes and made available to the public."

Based on the foregoing, you asked the following questions:

> "Is this draft copy of the Zoning Ordinance considered a record at this point? Should it be made available to the public even though the draft is very obsolete? Would this draft be considered intra-agency material?"

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and section 86(4) of the Law defines the term "record" expansively 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."

In view of the breadth of the definition, a draft would, in my opinion, constitute a "record" subject to rights of access, even though it may be "obsolete" or subject to change.

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

Third, as you suggested, a draft could be characterized as "intra-agency material" subject to 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;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits 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. I would conjecture that the draft could be withheld, for it would apparently not contain any of the kinds of accessible information described in subparagraphs (i) through (iv) of section 87(2)(g).

Lastly, even though the draft might justifiably be withheld, I point out that the Zoning Commission is a public body subject to the requirements of the Open Meetings Law. Like the Freedom of Information Law, 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 the subject under discussion falls within one or more among eight grounds for entry into an executive session.

Assuming that the Zoning Commission conducts meetings to discuss and revise the zoning ordinance, I believe that those meetings would be required to be conducted in public, for none of the grounds for executive session could justifiably be asserted. If the substance of the draft is or has been effectively disclosed at open meetings, there may be little reason for withholding the draft, despite the authority to do so pursuant to section 87(2)(g) of the Freedom of Information Law.

I hope that the foregoing will be useful to you. 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-5605

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

May 24, 1989

Ms. Jean Kessner
WIXT TV
5904 Bridge Street
East Syracuse, NY 13057

The staff of the Committee 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. Kessner:

I have received your letter of May 12, as well as the correspondence attached to it.

You have sought an advisory opinion concerning the propriety of a denial of a request for records by Douglas Eldridge, Counsel to the Low Level Radioactive Waste Siting Commission. Attached to your letter is correspondence addressed to Mr. Eldridge in which you requested records consisting of "offers to the Siting Commission for volunteers who want to sell their land to the state for use as a low level radioactive waste facility". The request included within its scope the identities of those who have made offers and the locations of their property.

In an effort to learn more of the situation, I have discussed the matter with Mr. Eldridge, who informed me that the offers were made contingent upon an agreement that the owners' identities would remain confidential. He indicated that several of the landowners were apprehensive concerning the disclosure of their identities due to the possibility of harassment from neighbors and others, including threats of bodily harm.

Based on the foregoing, 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, I point out that, based upon judicial interpretations of the Freedom of Information Law, neither a request for nor a promise of confidentiality would be relevant to a determination of rights granted by the Law. In Washington Post v. Insurance Department, the Court of Appeals held that a promise or assertion of confidentiality is all but meaningless and that, unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, records must be disclosed [61 NY 2d 557, 567 (1984)]. In another decision, it was found that a guarantee of confidentiality offered to school districts by a state agency conducting a survey could not be asserted as a basis for withholding records under the Freedom of Information Law [Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. Similarly, in a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference concerning the agency's disclosure of the incident to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold a record based upon the "preference" of the person who reported an offense [see Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985)].

Third, notwithstanding the inability to withhold records in conjunction with a promise of confidentiality, it appears that the information sought could, at this juncture, be withheld. Section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records when disclosure would constitute "an unwarranted invasion of personal privacy".

I have been informed by Mr. Eldridge that the properties offered have not yet been closely examined. Under the circumstances, since the parcels in question are not yet under serious consideration in the site selection process, based upon the apprehension expressed by the landowners, it appears that disclosure of their identities and, therefore, the location of their property, would result in an unwarranted invasion of personal privacy. Mr. Eldridge did indicate that if, following analyses of the properties in question, any are seriously considered, the information sought will be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Douglas Eldridge

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5606

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

May 25, 1989

Mr. George Scott
87-A-4269 C2-135
P.O. Box 700
Wallkill, NY 12589

The staff of the Committee on Open 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 May 15, as well as the correspondence attached to it.

The correspondence consists of a letter addressed to you by the freedom of information appeals officer for the New York City Police Department acknowledging that your appeal of March 8 was received on March 13. Although it was indicated that efforts would be made to provide an expeditious reply, it was noted that "a certain amount of time" would be needed to locate, review and retrieve the records that you requested before responding. As of the date of your letter to this office, you had not yet received a determination concerning your appeal. In view of the time that has passed, you wrote that you assume that your appeal "has been deemed denied".

You have requested my views on the matter and, in this regard, I offer the following comments.

First, section 89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and states in relevant part that the person designated to determine appeals "shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought".

Second, 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 provided no description of the nature of the records sought. Therefore, while I believe that your appeal has been constructively denied, that should not be construed as a suggestion that the records must necessarily be disclosed.

I hope that the foregoing clarifies the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5607

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

May 25, 1989

Mr. Richard Stewart
85-C-599 E-7-6
Elmira Correctional Facility
Box 500
Elmira, NY 14902

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

Dear Mr. Stewart:

I have received your letter of May 16 in which you requested assistance concerning a request made under the Freedom of Information Law.

According to your letter, approximately two months ago, you directed a request to Mr. Glenn Butler of the Department of Labor's Division of Safety and Health in Binghamton.

In this regard, first, a request should generally be directed to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests for records. Having contacted the Department of labor on your behalf, I was informed that your request should be made to Ms. Barbara Dinehart, Deputy Commissioner for Legal Affairs and Records Access Officer, Department of Labor, Labor Building, State Campus, Albany, NY 12240.

Second, for future reference, 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 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, sections 1401.5(d) and 1401.7(c)].

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, 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.

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-5608

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

May 25, 1989

Mr. Eugene P. Mercer, 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. Mercer:

I have received your letter of May 16. In brief, you wrote that you began the process of requesting records from the New York City Police Department some seven months ago. Although the receipt of your requests has been acknowledged, you have not yet been either granted or denied access to the records, which involve the death of your father, a former New York City police officer.

You have asked what steps can be taken to expedite the matter. In this regard, 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 pertaining to the procedural aspects of the Law (see attached 21 NYCRR Park 1401). In turn, section 87(1) requires each agency public to adopt regulations "pursuant to such general rules as may be promulgated by the committee on open government in conformity with the provisions of this article" (the Freedom of Information Law).

Since your request was made months ago, I point out that the Freedom of Information Law and the Committee's regulations provide guidance concerning the procedural requirements 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

Further, the regulations promulgated by Mayor Koch pursuant to the Freedom of Information Law are consistent with those adopted by the Committee on Open Government. The Mayor's regulations, which became effective in 1979, state in part in section 5(d):

> "If because of unusual circumstances, an agency is unable to determine within five days whether to grant, deny or otherwise respond to a request for inspection and copying, the records access officer shall, within such five day period, acknowledge receipt of the request in writing to the requesting party, stating the approximate date, not to exceed ten business days from the date of the acknowledgement, by which a determination with respect to the request will be made. If the agency does not make a determination with respect to the request within ten days from the date of such acknowledgement, the request may be deemed denied and an appeal may be taken to the person or body designated in the agency to hear appeals."

As such, the Mayor's regulations applicable to agencies within the jurisdiction of his office, such as the Police Department, include specific time limits for responding to requests that are consistent with the Committee's regulations.

You also raised questions concerning the possibility of having to go to court to seek judicial review of a denial. As indicated earlier, the vehicle for so doing involves the initiation of an "Article 78" proceeding in Supreme Court (the lowest court of general jurisdiction) in New York County. I do not have information concerning the form or content of the papers filed in such a proceeding. However, I believe that you could obtain or review the appropriate materials in a law library. In the alternative, an attorney could be consulted.

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-5756

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

September 20, 1989

Mr. Steve Sevits
[redacted]

The staff of the Committee 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. Sevits:

As you are aware, I have received your letter of September 11 and related materials.

According to your letter, you have been attempting to obtain textbooks for your son, "a non-public school student". The books are made available through a local BOCES, which has been designated as "distributing agency". Having received a variety of reasons for the failure to provide the books, you submitted a request under the Freedom of Information Law for "any and all portions of the records relating to any and all textbooks ordered for the use of [redacted], a first grade student". You also requested "all records including...original book orders..., copies of receipts, delivery receipts and any other records which would document receipt, handling, delivery or disposition of textbooks ordered for David Sevits, under Sec. 701 of the New York State Textbook Law". You wrote further that, in response to the request, you were told that if you withdrew the request, the books would be provided.

You asked whether, in my view, the request "is proper and in order".

In this regard, I offer the following comments.

First, as I recall our telephone conversation on the matter, I asked whether the books would have been ordered in a manner identifying those to be used by your son. In my view, the response to that question would determine whether your request was "proper" in terms of the Freedom of Information Law. You

transmitted a copy of a letter sent to you by Melvin H. Osterman, attorney for the BOCES indicating that-"books are not, and have not been, ordered for individual students". He added that: "Based upon lists provided by the various parochial schools books are purchased in bulk or, at least, in multiple copies", and that, therefore, no documents exist involving book orders pertaining specifically to your son. Under the circumstances, if the records sought do not exist, the Freedom of Information Law would not be applicable. I point out, too, that section 89(3) of the Law provides that an agency is not required to create or prepare a record in response to a request.

Second, I believe that book orders and related records would generally be accessible under the Freedom of Information Law, for none of the grounds for withholding those kinds of records could be asserted. As such, although none of the records pertain to your son, other existing records relating to the issue could be requested.

I hope that the foregoing serves to clarify the matter. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Melvin H. Osterman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5757

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

September 20, 1989

Mr. Andrei Malak
[redacted]

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

Dear Mr. Malak:

I have received your letters of September 9 and related materials.

You referred to a request directed to the Town of Brookhaven dated July 17. Since you received no response to the request, I contacted the appropriate office on your behalf in August. At that time, I informed you that I was told that the records were in the process of being located and that you would receive a response shortly. As of September 9, you had received no further reply, and you asked whether "this [is] a form of denial".

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), 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, sections 1401.5(d) and 1401.7(c)].

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, 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 on that basis. I believe that the person designated to determine appeals for the Town is Stanley Allen, Town Clerk.

Second, having reviewed the request in question, it is emphasized that 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. It is likely, in my view, that some of the information sought may not exist in the form of a record or records.

Lastly, with respect to your requests directed to the Suffolk County Water Authority, it is suggested that you speak with the Authority's records access officer, Mr. J.F. Dalo. Perhaps he can clarify the situation understandably and to your satisfaction.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Peter Pitsiokis
J.F. Dalo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5758

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

September 21, 1989

Ms. Charlene L. Page
[redacted]

The staff of the Committee on 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. Page:

I have received your letter of September 11 in which you requested assistance concerning a request made under the Freedom of Information Law.

Attached to your letter is a copy of a request dated August 25 directed to the Comptroller of the Town of Mt. Pleasant. In the request, you referred to a section of the agreement between the Board of Education of the Mt. Pleasant Central School District and its Teachers Association that requires that certain monies "be paid to the Teacher's Benefit Fund each fiscal year by the School Board...". You added that the agreement states that the Association's "welfare benefits trustees have to provide the Town Comptroller, a quarterly unaudited accounting of the use of such funds and an annual certified account", and you requested those records. As of the date of your letter addressed to this office, you had not received a response to the request. As such, you asked for "assistance in having the Comptroller comply with the Freedom of Information Laws".

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 on Open Government (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, sections 1401.5(d) and 1401.7(c)].

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, 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 on that basis. It might also be worthwhile to speak with the Comptroller to learn more of the status of the request.

Second, the Freedom of Information Law is applicable to all records of an agency, such as a town. Section 86(4) of that statute 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, if the Town maintains the documents in which you are interested, I believe that they would constitute "records" subject to rights of access, irrespective of their origin or use.

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. Based upon my understanding of the contents of the records sought, and assuming that the records are maintained by the Town, it would appear that they would be accessible in great measure, if not in toto.

Lastly, since you asked that I "have the Comptroller comply" with the Freedom of Information Law, I point out that the Committee on Open Government is authorized to advise; this office is not empowered to enforce the Freedom of Information Law, nor does it have the capacity to compel an agency to grant or deny access to records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Comptroller, Town of Mt. Pleasant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5758

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

September 21, 1989

Ms. Charlene L. Page
[redacted]

The staff of the Committee on 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. Page:

I have received your letter of September 11 in which you requested assistance concerning a request made under the Freedom of Information Law.

Attached to your letter is a copy of a request dated August 25 directed to the Comptroller of the Town of Mt. Pleasant. In the request, you referred to a section of the agreement between the Board of Education of the Mt. Pleasant Central School District and its Teachers Association that requires that certain monies "be paid to the Teacher's Benefit Fund each fiscal year by the School Board...". You added that the agreement states that the Association's "welfare benefits trustees have to provide the Town Comptroller, a quarterly unaudited accounting of the use of such funds and an annual certified account", and you requested those records. As of the date of your letter addressed to this office, you had not received a response to the request. As such, you asked for "assistance in having the Comptroller comply with the Freedom of Information Laws".

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 on Open Government (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, sections 1401.5(d) and 1401.7(c)].

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, 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 on that basis. It might also be worthwhile to speak with the Comptroller to learn more of the status of the request.

Second, the Freedom of Information Law is applicable to all records of an agency, such as a town. Section 86(4) of that statute 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, if the Town maintains the documents in which you are interested, I believe that they would constitute "records" subject to rights of access, irrespective of their origin or use.

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. Based upon my understanding of the contents of the records sought, and assuming that the records are maintained by the Town, it would appear that they would be accessible in great measure, if not in toto.

Lastly, since you asked that I "have the Comptroller comply" with the Freedom of Information Law, I point out that the Committee on Open Government is authorized to advise; this office is not empowered to enforce the Freedom of Information Law, nor does it have the capacity to compel an agency to grant or deny access to records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Comptroller, Town of Mt. Pleasant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5759

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

September 21, 1989

Mr. Harvey Smith, Director
Sullivan County Office of General
Services
Sullivan County Government Center
100 North Street
Monticello, New York 12701

The staff of the Committee on Open 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 September 15 in which you requested advice "as to whether personal time sheets are subject to release under Freedom of Information."

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 of portions thereof fall within one or more grounds for denial appearing in section 87(2) (a) through (i) of the Law.

Second, although two of the grounds for denial relate to attendance records or "time sheets," based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

Of 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Attendance records could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning the use of leave time or absences, or the times that employees arrive at or leave work, would constitute "statistical or factual" information accessible under section 87(2)(g)(i).

Also of relevance 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. In a decision dealing with attendance records that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the right of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives

> of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Further, in affirming the decision of the Appellate Division, the Court of Appeals held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75, 79). 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 government officers (Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571 [citing Public Officers Law section 84]).
>
> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (see, Public Officers Law section 87[2]; Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 79-80, supra). This presumption specifically extends to intra-agency and inter-agency materials, such as the report sought in this proceeding, comprised of 'statistical or factual tabulations or data' (see, Public Officers Law section 87[2][g][i]). Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating

> that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (see, Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75, 80, supra; Matter or Fink v. Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566)."

Therefore, I believe that attendance records or time sheets are generally available.

If attendance records or time sheets include reference to the 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, or the dates and times of attendance or absence, 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 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 or abuse on the part of government officers" (id. at 566).

In sum, subject to the qualifications described above, I believe that time sheets of public employees are accessible under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5760

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

September 21, 1989

Ms. Patricia L. Knapp, President
Canisteo Teachers Association
Canisteo Central School
Greenwood Street
Canisteo, New York 14823

The staff of the Committee on 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. Knapp:

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

The correspondence indicates that requests were directed to the Canisteo Central School District for "copies of all bills, receipts, and cancelled checks made to the law firm of Harris, Beach & Wilcox up to August 29, 1989." Although some of the records sought were made available, you wrote that the "statements for professional services rendered from 5/88-4/89 total $21,717.68," but that "the cancelled checks dated 6/88-5/89 total $12,827.56," thereby resulting in an "discrepancy of nearly $9,000. In addition, you explained that you requested "bills and receipts," but that you were given "statements of professional services on Canisteo Central School District letterhead."

You have requested my opinion in this matter. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and section 86(4) of the Freedom of Information 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."

Based on the foregoing, bills, receipts and cancelled checks main- tained by the District would, in my view, constitute "records" subject to rights of access conferred by the Freedom Information Law.

Second, as I understand the situation, the statements of professional services rendered by the law firm were prepared by the District and made available to you. In my opinion, the statements are not the records that you requested. It is possible that the figures appearing on the statements were derived from the bills and similar records that are the subject of your request.

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.

Bills, vouchers, contracts, receipts 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. With respect to payments to attorneys, I point out that, while the communications between an attorney and client are generally privileged, 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 time sheets, 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 found in the records in question 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 decisions have been rendered under the Freedom of Information Law in which it was held that records indicating payment by a village to its attorney are available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., August 20, 1981; Young v. Virginia R. Smith, Mayor of the Village of Ticonderoga,, Supreme Court, Essex County, Jan.

9, 1987]. In Minerva, supra, the issue involved a request for copies of both sides of cancelled checks made payable to a municipality's attorney. Although the court held that the front sides of the checks, those portions indicating the amount paid to the attorney, must be disclosed, it was found that the backs of the checks could be withheld, for disclosure might indicate how the attorney "spends his 'paychecks.'"

In sum, subject to the qualifications discussed above, I believe that the records sought should be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Charles Carlton, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5761

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

September 21, 1989

Mr. William Brown
86-A-6587 A-4-8
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. Brown:

I have received your letter of September 17, as well as the correspondence attached to it.

You indicated that you sent a request for records to a court clerk pursuant to section 255 of the Judiciary Law. Since several weeks have passed without having received a response, you asked to whom you could appeal. In addition, having reviewed your request, a copy of which you forwarded, it appears to have been made under the Judiciary Law and the Freedom of Information Law. You also asked that the clerk prepare "a full Vaughn Index on the documents" that might be withheld.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and section 86(3) of the Law defines the term "agency" to include:

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

In turn, section 86(1) defines "judiciary" to mean:

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts or court records. Further, while the Freedom of Information Law includes provisions that enable an applicant to appeal an agency's denial of a request for records, I am unaware of any similar provision found in the Judiciary Law or other statutes concerning court records. Under the circumstances, it is suggested that you resubmit the request or that you confer with your attorney.

Second, since you requested a "Vaughn index", I point out that the decision under which you requested such an index, Vaughn v. Rosen [484 F2d 820 (1973)], was rendered under the federal Freedom of Information Act. That statute pertains to records maintained by federal agencies and is separate and distinct from the New York Freedom of Information Law. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and ensuring that the burden of proof remains on the agency. However, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index prior to the initiation of litigation. Further, a judicial decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed [see Nalo v. Sullivan, 125 AD 2d 311 (1987)].

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5760

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

September 25, 1989

Mr. Van B. Watkins
87-A-8198
Unit G-42-6
Wende Correctional Facility
Wende Road, P.O. Box 1187
Alden, New York 14004-1187

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

Dear Mr. Watkins:

I have received your letter of September 14 in which you requested assistance concerning your efforts in gaining access to medical records.

According to your letter, you have unsuccessfully attempted to obtain medical records from your facility, as well as "outside hospitals."

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by the Department of Correctional Services and its facilities. A private hospital, however, would not be subject to the Freedom of Information Law. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

With respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that

fall within the scope of section 87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, since the requests involve medical records, it appears that the governing statute would be section 18 of the Public Health Law, which pertains specifically to access to medical records, rather than the Freedom of Information Law. Section 18 generally grants rights of access to medical records to patients that are maintained by a physician or a hospital. That statute, in my view, includes within its scope medical records maintained by your facility or the Department of Correctional Services, as well as medical records maintained by private or "outside" hospitals. I point out that section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of inability to pay."

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Coordinator
New York State Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5763

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

September 25, 1989

Mr. Robert T. Searing, Jr.
President
Robert T. Searing Associates, Inc.
1275 A. Monroe Avenue
Rochester, New York 14620-1693

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

Dear Mr. Searing:

I have received your letter of September 13, which reached this office on September 21.

According to your letter, when you "request a copy of a police report either for a motor vehicle accident or a theft claim," you are "told to write back in 60-90 days." It is your view that you "are entitled to those reports sooner than that, especially when [you] are obligated to adjust claims much faster than that by the New York Insurance Department."

You have requested my views on the matter. In this regard, I offer the following comments.

First with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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 grounds for denial that follow. Based upon the phrase quoted in the preceding sentence, there may be instances in which a single record or report is both accessible in part and deniable in part. Further, that language in my view imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

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 of 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) of the Freedom of Information Law 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 any particular interest or status must be demonstrated as a condition precedent to gaining access to the accident reports.

With regard to theft reports, I direct your attention to section 87(2)(e) of the Freedom of Information Law, which states that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:

(i) interfere with law enforcement investigations or judicial proceedings;

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

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

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

If a theft remains under investigation, depending upon the facts and circumstances, it is possible that portions of a theft report might justifiably be withheld pursuant to section 87(2)(e). Nevertheless, information in the reports indicating the items stolen was likely supplied by insureds or their agents and, therefore, section 87(2)(e) would not in my opinion serve as a basis for withholding those portions of the reports from those persons.

Lastly, 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 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, sections 1401.5(d) and 1401.7(c)]

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 with the Freedom of Information Law, a copy of this opinion will be forwarded to the Office of Counsel at the Division of State Police.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Ralph Ambrosio, Office of Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5764

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

September 26, 1989

Mr. Richard Becker
[redacted]

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

Dear Mr. Becker:

I have received your letter of September 18 in which you requested assistance.

Your first area of inquiry involves two missing persons reports allegedly maintained by the Nassau County Police Department concerning events occurring in 1975. Although one of the reports has been disclosed, the other was not made available.

In this regard, I offer the following comments.

First, since the events occurred several years ago, it is questionable in my view whether the report in question continues to exist. If it does not, the Freedom of Information Law would no longer be applicable. Further, section 89(3) of the Freedom of Information Law provides that an agency need not create a record in response to a request.

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 initial ground for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." A recent decision indicates that section 2207 of the Nassau County Government Law is a statute that exempts certain records from disclosure, including records of the Nassau County Police Department (Newsday v. O'Brien, Supreme Court, Nassau County, June 30, 1989). I believe that the deci-

sion has been appealed. However, at this juncture, it appears that the records in question, based upon the decision cited above, need not be disclosed. If the decision is overturned, rights of access would be governed by the Freedom of Information Law, and the contents of the reports and the effects of their disclosure would determine the extent to which the records are available or deniable. Without knowledge of the contents of the records, I could not advise with certainty regarding rights of access.

The second area of inquiry involves what you characterized as "complaints by attorneys for filing and service on companies," and you inquired specifically with respect to any such complaints concerning South Shore Datsun in Patchogue filed with the Department of State. I have spoken with Mr. James Aube, Director of the Division of Corporations, or your behalf. Mr. Aube indicated that the Division does not accept consumer complaints, but rather summonses and complaints. Having conducted a computer search regarding any such complaints made against South Shore Datsun, one complaint has been made. The plaintiff in that case was Mr. Keith Bogart, who was represented by the firm of Reilly, Like and Schneider in Babylon. To obtain a copy of the materials, a statutory fee of $5 made payable to the New York State Department of State would be assessed for copies; the fee for certified copies is $10. If you wish to seek records, a request may be made to Mr. James Aube, Director, Division of Corporations, Department of State, 162 Washington Avenue, Albany, New York 12231.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5765

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

September 26, 1989

Mr. Patrick Luis
#86-B-1418
P.O. Box 500
Elmira, New York 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. Luis:

I have received your letter of September 21 in which you raised a series of questions concerning the utility of the Freedom of Information Law.

In brief, as I understand your questions, you asked whether the Freedom of Information Law can be asserted to obtain litigation papers in suits brought under the federal Civil Rights Act (42 U.S.C. Section 1983), records indicating the parties, docket numbers and reasons for the initiation of such suits brought against the Department of Correctional Services, transcripts and film footage prepared by radio and television stations, and test results maintained by the Office of Safety and Health Administration (OSHA).

In this regard, I offer the following comments.

The New York State Freedom of Information Law is applicable to agency records, and the focal point of your inquiry involves whether the records in question are maintained by agencies. For purposes of the Freedom of Information Law, section 86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public oorporation, 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 foregoing, the Freedom of Information Law generally pertains to records of entities of state and local government in New York. As such, the Freedom of Information Law would not apply to records maintained by federal courts or by radio or television stations.

Records of the Department of Correctional Services are subject to the Freedom of Information Law. If that agency maintains and, based on its record-keeping systems, can locate records involving lawsuits initiated under the federal Civil Rights Act, I believe that those portions identifying the parties and docket numbers would be accessible under the Freedom of Information Law. Further, "litigation" papers available from a court would, in my view, also be available from an agency.

Lastly, with respect to the Office of Safety and Health Administration, there is a federal agency by that name. If you are interested in seeking records of that agency, rights of access to its records would be governed by the federal Freedom of Information Act (5 U.S.C. section 552). There is also a Division of Safety and Health at the New York State Department of Labor, which is subject to the New York Freedom of Information Law . I am unfamiliar with statutes that might pertain specifically to the test results in which you are interested. However, if the Freedom of Information Law governs rights of access, it would appear that test results prepared by a state agency would be accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5766

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

September 28, 1989

Ms. Antoinette P. Carbone
[redacted]

The staff of the Committee on 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. Carbone:

I have received your letter of September 22 in which you requested assistance.

In brief, as I understand the matter, the Miller Place School District hired a consultant to report regarding the District's space needs. A presentation was made by the consultant at a meeting during which an interim report was described and made available to Board members. Having requested the report, you were informed that the report is a "draft" and that it would not be made public.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an agency, such as a school district. Further, section 86(4) of the Law defines the term "record" expansively 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."

In my view, an interim report or a "draft" prepared for an maintained by the District would clearly constitute a "record" subject to rights of access conferred by the Freedom of Information Law.

Second, the Court of Appeals, the state's highest court, has determined that reports prepared by a consultant retained by an agency constitute "intra-agency" materials" subject to the Freedom of Information Law that would be accessible or deniable depending upon their contents. In its discussion of the issue of consultant reports, the Court likened those records to advisory materials prepared by the staff of an agency, stating that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional material, prepared to assist an agency decision maker***in arriving at this decision' (Matter of McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material in exempt 'to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

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. Moreover, it is emphasized 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 that follow. The language quoted in the preceding sentence indicates that a single record or report might be both accessible or denial be, in whole or in part. I believe that it also requires that agency officials review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Fourth, the provision concerning 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

As indicated earlier, although the records might be characterized as "intra-agency materials" and perhaps portions of those materials may be withheld, other aspects of the materials may be available. It has been held that factual information appearing in narrative form, as well as those portions appearing

in numerical or tabular form, is 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.' the also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 AD 2d 176, 181, mot for lv to ap den 48 NY 2d 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 AD 2d 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 statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, should in my view be available.

Similarly, the Court in Xerox, supra, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, in 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 or 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 the appellant" (id. at 133).

Based upon the foregoing, I believe that the report in question, insofar as it consists of statistical or factual information, must be disclosed.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the 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:saw

cc: Mr. Palgutta, Superintendent
Board of Education, Miller Place School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5767

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

September 28, 1989

Ms. Susan Colinan
[redacted]

The staff of the Committee on 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. Colinan:

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

According to your letter, you delivered a request for information, a copy of which you attached, to the St. Johnsville School District Clerk on September 19. The request was accepted, and was reviewed at that time by the Superintendent, who asked how quickly you needed the information. When you said that you would like to obtain it "within a couple of days," the Superintendent indicated that a response could be made within that time. Further, when you asked whether you were required "to complete a formal request," he replied in the negative. Three days later you returned to obtain the information, and you were informed by the clerk that you "needed to complete a request on their form." You questioned the requirement that you complete the form and contended that the Freedom of Information Law was violated because "no one acted on [your] request within 24 hours" and the District's response "will be beyond the five day limit."

In this regard, I offer the following comments.

First, the Freedom of Information Law does not refer to a 24 hour time limit for responding to requests. However, section 89(3) of the Law requires that an agency respond to a request within five business days of the receipt of a request.

Second, there is nothing in the Freedom of Information Law that requires an applicant to complete a form prescribed by an agency. The Law and the Committee's regulations 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 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. It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response to or deny a request for records. A delay due to a failure to use a prescribed form 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 writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probably that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency be mail. Therefore, to the extent that the agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, 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, a 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 government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

Lastly, having reviewed your request, I point out that the Freedom of Information Law generally pertains to existing records. Section 89(3) provides in part that, unless otherwise indicated, an agency need not create a record in response to a request. It is possible that some aspects of your request involve information that does not exist in the form of a record or records. It is also noted that one of the few instances in which an agency must maintain a record involves payroll information. Specifically, section 87(3)(b) of the Law requires that each agency maintain:

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

I hope that the foregoing serves to clarify the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Ms. Reese, District Clerk
Mr. Lapone, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3768

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

September 29, 1989

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.

Dear Mr. Kane:

I have received your letter of September 24, as well as the correspondence attached to it.

Your inquiry concerns denials of access to records by the Fulton County Economic Development Corporation and its failure to respond to your appeals.

In my view, the issue is whether the Corporation is an agency required to comply with the Freedom of Information Law. That question was considered in an advisory opinion addressed to you on August 16. At that time, the Corporation disclosed records to you "as a courtesy" despite its contention that the Corporation is not subject to the Freedom of Information Law. Although an argument was made for the proposition that the Corporation, a local development corporation, is subject to the Freedom of Information Law, I also indicated that its status was unclear. It is assumed that the Corporation continues to contend that it is not an agency and that its records fall outside the scope of the Freedom of Information Law.

If the Corporation is an agency, it would have failed to respond to your appeals within the statutory time for response. The provision in the Freedom of Information Law pertaining to the right to appeal 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."

When an agency does not render a determinstion on an appeal within the statutory time, the applicant would have exhausted his administrative remedies and could initiate a judicial proceeding pursuant to Article 78 of the Civil Practice Law and Rules [see Floyd, Matter of v. McGuire, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)]. In the alternative, a proceeding could be initiated to determine whether a local development corporation, such as the Fulton County Economic Development Corporation, is indeed an agency required to give effect to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5769

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

October 2, 1989

Mr. John DeSimone
Erie County Correctional Facility
Box X
Alden, New York 14004

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

Dear Mr. DeSimone:

I have received your letter of September 24, as well as the correspondence attached to it.

Your inquiry concerns your ability to obtain a copy of your pre-sentence report.

In this regard, I offer the following comments.

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 he 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. For

> purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation department outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available.
>
> "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."

As such, pre-sentence reports are confidential with respect to the public and may be made available to a defendant only by a court. I point out that the last sentence of subdivision (2)(a) of section 390.50 represents an amendment to the original provision. Further, in a decision concerning the amendment, it was found that:

> "The obvious purpose of the legislature in enacting Chapter 132 of the Laws of 1984 was to make the pre-sentence report generally more accessible to counsel and/or the defendant pro se. The spirit of such amendments was open disclosure and discussion of the information before the Court in sentencing and/or appellate review of sentencing and the need to remedy the mischief created by bureaucratic roadblocks to that process. Therefore, this court holds that the agency should be obligated to make them available pursuant to court order..." [see People v. Zavaro, 481 NYS 2d 845, 846 (1984)].

Based upon the decision cited above, it appears that a county probation department must make a pre-sentence report available pursuant to an order of the court.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5770

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

October 3, 1989

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 28, as well as the materials attached to it.

You have asked "whether an agency may release records which have been found by the court to fall within exemption 87(2)(g) of the FOIL or does the FOIL itself bar such a release".

In this regard, I offer the following comments.

First, the language of the Freedom of Information Law indicates that an agency may withhold records, but that it is generally not required to do so. Specifically, the introductory language of section 87(2) states in relevant part that: "Each agency shall...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof" that fall within the grounds for denial that follow (emphasis added).

Second, the Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the

> agency's discretion to disclose such records...if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, although an agency may in appropriate circumstances withhold records pursuant to section 87(2)(g), I do not believe that it is obliged to do so.

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-5771

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

October 3, 1989

Ms. Mina 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 Ms. Friedman:

I have received your letter of September 22, as well as the correspondence attached to it.

You have alleged that the New York City Department of Transportation and its Parking Violations Bureau have engaged in "an ongoing and continuous pattern and policy of blatant violation..." of the Freedom of Information Law and the "Privacy Law" and applicable regulations promulgated thereunder. You have asked that I investigate the matter, "secure compliance" with the Freedom of Information Law and that pending the investigation, I "secure assurance" from Department officials that matters pertaining to a summons he held "in abeyance."

Based upon your correspondence, you received a "Notice of Impending Default Judgement" in late July concerning a summons issued on May 2. You contended that you did not engage in any violation of law and that you did not receive the summons. As such, on August 11, you requested a copy of the summons, as well as the name, badge number, work location, job title, duties and functions of the person who issued the summona. You also asked whether such person "has 'peace officer' status" and requested "a copy of the tour of duty report and list of all summons issued for May 2, 1989, by this person." In a second letter dated September 1, you indicated that a copy of the summons was made available, but that it was illegible. As such, you requested a legible copy. In that letter, you referred to a denial of access to records that had been appealed, and the appeal indicates that, while an illegible copy of the summons was made available, all other aspects of the request were denied. A third attachment is a letter addressed to the Commissioner in which you requested

information regarding the duties of the Department's records access and appeals officers and its inspector general. You also requested rules and regulations concerning the implementation of the Freedom of Information Law by the Department, as well as those pertaining to the issuance of summonses.

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 or the authority to investigate, nor is it empowered to compel an agency to comply with the Freedom of Information Law. Similarly, the Committee has no authority to seek assurance that a proceeding be kept in abeyance pending the resolution of requests made under the Freedom of Information Law.

Second, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. If, for example, there is no list of summonses issued by a Department employee on a particular date, the Department, in my opinion, would not be obliged to prepare such a list on your behalf.

Third, section 89(3) also requires that an applicant "reasonably describe" the records sought. As such, a request should include sufficient detail to enable agency officials to locate and identify records. In some instances, the nature of an agency's filing system will determine the extent to which records may be retrieved or located.

Fourth, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It appears that the records sought, to the extent that they exist and have been reasonably described, should be made available upon payment of the appropriate fees, for none of the grounds for denial could apparently be asserted.

Fifth, one of the requests was made directly to the Commissioner. I believe that it should have been made to the Department's records access officer.

I point out that the Mayor of New York City has promulgated uniform regulations pursuant to the Freedom of Information Law applicable to all agencies in his administration. As such, the Department might not have prepared separate rules and regulations concerning its implementation of the Freedom of Information Law. I have enclosed copies of those regulations, as well as amendments thereto.

Lastly, I have contacted the Department's records access officer, Mr. Irwin Cohen, on your behalf. Since he receives hundreds of requests, he did not recall the specific status of your request. However, he suggested that a new request be sent to him directly at the Department of Transportation, 40 Worth Street, New York, New York 10013. He added that such a request should, if possible, identify the person who received the summons.

I hope that the foregoing serves to clarify the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-577

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

October 3, 1989

Ms. Sandra L. Berman
Town Attorney
Town of Smithtown
99 West Main Street
P.O. Box 575
Smithtown, New York 11787

The staff of the Committee 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. Berman:

I have received your letter of September 22, as well as the materials attached to it.

Your question involves "the public availability of architects/surveyors building plans and/or surveys for inspection and/or copying in light of FOIL and prior case law." According to a memorandum apparently prepared by your staff, case law indicates that an architect has "a common-law copyright in his plans." As such, the memorandum apears to suggest that copyrighted plans are available for inspection, but that they cannot be reproduced without the consent of the holder of the copyright.

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 the term "record" expansively 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."

Based on the foregoing, architects plans and similar or related documents in my view clearly constitute "records" subject to rights conferred 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial could likely be asserted to withhold the records in question.

Third, section 87(2) of the Freedom of Information Law states that accessible records must be made available for inspection and copying. Further, section 89(3) indicates that an agency is obliged to make a copy of an accessible record if the applicant pays the appropriate fee for copying.

The question, in my view, involves the effect of a copyright appearing on a document. In order to offer an appropriate response, I have discussed the matter with a representative of the U.S. Copyright Office and the Office of Information and Privacy at the U.S. Department of Justice, which advises federal agencies regarding the federal Freedom of Information Act (5 U.S.C. section 552), the federal counterpart of the New York Freedom of Information Law.

In my opinion, the decisions cited in the staff memorandum are largely out of date, for the Copyright Act has been substantially revised since those decisions were rendered. Specifically, the Federal Copyright Act of 1976, 17 U.S.C. section 101 et seq., appears to have supplanted the earlier case law on the subject. Further, I am unaware of any judicial decisions rendered in New York concerning the relationship between the Copyright Act and the New York Freedom of Information Law.

Useful to the inquiry is a federal court decision in which the history of copyright protection was discussed, and in which reference was made to notes of House Committee on the Judiciary (Report No. 94-1476) referring to the scope and intent of the revised Act. Specifically, it was stated by the court that:

"The power to provide copyright protection is delegated to the Congress by the United States Constitution. Article 1, section 8, clause 8, of the Constitution grants to Congress the power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'

Copyright did not exist at common law but was created by statute enacted pursuant to this Constitutional authority. See Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460, 98 L.ed. 630 (1954); see also MCA, Inc., v. Wilson, 425 F.Supp. 443, 455 (S.D.N.Y. 1976); Mura v. Columbia Broadcasting System, Inc., 245 F.Supp. 587, 589 (S.D.N.Y. 1965), and cases cited therein.

Prior to January 1, 1978, the effective date of the revised Copyright Act of 1976, there existed a dual system of copyright protection which had been in effect since the first federal copyright statute in 1790. Under this dual system, unpublished works enjoyed perpetual copyright protection under state common law, while published works were copyrightable under the prevailing federal statute. The new Act was intended to accomplish 'a fundamental and significant change in the present law by adopting a single system of Federal statutory copyright...(to replace the) anachronistic, uncertain, impractical, and highly complicated dual system.' H.R. Rep. No. 94-1476; 94th Cong. 2d Sess. 129-130, reprinted in [1976] 5 U.S. Code Cong. & Ad. News 5745. This goal was effectuated through the bed-rock provision of 17 U.S.C. subsection 301, which brought unpublished works within the scope of federal copyright law and preempted state statutory and common law rights equivalent to copyright. Id. at 5745-47. Thus, under subsection 301(a), Congress provided that Title 17 of the United States Code, the Federal Copyright Act, preempts all state and common law rights pertaining to all causes of action which arise subsequent to the effective date of the 1976 Act, i.e., January 1, 1978:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." [Meltzer v. Zoller, 520 F.Supp. 847, 853 (1981)]

Based upon the foregoing, "common law" copyright appears to be a concept that has been rejected and replaced with he current statutory scheme embodied in the revised Federal Copyright Act.

In view of the language of the Copyright Act, case law and discussions with a representative of the Copyright Office, it is clear in my opinion that architectural plans and similar documents may be copyrighted.

To be copyrighted, 17 U.S.C. section 401(b) states that a work must bear a "notice," which:

> "shall consist of the following three elements:
>
> (1) the symbol c (the letter C in a circle), or the word 'Copyright,' or the abbreviation 'Copr.'; and
>
> (2) the year of the first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

> (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner."

If those elements do not appear on the work, I do not believe that it would be copyrighted, and that it could be reproduced in response to a request made under the Freedom of Information Law.

Assuming that a work is subject to copyright protection, such a work that includes the notice described above is copyrighted. It is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. section 408(a)] be registered with the Copyright Office. No action for copyright infringement can be initiated until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use the Freedom of Information Law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to section 87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statutes." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall, 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure... by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to section 87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. section 107, which codifies the doctrine of "fair use." Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are maintained for the regulation of commercial interprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under section 107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. section 107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secrets exception "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to the government...Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. [section] 107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information Act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with section 87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work should be duplicated.

Enclosed on request is a copy of the text of the article appearing in FOIA Update.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5773

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

October 4, 1989

Mr. Howard Jones
Business Agency
Local Union 964
A.F. of L. - C.I.O.
130 N. Main Street
New City, New York 10956-3896

The staff of the Committee on Open 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 September 27, as well as the correspondence attached to it.

According to the materials, a request for records relating to the renovation of schools and buildings owned or leased by the Monroe-Woodbury Central School District was made on July 6. As of the date of your letter to this office, you had received no response to the request.

The records sought involve "certificates of non-collusion filed by the contractor and sub-contractor," payroll records identifying the contractor's and sub-contractor's employees, including their names, addresses, classifications, rates of pay, daily and weekly members of hours worked, deductions made and actual wages paid. You also requested a copy of a "wage determination," Internal Revenue Service employers' identification numbers, copies of "affirmative action compliance" and "public notice for bids and all building documents."

You have requested assistance in the matter. 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), 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, sections 1401.5(d) and 1401.7(c)]

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, I believe that your request has been constructively denied and that you may appeal on that basis. It is suggested that you contact the District Clerk or other official to determine the identity of the person or body to whom an appeal may be made.

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.

Relevant to your request insofar as it pertains to payroll information is section 87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute an "unwarranted invasion of personal privacy." Further, section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy. From my perspective, those portions of payroll records indicating the classification of a contractor's or sub-contractor's employees, rates of pay, days and hours worked and gross wages should be disclosed. However, those portions

involving the employees' names and home addresses, deductions and net pay might, in my view, be withheld as an "unwarranted invasion of personal privacy," for those aspects of the records would likely be irrelevant to the duties of the agency, the School District [see Freedom of Information Law, section 89(2)(b)(iv)]. It is noted that the names and salaries of public employees must be disclosed [see Freedom of Information Law, 87(3)(b)]. However, section 89(7) of the Law states that home addresses of public employees need not be disclosed. Similarly, it has been advised that records involving deductions from public employees' paychecks may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In short, the fact that deductions may be made due to the number of exemptions claimed, charitable contributions or due to one's status as a garnishee, for example, are irrelevant to the performance of an employee's duties. Since more information is generally available regarding public employees than others, because public employees are required to be more accountable than others, it appears that the personal information you seek concerning employees of private contractors, including their names and addresses, could be deleted from the payroll records in which you are interested.

I am unfamiliar with any federal laws concerning the disclosure of employers' identification numbers. Assuming that there is no statute that prohibits disclosure, I believe that identification numbers should be disclosed.

The remaining records sought would, in my view, be accessible, for none of the grounds for denial apparently could be asserted. I point out that "bidding documents" and similar records have been found to be available following the award of a contract [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (1980)].

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to District officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Mr. Lewis, Asst. Superintendent, Buildings and Grounds
District Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1669
FOIL-AO-574

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

October 4, 1989

Ms. Ann Ruzow Holland
Executive Director
Friends of Keeseville, Inc.
Box 446
Keeseville, New York 12944

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

Dear Ms. Holland:

As you are aware, your letter of September 27 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, on which the Secretary serves, is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

Your inquiry, based upon your letter and our conversation, involves the status of the Friends of Keeseville, Inc. under those statutes. You indicated that the Friends of Keeseville is a private, not-for-profit, tax-exempt organization.

Both the Freedom of Information Law and the Open Meetings Law apply to governmental entities. Specifically, the Freedom of Information Law pertains to agency records, and section 86(3) of that statute defines the term "agency" to mean:

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

Since the organization that you serve is not a "governmental entity," it is not in my opinion an "agency," and rights conferred by the Freedom of Information Law would not extend to the Friends of Keeseville. As such, although you may choose to disclose records, you are not required to do so by the Freedom of Information Law.

As we discussed, the organization may have relationships with agencies that are subject to the Freedom of Information Law. Records pertaining to the Friends of Keeseville kept by those agencies must be disclosed by the agencies to the extent required by the Freedom of Information Law.

Similarly, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of that Law defines the phrase "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."

Again, based upon my understanding of the organization, it would not constitute a public body, for it does not perform a governmental function. Therefore, meetings of the Board would not be governed by the Open Meetings Law and the Board could, in its discretion, conduct public or private meetings.

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws and an explanatory brochure.

I hope the foregoing serves to clarify the matter. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5775

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

October 9, 1989

Ms. Viki DeJong, Chairperson
Citizens Committee for Civic
Action, Inc.
800 Captains Gate
Westbury, New York 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 Ms. DeJong:

I have received your letter of September 29, as well as the materials attached to it.

In your efforts to obtain information from the Nassau County Department of Public Works, you wrote that County officials would not respond to your questions and that you had to submit a written request under the Freedom of Information Law. Although a written request was made on September 11, it appears that the request was rejected and that you were asked to submit the request on the agency's printed form. You did so on September 23 and the request involved "all correspondence, reports, memos, permit applications, permits issued from or to individuals, civic organizations, Nassau County officials, the Town of Hempstead officials, and the NYS DEC in regard to any information or requests to fill in or resume dumping in Recharge Basin #272, Speno Park, East Meadow, New York." The request was denied, indicating that: "Records not specifically described; materials are Inter/Intra Agency."

You wrote that you appealed the denial, but that you "do not expect a favorable response." As such, you requested assistance in the matter. In this regard, I offer the following comments.

First, there is no law of which I am aware that requires that agency officials respond to questions. Further, section 89(3) of the Freedom of Information Law indicates that an agency may require that a request for records be made in writing. However, there is nothing in the Freedom of Information Law that requires an applicant to complete a form prescribed by an agency. The Law and the Committee's regulations 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. It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response to or deny a request for records. A delay due to a failure to use a prescribed form 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 writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that the agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, 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, a 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 government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

Second, the Freedom of Information Law does not require that records sought be "specifically described." When the Law was enacted in 1974, it required that an applicant request "identifiable" records. That standard resulted in the kind of difficulty that you are facing. If the applicant could not specify a requested record, the request would not have identified the record sought. However, the Freedom of Information Law was repealed and replaced with the current law in 1978. Section 89(3)

of the Law now requires that an applicant "reasonably describe" the records sought. Judicial decisions interpreting records when the agency, based upon the terms of a request, can local the records. Assuming that the agency can locate records falling within the scope of your request, I believe that your request would have met the standard of reasonably describing the records. It is noted, too, that regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law and have the force of law, state that the records access officer is responsible for assuring that agency personnel "Assist the requester in identifying requesting records, if necessary" [see 21 NYCRR section 1401.2(b)].

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.

The reference in the denial concerning materials that are "Inter/Intra agency" pertains to 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

I point out, too, that section 87(2)(g) involves communications among or between officials within an agency (intra-agency materials) or to another agency (inter-agency materials). Correspondence, reports, permit applications, permits and the like involving communications with individuals or civic organizations would not, in my view, constitute inter-agency or intra-agency materials. As such, I do not believe that section 87(2)(g) could be asserted as a basis for withholding those kinds of records.

While communications with Nassau County officials might be characterized as intra-agency materials, and communications with the Town of Hempstead or the Department of Environmental Conservation constitute inter-agency materials, those characterizations alone do not determine the extent to which the materials may be withheld. As indicated earlier, the contents of the materials determine the extent to which they must be disclosed or may be withheld. For instance, statistical or factual data contained in a communication between the County and the Department of Environmental Conservation would he available pursuant to section 87(2)(g)(i); a permit issued to the Town of Hempstead, for instance, would in my view, be reflective of a final determination that must be disclosed under section 87(2)(iii).

In sum, I believe that the response to your request was inadequate and inconsistent with the terms of the Freedom of Information Law. In an effort to enhance compliance with the Law, copies of this opinion will be sent to the Department of Public Works. In addition, if you helieve that the Department of Environmental Conservation may have some of the records in which you are interested, it is suggested that you submit a request to the records access officer at its regional office on Long Island.

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:saw

cc: Acting Deputy Commissioner of Public Works
Commissioner of Public Works

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5776

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

October 11, 1989

Ms. Jane Builder
Legal Intern
Hudson River Fishermen's
Association
Box 312
Cold Spring, New York 10516

The staff of the Committee on 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. Builder:

I have received your letter of September 28, as well as the materials attached to it.

According to your letter, you are a student at Pace University School of Law working as a research assistant for Professor Robert F. Kennedy, Jr., who also serves as the attorney for the Hudson River Fisherman's Association. In your efforts to obtain information concerning the New York City reservoir system, you wrote that you had used the Freedom of Information Law with a great deal of success. However, you indicated that "this past summer that all changed." Specifically, in June, three requeats were made to the New York City Department of Environmental Protection. Having made several calls to determine the status of your requests, you reached Ms. Marie Dooley, the Department's records access officer, on June 29. She indicated that she had never received two of the requests. A new request combining the two that had not been received was made on June 29. Baaed upon your ensuing calls to the Department, it was suggested that the Department lacks the staff to respond to the requests, that some aspects of the requests are "too vague," and that the requests have been referred to its Office of Counsel because the Fishermen's Association is involved in a lawsuit against the Department. In short, although you were told that Department staff would "get back" to you, you have not yet received either a denial of the requests or the records sought.

In this regard, I offer the following comments.

First, by was 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 aspects of the Law (see attached 21 NYCRR Part 1401). In "pursuant to such general rules as may be promulgated by the committee on open government in conformity with the provisions of this article" (the Freedom of Information Law).

Second, the Freedom of Information Law and the Committee's regulations provide guidance concerning the procedural requirements 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 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, sections 1401.5(d) and 1401.7(c)]

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)].

It is noted, too, that the "Uniform Rules and Regulations Pertaining to the Administration of the Freedom of Information Law" promulgated by Mayor Koch are consistent with those adopted by the Committee on Open Government. The Mayor's regulations, which became effective in 1979, state in part in section 5(d):

> "If because of unusual circumstances an agency is unable to determine within five days whether to grant, deny or otherwise respond to a request for inspection and copying, the records access officer shall, within such five day period, acknowledge receipt of the request in writing to the requesting party, stating the approximate date, not to exceed ten business days from the date of the acknowledgement, by which a determination with respect to the request will be made. If the agency does not make a determination with respect to the request within ten days from the date of such acknowledgement, the request may be deemed denied and an appeal may be taken to the person or body designated in the agency to hear appeals."

As such, the Mayor's regulations applicable to agencies within the jurisdiction of his office, including the Department of Environmental Protection, in my view specify the time limits for responding to requests and indicate that those limits have been exceeded with respect to your requests.

Under the circumstances, I believe that your requests have been constructively denied and that you may appeal on that basis pursuant to section 89(4)(a) of the Freedom of Information Law.

I would also point out that it has been held judicially that a shortage of manpower to comply with a request does not constitute a valid basis for a denial of access to records. In United Federation of Teachers v. New York City Health and Hospitals Corporation, it was stated that:

> "Were the court to recognize the 'defense' of a shortage of manpower by the agency from which disclosure is sought, it would thwart the very purpose of the Freedom of Information Law and made possible the circumvention of the public policy embodied in the Act" [428 NYS 2d 823, 824 (1980)].

Third, the fact that the Hudson River Fishermen's Association may be involved in litigation against the Department is, in my view, irrelevant to the duties imposed by the Freedom of Information Law. As stated by the Court of Appeals: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by

the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is a member of the public, and neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) 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.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action.'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not affect either the rights of the public or a litigant under the Freedom of Information Law.

Fourth, with respect to claims that some aspects of your request are vague, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Based upon judicial interpretations of the FOIL, a request meets the standard of reasonably describing when agency

officials, on the basis of the terms of a request, can locate and identify the records sought. Therefore, a request need not identify with particularity the specific records in which the applicant is interested.

Lastly, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency is generally not required to create or prepare a record is response to a request. Therefore, if, for example, the Department maintains no records "indicating how many sewage treatment facilities are being proposed, which would discharge into the watershed," it would not be obliged to prepare such records on your behalf in order to comply with your request.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Ms. Dooley.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Marie Dooley, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5777

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

October 11, 1989

Mr. Wilfred David
Staff Writer
Westchester Rockland Newspapers
733 Yonkers Avenue
Yonkers, New York 10704

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

Dear Mr. David:

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

You have sought an advisory opinion relating to a request for records of the City of Yonkers. Specifically, in a letter dated September 18, you requested from the City Corporation Counsel "records or portions thereof pertaining to police brutality and misconduct lawsuits filed against the Yonkers Police Department and the City of Yonkers." You added that you "are particularly interested in the 17 lawsuits which the city supplied to consultants, Murphy, Mayo and Associates of Fairfax, VA." On September 27, the request was denied on he grounds that "the information responding to your request is protected under attorney-client privilege, Section 50-A of the Civil Rights Law and Section 87-2(g) of the Public Officers Law known as the Freedom of Information Law, also please see In the Matter of Xerox Corporation v. Town of Webster, 65 NY 2d 131, 480, 490, NYS 2d 488." You appealed the denial, reiterating your request for "those papers filed with [the Office of Corporation Counsel] and the Corporation Counsel's answer."

In this regard, I offer the following comments.

First, as I understand the request, the denial rendered by the Corporation Counsel was responsive to some of the records sought, but it appears to have failed to deal with other records maintained by the City. It is likely that some of the records fall within the scope of the attorney-client privilege. Here I point out that the first basis for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For nearly a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1989); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under section 4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with section 87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)].

Similarly, section 50-a of the Civil Rights Law exempts from disclosure police officers' personnel records that sre used to evaluate performance toward continued employment or promotion. It is assumed that various records relating to charges of police brutality or misconduct might justifiably be withheld under section 50-a.

Nevertheless, legal papers filed by plaintiffs against the City were obviously not prepared by the City, its officials or its agents. As such, in my opinion, those papers would not be subject to the attorney-client privilege. Further, since those papers were created by plaintiffs, I do not believe that they could be characterized as personnel records subject to section 50-a of the Civil Rights Law. The last basis for denial reference in the response to the request apparently refers to a report prepared by consultants retained by the City. Again, plaintiffs' submissions could not in my opinion be viewed as consultants' reports or inter-agency or intra-agency materials, and section 87(2)(g) of the Freedom of Information Law would not constitute a ground for withholding records submitted to or served upon the City by plaintiffs. For similar reasons, the answers prepared by

the City, once served upon plaintiffs, would in my view, be outside the scope of the attorney-client privilege. As soon as those papers are made available to the City's legal adversary, I believe that they become a matter of public record. Moreover, although the Freedom of Information Law does not apply to the courts and court records, such records are generally available under other provisions of law [see e.g., Judiciary Law, section 255]. From my perspective, if the records sought are publicly available from a court, they would also be available under the Freedom of Information Law from the City. In short, papers submitted by plaintiffs to the City and the City's responses thereto could not in my opinion be characterized as privileged or confidential, for they would have been communicated between or among persons other than City officials and their legal counsel.

Lastly, in our discussion of the matter you indicated that the consulting firm identified earlier, Murphy, Mayo and Associates, was retained by the City to perform a study of the Police Department. Although you stated that communications between the City and the consulting firm included reference to the lawsuits that are the subject of your request, you added that the firm was not hired to deal solely with or to focus upon the lawsuits. Rather, you suggested that the study is intended to provide a general overview of the functioning of the Department, including recommendations for improvements.

Based upon the decision cited in the denial, Xerox Corporation v. Webster, supra, the communications between an agency and its consultants can be treated as "intra-agency materials" subject to 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

In its discussion of the issue of consultant reports, the Court of Appeals in Xerox stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional material, prepared to assist an agency decision maker***in arriving at his decision' (Matter of McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, Supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)]."

The Court, however, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held 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 or 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 the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I am unfamiliar with the contents of the communications between the City and the consulting firm. However, if, for example, they contain a list or description of the 17 lawsuits initiated against the City, that portion of the communications might consist of "factual" information accessible under section 87(2)(i) of the Freedom of Information Law. Further, those communications would not, as I understand the relationship between the City and the firm, be subject to the attorney-client privilege or section 50-a of the Civil Rights Law.

For the reasons described above, I believe that the litigation papers exchanged between the parties should be disclosed by the City. In addition, depending upon their contents, portions of the communications with the City's consultants concerning the lawsuits might also be accessible under the Freedom of Information Law.

As you requested, a copy of this opinion will be forwarded to J. Radley Herold, Corporation Counsel for the City of Yonkers.

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:saw

cc: J. Radley Herold, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5778

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

October 12, 1989

Dr. Jonathan Slosser
[redacted]

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

Dear Dr. Slosser:

As you are aware, I have received your letter of September 29, as well as materials related to it.

You have sought an advisory opinion concerning the response to a request for records rendered by the New York City Department of Health.

By way of background, a request was made on April 7 to inspect various records of the Department. Some of the information sought was disclosed; in other instances, it was advised that the Department does not maintain records responsive to your request. A second, related request was made on August 5. Although you referred to the Department's response in an appeal dated September 17, you did not send forward a copy of that response. As I understand the correspondence, it appears that the records withheld involve records of animal bites maintained by the Department.

According to your appeal, records of animal bites were denied pursuant to section 11.07 of the New York City Health Code. Subdivision (a) of that provision confers confidentiality with respect to reports and records of cases of "venereal disease, non-gonococcal urethritis, narcotics addiction, or drug abuse" and states that such records "shall not be subject to subpoena or to inspection by persons other than authorized personnel of the Department". Subdivision (b) pertains to reports

and records "of carriers of diseases and conditions other than" those described in subdivision (a) and states that those records are confidential with respect to all but authorized personnel of the Department, Corporation Counsel or the subject of such records or his legal representative. It is your contention that section 11.07 does not specifically exempt records concerning animal bites from disclosure, for, in your view, a person bitten by an animal is not a "carrier of disease or condition".

The Department also apparently relied in part upon section 89(2)(b) of the Freedom of Information Law, which refers to medical records. You contend that records concerning dog bites are not medical records and that the cited provision of the Freedom of Information Law is inapplicable. Further, you contend that the records are subject to the Freedom of Information Law and that you should be permitted to inspect the records after identifying details have been deleted.

In this regard, I offer the following comments.

First, I am not an expert concerning issues involving health or communicable diseases or conditions. As such, I cannot appropriately comment on your contention that section 11.07 does not pertain to records relating to animal bites.

Second, as you suggested, the first ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". It has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of an administrative code or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, if the New York City Health Code was not enacted by the State Legislature, it would not constitnte a "statute" that exempts records from disclosure. Conversely, if it was enacted by the State Legislature and includes the records in question within the scope, the records would, in my view, be specifically exempted from disclosure by statute.

Third, assuming that section 11.07 is not a statute, I believe that rights of access to the records in question would be governed by the Freedom of Information Law. If the Freedom of Information Law applies, it would appear that records involving incidences of animal bites would be available, except to the extent that disclosure would constitute "an unwarranted invasion of personal privacy" in accordance with sections 87(2)(b) and 89(2)(b) of the Freedom of Information Law. Section 89(2)(b)

provides a series of examples of unwarranted invasions of personal privacy, the first two of which specifically refer to medical histories and medical records. However, the introductory language of that provision states that an unwarranted invasion of personal privacy includes but shall not be limited to the examples that follow. Therefore, although section 89(2) does not include specific reference to records involving animal bites, I believe that such records or portions thereof may be withheld in appropriate circumstances to protect privacy. In my view, names of persons bitten and other identifying details pertaining to those persons could justifiably be withheld or deleted from the records on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Since you requested an opportunity to "inspect" the records, and since portions of the records could in my opinion justifiably be withheld if the Freedom of Information Law applies, you could not likely inspect them until copies are made and appropriate portions are deleted. If copies must be made, I believe that the Department could charge a fee for copies. Unless a different fee is prescribed by statute, the Department could charge up to twenty-five cents per photocopy for reproducing the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Caruso, Records Access Officer
Irwin S. Davison, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5779

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

October 12, 1989

Mr. Harry S. Parker
[redacted]

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

Dear Mr. Parker:

I have received your letter of October 2 in which you raised questions concerning the Freedom of Information Law.

According to your letter, on July 7, 1988, you wrote to Ms. Stacy Van Hooven of the Marshals Bureau of the New York City Department of Investigation to register a complaint concerning the actions of a particular New York City marshal. On two occasions, you requested a "receipted copy of your letter." On September 12 of this year, Ms. Van Hooven contacted you "and stated that she did not have the letter in the file but would write a letter saying confirming receipt of [your] letter in July 1988." As of the date of your letter to this office, you had received no further response. Since the "original letter was [your] own personal letter," you asked whether you should be able to obtain a copy of that letter under the Freedom of Information Law.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records. If, for example, the letter has been destroyed or discarded, the Department would not be able to prepare a copy, and the Freedom of Information Law would not be applicable. If the letter is maintained by the Department but cannot be found, I believe that a response should be given to that effect. Further, in either event, upon request, you may ask that the agency "certify that it does not have possession of such record or that such record cannot be found after diligent search" [see the Freedom of Information Law, section 89(3)].

Second, assuming that the letter continues to exist and can be found, I point out that the Freedom of Information Law pertains to all agency records and that 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."

Based on the foregoing, if the letter is maintained by the Department, I believe that it would constitute a "record" subject to rights conferred by the 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) of the Law. From my perspective, a copy of a letter that you prepared should be made available to you, for none of the grounds for denial could, in my opinion, be asserted.

In short, if the letter exists and can be found, I believe that it would be accessible to you under the Freedom of Information Law.

Lastly, since I am unaware of Ms. Van Hooven's functions, it is noted that regulations promulgated under the Freedom of Information Law by the Committee on Open Government (21 NYCRR Part 1401) and by the Mayor of New York City require that each agency designate one or more records access officers. The records access officer has the duty of coordinating an agency's response to requests for records. I believe that the records access officer for the Department of Investigation is Mr. Brian Foley. In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to Ms. Van Hooven and Mr. Foley.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Stacey Van Hooven, Marshals Bureau
Brian Foley, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5780

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

October 13, 1989

Mr. German Rivera
#80-A-2630
354 Hunter Street
Ossining, New York 10562-5442

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

Dear Mr. Rivera:

I have received your letter of October 4.

You wrote that you requested records under the Freedom of Information Law from the Office of the District Attorney of Queens County. Following a denial of the request, you appealed. In response to the appeal, the denial was affirmed, but for a reason different from that offered initially. Specifically, the appeals officer, according to your letter, wrote that, having reviewed the files, no records could be found under your name.

You have asked that this office "exercise its powers and compel the Queens District Attorney's office to allow [you] access to those records accessible to [you] and under [its] control..."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee has no power to compel an agency to grant or deny access to records.

Second, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states that an agency generally need not create of prepare a record in response to a request. As such, if no records falling within the scope of

your request exist, the Freedom of Information Law would not be applicable. The same provision states that when a record cannot be located, upon request, the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Third, in your letter, you did not describe the nature of the records in which you are interested. Here I point out that section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. It is possible that your request failed to include sufficient information to enable officials of the District Attorney's office to locate the records.

If you could provide additional information regarding the records that you requested, perhaps I could offer more useful guidance.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5781

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

October 13, 1989

Mr. Jonathan Roach
88-C-991
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. Roach:

I have received your letter of October 5 in which you raised questions relating to the Freedom of Information Law.

According to your letter, you are currently serving a sentence in conjunction with a charge of forgery. That plea was made "in full satisfaction of an unrelated and uncharged assault". You wrote that you are interested in obtaining a copy of the police report filed in relation to the assault. You also indicated that you do not know where such a request should be directed.

In this regard, I offer the following comments.

First, as a general matter, a request for records should be made to the agency that maintains the records in which you are interested. Further, 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 must designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests. Your letter does not indicate which police department prepared the report concerning the assault. However, since the incident apparently occurred in a city in Monroe County, I have contacted the City of Rochester on your behalf and have arranged to have a request form sent to you in the event that the report was prepared by its Police Department. The form will indicate a mailing address for the purpose of submitting a request.

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.

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. Since I am unfamiliar with the contents or the effects of disclosure of the arrest report, I cannot offer specific guidance concerning rights of access to the report. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the report.

Of potential 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". It might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to investigative records maintained by a police department or other law enforcement agencies 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."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e).

Another possible ground for denial is section 87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is section 87(2)(g). The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Investigative records prepared by employees of a law enforcement agency could in my view be considered as "intra-agency materials". Those records might include opinions or recommendations made by police officers or others that could be withheld under section 87(2)(g).

In sum, as suggested in the preceding commentary, rights of access to records, as well as an agency's authority to withhold records, are largely dependent upon the contents of the records and the effects of their disclosure.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory brochure that may be useful to you.

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

OML-AO 1672
FOIL-AO-5782

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

October 16, 1989

Ms. Ronda Engman
[redacted]

The staff of the Committee on 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. Engman:

I have received your letter of October 5, as well as the materials attached to it.

Your inquiry concerns a request for records directed to Mr. Jack Lowe, Director of Sponsored Programs at Cornell University. The records sought, which relate to certain grants, include:

"1. The grant reference number.
2. When the grant first went in effect.
3. How much money has been allocated thus far for each grant.
4. What kind of and how may research models are being used for each grant.
5. The general nature of the experimentation being conducted on these research models."

In response, Mr. Lowe indicated that his office, as a matter of policy, "does not release specific information contained within grants for a variety of reasons not the least of which is to protect the proprietary information contained therein." He added that three aspects of the information sought, including "the grant number, date of activation and total award" have been made available to you through a newsletter. Mr. Lowe also referred to the functions and procedures of the University's Institutional

Animal Care and Use Committee, which protect "proprietary information," and to recent incidents that have threatened the safety of personnel, the projects and the animals used in the projects.

In this regard, I offer the following comments.

First, the initial issue to be considered is whether Cornell University is subject to the requirements of the Freedom of Information Law. As you are aware, although Cornell is in many respects a private institution, it also operates four "statutory colleges" that function in certain respects as extensions of the State University of New York. I believe that the records in question are maintained by or involve one of the four statutory colleges. As such, rights of access under the Freedom of Information Law would be contingent upon whether that materials sought are "agency records." Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

In Holden v. Board of Trustees of Cornell University [440 2d 58, aff'd 80 AD 2d 378 (1981)], it was held that the Cornell Board of Trustees is a "public body" subject to the Open Meetings Law when it deliberates with respect to the four statutory colleges administered by Cornell under the supervision of the State University of New York. Although the court found that such activities of the Board of Trustees fell within the scope of the Open Meetings Law, it did not determine whether the records regarding statutory colleges would be subject to the Freedom of Information Law. Section 102(2) of the Open Meetings Law defines "public body" to include:

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

From my perspective, a distinction between the definitions of "agency" in the Freedom of Information Law and "public body" in the Open Meetings Law involves the language referring to "governmental" entities performing a governmental or proprietary func-

tion in the case of the former, as opposed to "any" entity performing a governmental function in the latter. Whether a court would equate these two phrases in view of the activities performed by Cornell with respect to the statutory colleges is as yet undetermined.

Second, the difficulty in determining whether or not an entity is "governmental" in character was recognized by the Court of Appeals in Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)]. In that case, the State's highest court found that records of a volunteer fire company, a not-for-profit-corporation, providing fire protection services to a municipality, are subject to the Freedom of Information Law. However, the Court stated that:

> "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 News v. Kimball, supra, at 581)."

The Court of Appeals disagreed with the argument of the volunteer fire company that it should not be subject to the Freedom of Information Law because it did not constitute an "organic arm of government." The extent to which there may be similarities or analogies that can be drawn between the Kimball holding and the factual situation at issue is in my view conjectural. It is undisputed that the State University system is an "agency" subject to the Freedom of Information Law; whether the records of the four statutory colleges are "agency records" remains to be determined.

In short, unless the statutory colleges are "agencies" subject to the Freedom of Information Law, there would be no obligation, in my view, to give effect to the Freedom of Information Law.

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

Of potential significance is the initial ground for denial, section 87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." A federal statute, 7 U.S.C. section 2142, which is entitled "Standards and certification process for humane handling, care, treatment and transportation of animals," and which deals with institutional committees in research facilities, states in subdivision (6)(b) that:

> "No rule, regulation, order or part of this chapter shall be construed to require a research facility to disclose publicly or to the Institutional Animal Committee during its inspection, trade secrets or commercial or financial information which is privileged or confidential."

In my view, to the extent that your request involves "proprietary information," i.e., trade secrets or commercial or financial information that is privileged, such information would be specifically exempted from disclosure by federal statute.

Based on the foregoing, to the extent that the federal statute cited above is applicable, it appears that records falling within the scope of your request could be withheld, whether or not the documents in question could be characterized as "agency records." On the other hand, to the extent that the federal statute does not apply, the records sought would be subject to the Freedom of Information Law if the documentation consists of agency records. I do not have sufficient familiarity with the contents of the records or the possibility that they may consist of "proprietary information" to offer specific guidance concerning Cornell's obligation to disclose or its authority to withhold the records.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Jack W. Lowe, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5783

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

October 17, 1989

Mr. Seymour H. Miller
[redacted]

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

Dear Mr. Miller:

I have received your letter of October 10 in which you complained that requests directed to the New York City Department of Housing Preservation and Development have either been lost or unanswered. You have asked for an advisory opinion concerning the course of action that may be taken. Further, you inquired as to whether there is "a speedy and automatic penalty imposed on such agencies, to act as a deterrent to future wrongs".

In this regard, I offer the following comments.

First, your initial request was apparently sent to a local office of the Department. While I believe that the request should have been answered directly or forwarded to the appropriate person, requests made under the Freedom of Information Law should generally be directed to the agency's designated "records access officer". By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see attached regulations, 21 NYCRR Part 1401). In turn, section 87(1)(a) of the Law states that a public corporation, such as the City of New York:

> "shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

As such, an agency's regulations should be consistent with those promulgated by the Committee.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, section 1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more personas as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefore.
>
> (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 request to copy those records..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests.

Second, the Freedom of Information Law and the Committee's regulations prescribe time limits within which an agency must respond 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 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, sections 1401.5(d) and 1401.7(c)].

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, 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

It is noted, too, that the "Uniform Rules and Regulations Pertaining to the Administration of the Freedom of Information Law" promulgated by Mayor Koch are consistent with those adopted by the Committee on Open Government. The Mayor's regulations, which became effective in 1979, state in part in section 5(d):

> "If because of unusual circumstances, an agency is unable to determine within five days whether to grant, deny or otherwise respond to a request for inspection and copying, the records access officer shall, within such five day period, acknowledge receipt of the request in writing to the requesting

> party, stating the approximate date, not to exceed ten business days from the date of the acknowledgement, by which a determination with respect to the request will be made. If the agency does not make a determination with respect to the request within ten days from the date of such acknowledgement, the request may be deemed denied and an appeal may be taken to the person or body designated in the agency to hear appeals."

As such, the Mayor's regulations applicable to agencies within the jurisdiction of his office, including the Department of Housing Preservation and Development, specify the time limits for responding to requests.

Under the circumstances, if your request has not been answered within the appropriate time limits, you may consider the request to have been denied and may appeal on that basis.

Lastly, there is no "speedy and automatic penalty" that may be imposed upon agencies that fail to comply with the Freedom of Information Law. If an agency does not comply with the Law, an applicant may seek judicial review. The only provision in the Freedom of Information Law that might be characterized as authorizing a "penalty" is section 89(4)(c), which provides a court with discretionary authority to award attorney's fees to a successful petitioner when certain conditions are present. The Committee on Open Government in its latest annual report to the Governor and the Legislature recommended that the Law be amended to provide a court with greater authority to award attorney's fees. Its recommendation, however, was not enacted.

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: Alfred Schmidt, Records Access Officer

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5784

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

October 17, 1989

Mr. Anthony Collins
#81-A-1572
P.O. Box 367-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. Collins:

I have received your letter of October 11, as well as the correspondence attached to it.

As I understand the matter, you requested copies of forensics reports from the New York City Police Department relative to a particular complaint. In response to the request, you were informed by the Department's Records Access Officer that the records were "not on file with this agency." Since you consider the records to have been denied, you asked for the name of the person to whom an appeal may be made. In addition, you questioned whether "it is truly possible that they don't have the information" and asked whether some other entity might possess the reports.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and an agency has the capacity to grant or deny access only with respect to such records. In my view, if the Department does not maintain the records sought, I do not believe that a response to that effect could be characterized as a denial. Nevertheless, for future reference, the appeals officer for the Department is Eileen O. Millett, Assistant Deputy Commissioner for Legal Affairs.

Second, without knowledge of the facts relating to the complaint, I cannot advise whether the Police Department should or must have the records in question. Assuming that forensics reports have been prepared, it is possible that they may be maintained by a district attorney or perhaps by the clerk of a court in which a proceeding relating to the complaint was conducted.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5785

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

October 18, 1989

Mr. George Charleston
88-A-7371
P.O. Box 367B
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. Charleston:

I have received your recent letter in which you raised an issue concerning access to records.

Having requested an opportunity to review correction records pertaining to you at your facility, you were informed that you could not obtain certain records, such as your pre-sentence report. You have requested assistance concerning your right to obtain the pre-sentence report.

In this regard, I offer the following comments.

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. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available.

"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."

As such, pre-sentence reports are confidential with respect to the public and may be made available to a defendant only by a court. Since you referred to the possible importance of the report, I point out that the last sentence of subdivision (2)(a) of section 390.50 represents an amendment to the original provision. Further, in a decision concerning the amendment, it was found that:

> "The obvious purpose of the legislature in enacting Chapter 132 of the Laws of 1984 was to make the presentence report generally more accessible to counsel and/or the defendant pro se. The spirit of such amendments was open disclosure and discussion of the information before the Court in sentencing and/or appellate review of sentencing and the need to remedy the mischief created by bureaucratic roadblocks to that process. Therefore, this court holds that the agency should be obligated to make them available pursuant to court order..." [see People v. Zavaro, 481 NYS 2d 845, 846 (1984)].

Based upon the foregoing, I believe that a request for the presentence report should be made to the sentencing judge.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5786

162 WASHINGTON AVENUE, ALBANY, NEW YOR
(518) 474-25

October 18, 1989

Ms. Alberta Cozza
[redacted]

The staff of the Committee on 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. Cozza:

I have received your letter of October 12, as well as the correspondence attached to it.

According to the correspondence, it appears that you requested a fee schedule from your dentist. In response to the request, you were informed that, as a matter of policy, the fee schedule is not given to patients. Your question is whether the issue falls within the scope of the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and section 86(3) of the Law defines the term "agency" to mean:

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

As such, the coverage of the Freedom of Information Law generally includes records maintained by entities of state and local government. Records of a private dentist, therefore, would not f

within the requirements of the Freedom of Information Law. Further, the letterhead of the dental center where you were treated suggests that it is a private rather than a governmental entity.

Second, the State Education Department licensees dentists and has certain rule-making authority concerning the conduct of licensees. Although I am unaware of whether there is any rule or regulation relative to the issue that you raised, it is suggested that you contact the Department to obtain information on the subject. Such an inquiry may be directed to:

Martin Rubin, Executive Secretary for Dentistry
Office of the Professions
State Education Department
Cultural Education Center
Empire State Plaza
Albany, New York 12230

Mr. Rubin can be reached by phone at (518) 474-3838.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5787

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

October 18, 1989

Mr. Robert Merlino
Din: 85-A7998 (29-20)
Box 338
Napanoch, New York 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. Merlino:

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

As I understand the matter, several months ago you requested various records from the New York City Police Department. In response to the request, you received a chemical analysis concerning one indictment number, but you did not receive a chemical analysis concerning a different indictment number. It is your view that if you received an analysis relating to one of the indictment numbers, there should be no reason for being unable to obtain a similar report relative to the other indictment number.

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. Since the event resulting in the charges occurred in 1982, it is assumed that any investigation concerning the matter has ended. Further, it would appear that a chemical analysis would consist wholly of factual information. If my assumptions are accurate, I believe that the report in which you are interested would be accessible under the Freedom of Information Law, if it exists.

Second, having reviewed the materials attached to your letter, it appears that there may have been several charges or indictment numbers relating to a single incident. If the two indictment numbers cited in your letter pertain to the same incident, it is possible if not likely in my view that there was one chemical analysis performed. If that was the case, there would be no second chemical analysis, and the Department would have fully responded to your request. In short, you may be seeking a record that does not exist.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5788

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

October 18, 1989

Mr. Joseph S. De Fazio
Joe D Real Estate, Inc.
2401 Monroe Avenue
Rochester, NY 14618

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

Dear Mr. De Fazio:

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

The correspondence consists of a letter of September 26 sent to the records access officer of the Village of Brockport in which you requested "a copy of each bill, voucher and payment concerning each expenditure made by the Village" in connection with "Legal Expenses and Expert Fees Concerning Joe D Real Estate, Inc., vs. Village of Brockport". As of the date of your letter to this office, you had received no response to your request.

In this regard, I offer the following comments.

First, bills, vouchers, contracts 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. With respect to payments to attorneys, I point out that, while the communications between an attorney and client are generally privileged, 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 time sheets, 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 details or descriptions of services rendered found in the records in question 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 decisions have been rendered under the Freedom of Information Law in which it was held that records indicating payment by a village to its attorney are available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., August 20, 1981; Young v. Virginia R. Smith, Mayor of the Village of Ticonderoga, Supreme Court, Essex County, Jan 9, 1987].

Second, 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 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, sections 1401.5(d) and 1401.7(c)].

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, 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 on that basis. As suggested earlier, the appeal would be made to the Village Board of Trustees or a person designated by the Board to determine appeals.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion 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: Records Access Officer, Village of Brockport

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5789

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

October 19, 1989

Mr. Edward J. Heldman
[redacted]

The staff of the Committee 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. Heldman:

I have received your letter of October 7, as well as the correspondence attached to it.

The correspondence consists of a letter addressed to Assistant Commissioner Thomas Neveldine of the Office of Education of Children with Handicapping Conditions at the State Education Department concerning requests made under the Freedom of Information Law. The requests were made early in June and were approved by Eugene Snay, the Department's Records Access Officer. Since you did not receive the records sought, you appealed to the Commissioner on August 29. On September 5, you were contacted by a representative of the Office, who indicated that the request would be honored and that the delay was caused by an administrative change and a shortage of staff. As of the date of your letter to this office, you still had not received the records, which involve statistics concerning the education of handicapping children and information about an impartial hearing officers training course.

You have complained with respect to the matter and requested advice. 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 aspects of the Law (see 21 NYCRR Part 1401). In turn, each agency is required by section 87(1) of the Law to adopt

rules and regulations "pursuant to such general rules as may be promulgated by the committee on open government in conformity with the provisions of this article" (the Freedom of Information Law).

One aspect of the regulations involves a requirement that each agency designate one or more records access officers. The records access officer, according to the regulations [section 1401.2(a)], has "the duty of coordinating agency response to public requests for access to records". Although Mr. Snay, the records access officer, approved the request, it appears that he may not have been aware of the delay in response.

Second, the Freedom of Information Law and the Committee's regulations provide guidance concerning the procedural requirements 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

Under the circumstances, I believe that your request was constructively denied and that you could have appealed on that basis pursuant to section 89(4)(a) of the Freedom of Information Law.

I would also point out that it has been held judicially that a shortage of manpower to comply with a request does not constitute a valid basis for a denial of access to records. In United Federation of Teachers v. New York City Health and Hospitals Corporation, it was stated that:

> "Were the court to recognize the 'defense' of a shortage of manpower by the agency from which disclosure is sought, it would thwart the very purpose of the Freedom of Information Law and made possible the circumvention of the public policy embodied in the Act" [428 NYS 2d 823, 824 (1980)].

Lastly, I have contacted the Department on your behalf to learn more of the status of your request. I was informed that responses to the requests were sent to you via certified mail on October 12. It was also explained that although certain aspects of your request were honored some time ago, a response to the remainder of the request was delayed due to changes in staffing.

Further, having been informed of the general nature of the requests, I point out for future reference that section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. In brief, it has been held that a request reasonably describes the records when the agency can locate and identify the records based upon the terms of a request [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986); also Johnson Newspaper Corp. v. Stainkamp, 94 AD 2d 825, 826, modified on other grounds, 61 NY 2d 958 (1984)]. Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system; whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Comm., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden.

> It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

From my perspective, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the nature of an agency's filing system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. Based upon my discussions with staff at the Department, even though your request has apparently been fulfilled, it appears that staff engaged in extraordinary efforts in locating the records. It is likely that in so doing, the Department acted in excess of the requirements of the Freedom of Information Law.

During a conversation with Department staff, reference was made to your letter of September 26 in which you requested a "clarification" concerning the records. In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create records in response to a request. Despite its title, the Freedom of Information Law involves access to records rather than "information". It is a vehicle under which an applicant may seek existing records; however, it does not require that agency officials answer questions or provide explanations of the contents of records. Although I was told that a response to your request for a clarification will be rendered within approximately a week, again, I believe that such a response would represent an effort that exceeds the obligations imposed by the Freedom of Information Law.

I hope that I have been of some assistance and that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5790

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

October 19, 1989

Mr. Clarence Sanders
[redacted]

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

Dear Mr. Sanders:

Your letter of October 11 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State upon which the Secretary serves as a member, is responsible for advising with respect to the Freedom of Information Law.

According to your letter and the correspondence attached to it, you requested three collective bargaining agreements, as well as any supplemental agreements, between the New York City Transit Authority, the Manhattan and Bronx Surface Transit Operating Authority and the Transport Workers Union of America. In response to the request, you were informed by the Transit Authority's Freedom of Information Officer, Ms. Corrine A. McCormick, that the agreements in question include approximately 600 pages, and that the fee for reproducing those records would be approximately $150. A similar request was made to the Transport Workers Union.

As an employee subject to the agreements, you questioned both the fairness of and the right to assess the fee. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records and section 86(3) of the Law defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law generally includes entities of state and local government within its coverage. As such, I believe that the Transit Authority is clearly an "agency" required to comply with the Freedom of Information Law. The union in my opinion is not an agency. Therefore, while the union may choose to reproduce the agreements, it would not be subject to the requirements of the Freedom of Information Law.

Second, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy. Consequently, if a request encompasses 600 pages, the agency could charge $150 in accordance with the Law. Further, a judicial interpretation of the Freedom of Information Law indicates that an agency may require that the fee for copies be paid in advance (Santucci v. McGuire, Supreme Court, New York County, November 4, 1982).

Lastly, although an agency may charge a fee for copies, no fee may be assessed for the inspection of records. Therefore, if you choose to do so, you could arrange to inspect the records at no charge, or perhaps review the records to determine which portions you would like to have copied.

I hope that the foregoing serves to clarify the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Corrine A. Mc Cormick, Freedom of Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5791

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

October 19, 1989

Mr. Anthony Chiarenza
87-A-8167
Sing-Sing Correctional Facility
354 Hunter Street
Ossining, New York 10562

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

Dear Mr. Chiarenza:

I have received your letter of October 10 in which you requested assistance concerning a request for records.

As I understand the matter, you accused a Trooper Freeman of perjury, and you were interviewed with respect to the accusation by an Inspector Weber. Inspector Weber indicated that he would be speaking with you again, but he never did so. Soon after the interview, you wrote that Trooper Freeman committed suicide. Thereafter, you requested from the Division of State Police copies of Inspector Weber's report concerning the investigation of Trooper Freeman, as well as "information on the cause or reason for [redacted]." Your request was denied, and you were informed that Inspector Weber "had left the Department." Your request for information to be used to contact him was denied. In addition, you asked whether I am related to Trooper Freeman.

In this regard, I offer the following comments.

Firat, I am unrelated to Trooper Freeman.

Second, with respect to your effort to contact Investigator Weber, section 89(7) of the Freedom of Information Law states in part that nothing in the Law requires the disclosure of the home address of a current or former public servant. If, however,

Mr. Weber transferred to another agency of government, and if the Division maintains a record indicating his new public office address, that portion of the record would, in my view, be accessible under the Freedom of Information Law.

Third, with regard to Inspector Weber's report and records relating to the suicide, I point out that 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. Since I an unfamiliar with the contents or the effects of disclosure of the records, I cannot offer specific guidance concerning rights of access to them. However, the following paragraphs will review the grounds for denial that may be significant in consideration of those records.

Of potential 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." It might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself, such family relations of a suicide victim, for example.

Perhaps the most relevant provision concerning access to investigative records maintained by the Division of the State Police or other law enforcement agencies 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."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e).

Another possible ground for denial is section 87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person." The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is section 87(2)(g). The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Investigative records prepared by employees of a law enforcement agency could in my view be considered as "intra-agency materials." Those records might include opinions or recommendations made by an inspector, or by police officers or others that could be withheld under section 87(2)(g).

In sum, as suggested in the preceding commentary, rights of access to records, as well as an agency's authority to withhold records, are largely dependent upon the contents of the records and the effects of their disclosure.

Fourth, section 89(4)(a) of the Freedom of Information Law provides a right to appeal a denial of access to records. Specifically, 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."

Lastly, under the circumstances, it is suggested that you discuss the matter with your attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FAL-AO-5792

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

October 19, 1989

Mr. Paul W. Karpowich
[redacted]

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

Dear Mr. Karpowich:

I have received your letter of October 12, which relates to an opinion addressed to you on September 11.

Having reviewed the opinion and the materials that you forwarded, I would like to attempt to clarify the matter.

Certainly a town ordinance constitutes a record subject to rights conferred by the Freedom of Information Law. Your request involved the section of the Town of Milan Zoning Ordinance "that permits a non-agricultural business be conducted from a R5A zone and or a A3A zone". I would guess that there is no particular section of the ordinance that specifically refers to a non-agricultural business conducted in certain zones. However, the information sought might, upon analysis, be contained in a record or perhaps a series of records. Stated differently, an analysis or interpretation of the ordinance might provide the information in which you are interested.

In this regard, the Freedom of Information Law pertains to existing records. It does not require public officials to analyze or interpret records. In short, as I understand the issue, you requested an answer to a question that could be provided only in conjunction with an analysis or interpretation of the ordinance. If my assumption is accurate, I do not believe that the Freedom of Information Law would be the appropriate vehicle for seeking an answer.

It is suggested that you review the ordinance, attempt to reach your own opinion of the matter and then discuss the issue with the appropriate Town official.

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-5793

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

October 20, 1989

Mr. Mitch Paulsen
Mitch Paulsen Outreaches
P.O. Box 0322
Baldwin, New York 11510

The staff of the Committee 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. Paulsen:

I have received your letter of September 28, as well as the correspondence attached to it.

The correspondence indicates that you requested the following materials from the Nassau County Police Department:

"1) Any condensed version(s) of the Town of Hempstead codes containing chapter 144, regardless of who produced it (them).

2) Any condensed or other version of the Town of Hempstead codes on the person of officer Cacioppo Shield #995 serial #5567 on the evening of August 26, 1989.

3) The name(s) and title of any person(s) or officer(s) who were involved in any capacity in the production of the aforementioned version(s).

4) A copy of chapter 144 of the Town of Hempstead code that is resident in the 8th precinct as their official rendering.

5) Any law or regulation that would expressly prohibit the free distribution of non-commercial literature at the Nassau Coliseum. That is, literature being distributed outside on the sidewalk in such a way that does no violate any other regulation (block entrances, impede traffic, litter, etc.).

6) The name, title, salary and official address of every officer working out of the 8th, Highway and Mounted precincts. The name, title and salary of every employee working in the police department legal bureau, including but not limited to secretaries, officers and attorneys.

7) The salary and official address (that is the address where legal papers can be served) of Inspector Doughty, Lieutenant Turk, Officers Gregory and Cacioppo if not included in (6)."

In response to the report, Richard Baribault, Deputy Inspector and Commanding Officer of the Department's Legal Bureau, indicated he had already responded to certain aspects of your request and advised with respect to the other requests that:

"1) Copies of Chapter 144 of the Town of Hempstead Code should be obtained from the Town Clerk, who is the official keeper of said local law.

2) With reference to law concerning the distribution of literature, you have failed to identify any specified document which can be identified under the 'Public Officers Law.'

3) Concerning information pertaining to police personnel in the Eighth Precinct, Highway Patrol Bureau, Legal Bureau and Mounted Unit, your request should be directed to the Office of the Nassau County Comptroller."

You have requested an advisory opinion concerning the matter. In this regard, I offer the following comments.

First, having discussed the matter with Inspector Baribault, I was informed that the Department has neither prepared nor distributed "condensed versions" of any codes enacted by the Town of Hempstead. As he suggested, copies of such codes may be obtained from the Hempstead Town Clerk.

Second, with respect to item 5 of your request, it appears that there is no document that refers to laws concerning the distribution of literature at the Nassau Coliseum. In discussing the matter with Inspector Baribault, although he made no reference to any law, he indicated that the Coliseum is a private entity, and that judicial decisions have been rendered dealing with the kind of issue that you raised. In addition, it is emphasized that the Freedom of Information Law pertains to records; it does not require that agency official interpret records in an effort to provide "information."

Third, as Inspector Baribault indicated, payroll information concerning Police Department personnel is maintained by the County Comptroller. I point out that section 87(3)(b) of the Freedom of Information Law requires that each agency, such as Nassau County, maintain:

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

I believe that much of the personnel-related information that you seek would be contained in the list prepared pursuant to section 87(3)(b). It is noted, however, that an agency is generally not required to create a record in response to a request [see Freedom of Information Law section 89(3)]. Therefore, to the extent that the information that you requested does not exist in the form of a record or records, the Freedom of Information Law would not require that new records be prepared to satisfy your request.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Richard Baribault, Deputy Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5794

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

October 24, 1989

[redacted]

The staff of the Committee 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 [redacted]:

I have received your letter, which is dated September 6, but which reached this office on October 17.

You have requested an advisory opinion concerning a denial of a request made to the Fulton County Department of Social Services. Specifically, you asked to be informed of the "nature and cause of [an] accusation and to be confronted with witnesses against [you]...". Further, you expressed the view that you have a right to the information under the Constitution of the United States.

In this regard, I offer the following comments.

First, while I am not an expert with respect to constitutional issues, I do not believe that there is any constitutional right to government records. Any such rights that exist are conferred by statutes enacted by legislative bodies.

Second, the statute that deals generally with access to records maintained by entities of state and local government in New York is the Freedom of Information Law. That statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Third, having conferred with an attorney for the Department, I was informed that your request involved records relating to child abuse. Here I point out that the initial ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is section 422 of the Social Services Law. In brief, that statute requires that information regarding reports of child abuse must be kept confidential, except in specified situations. As such, any rights that you may have would exist under the Social Services Law rather than the Freedom of Information Law, and it is suggested that you review section 422.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5795

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

October 26, 1989

Mr. German Rivera
Sing-Sing Correctional Facility
354 Hunter Street
Ossining, New York 10562-5442

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

Dear Mr. Rivera:

I have received your letter of October 19, which relates to my earlier letter addressed to you.

You wrote that you are attempting to obtain copies of your pre-sentence report and a "transcript of tape recordings" maintained by the office of a district attorney.

In this regard, I offer the following comments.

First, I believe that a statute other than the Freedom of Information Law governs the disclosure of pre-sentence report. 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. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available.

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."

As such, pre-sentence reports are confidential with respect to the public and may be made available to a defendant only by a court. I point out that the last sentence of subdivision (2)(a) of section 390.50 represents an amendment to the original provision. Further, in a decision concerning the amendment, it was found that:

> "The obvious purpose of the legislature in enacting Chapter 132 of the Laws of 1984 was to make the presentence report generally more accessible to counsel and/or the defendant pro se. The spirit of such amendments was open disclosure and discussion of the information before the Court in sentencing and the need to remedy the mischief created by bureaucratic roadblocks to that process. Therefore, this court holds that the agency should be obligated to make them available pursuant to court order..." [see People v. Zavaro, 481 NYS 2d 845, 846 (1983)].

Based upon the foregoing, I believe that a request for the pre-sentence report should be made to the sentencing judge.

Second, with respect to a request that may be made for transcripts of tape recordings, as indicated in my previous letter to you, section 89(3) requires that an applicant must "reasonably describe" the records sought. As such, a request should contain sufficient detail to enable agency officials to locate the records. Therefore, it is suggested that your request include as much detail as possible, such as names, dates, docket and indictment numbers, etc.

Third, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states that an agency is generally not required to create a record in response to a request. If, for example, a transcript of a tape recording has not been prepared, the agency would not be required to create a transcript in response to a request.

Fourth, if a transcript or tape recording is maintained by an agency, I believe that either would constitute a "record" subject to rights of access. Section 86(4) of the Freedom of Information Law defines the term "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."

Lastly, I am unfamiliar with the contents of the transcript or tape recording in question. Consequently, I cannot offer specific guidance concerning the extent to which it would be available. However, several of the grounds for denial may be relevant.

Of potential 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." It might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself.

Perhaps the most relevant provision concerning access to investigative records maintained by law enforcement agencies 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."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (1) through (iv) of section 87(2)(e).

Another possible ground for denial is section 87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person." The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is section 87(2)(g). The cited provision permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Investigative records prepared by employees of a law enforcement agency could in my view be considered as "intra-agency materials." Those records might include opinions or recommendations made by an inspector, or by police officers or others that could be withheld under section 87(2)(g).

In sum, as suggested in the preceding commentary, rights of access to records, as well as an agency's authority to withhold records, are largely dependent upon the contents of the records and the effects of their disclosure.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5796

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

October 27, 1989

Mr. Alberto Quinones
88-A-4220
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

Dear Mr. Quinones:

I have received your letter of October 24. You requested from this office all records pertaining to you.

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 appear to be interested.

A request should be made to the records access officer at the agency or agencies that you believe would maintain records of interest to you. The records access officer has the duty of coordinating an agency's response to requests made under the Freedom of Information Law. I point out that the regulations promulgated 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.

In addition, 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 include sufficient detail to enable agency officials to locate and identify the records.

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-5797

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

October 27, 1989

Ms. F.J. Thompson
[redacted]

Dear Ms. Thompson:

I have received your letters of October 22 in which you asked whether certain records relating to appeals were forwarded to this office.

Having reviewed our files, the records in question have not been sent to the Committee as required by section 89(4)(a) of the Freedom of Information Law. As you are aware, that provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. 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 enhace compliance with the Freedom of Information Law, copies of this letter will be sent to the persons identified in your correspondence.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Joseph Messina
Donald S. Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5797

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

October 27, 1989

Ms. F.J. Thompson
[redacted]

Dear Ms. Thompson:

I have received your letters of October 22 in which you asked whether certain records relating to appeals were forwarded to this office.

Having reviewed our files, the records in question have not been sent to the Committee as required by section 89(4)(a) of the Freedom of Information Law. As you are aware, that provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. 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 enhace compliance with the Freedom of Information Law, copies of this letter will be sent to the persons identified in your correspondence.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Joseph Messina
Donald S. Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-94
FOIL-AO-5798

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

October 27, 1989

Mr. Gregory Treadwell
#71-B-0057
Sing-Sing Correctional Facility
354 Hunter Street
Ossining, New York 10562

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

Dear Mr. Treadwell:

I have received your letter of October 16, as well as the materials attached to it.

You have requested an opinion concerning your effort to insure that "incorrect and erroneous" information concerning you is amended or perhaps expunged.

In this regard, I offer the following comments.

First, the Freedom of Information Law involves rights of access to records. Nothing in that statute pertains to the right of an individual to correct or amend records.

Second, although the Personal Privacy Protection Law generally provides that persons who are the subjects of records maintained by state agencies may seek to amend or correct records pertaining to them, the provisions of that statute concerning amendment or correction or records do not apply to "public safety agency records" [see Personal Privacy Protection Law, sections 92(8) and 95(7)]. The records to which you referred that are maintained by a state agency would, in my opinion, constitute public safety agency records.

Further, rights conferred by the Personal Privacy Protection Law are not applicable to records maintained by the courts, any unit of local government or offices of district attorneys.

I hope the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5799

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

November 1, 1989

Mr. Thomas J. Muller
89-B-1631
P.O. Box 500
Elmira, New York 14902-0500

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

Dear Mr. Muller:

I have received your letter of October 19 in which you requested assistance.

Your inquiry pertains to a request for medical records maintained by the Elmira Correctional Facility. In response to the request, you were informed that there would be charge of 25 cents per photocopy, as well as a fee of $5.00 to cover staff time for reviewing and copying the records.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by the Department of Correctional Services and its facilities. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appear in section 87(2)(a) through (i) of the Law.

With respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personal could be characterized as "intra-agency materials" that

fall within the scope of section 87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, on January 1, 1987, a new statute, section 18 of the Public Health Law, became effective. In brief, that statute generally grants rights of access to medical records to the subjects of the records.

With respect to fees, unless another statute permits the assessment of a different fee, records accessible under the Freedom of Information Law may be inspected free of charge, and the agency cannot impose a fee involving personnel costs, for instance. When copies are requested, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing records that cannot be photocopied, unless otherwise provided by a statute other than the Freedom of Information Law. Section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of inability to pay."

In view of the foregoing, it appears that the fees assessed by the Department are being imposed pursuant to the Public Health Law rather then the Freedom of Information Law. There are no judicial decisions of which I am aware that deal with whether fees for the records in question should be properly assessed under the Freedom of Information Law or under section 18 of the Public Health Law. Assuming that the fee could be charged under the latter, it would apparently have been appropriate.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

> Access to Patient Information Coordinator
> New York Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5800

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

November 1, 1989

Mr. Robert Millman
Millman Video Productions
HCR 1, Box 139
Jerome Avenue
Cairo, New York 12413

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

Dear Mr. Millman:

As you are aware, I have received your letters of October 12 and October 18, as well as related materials.

Your inquiry concerns requests to view and obtain a copy of a "3/4 inch videotape original edited master" that you produced pursuant to an agreement with Greene County. You wrote that neither your requests nor your appeal have been answered by County officials. It is noted that I have attempted to contact the County Attorney on several occasions to discuss the matter but that my calls have not been returned.

In this regard, I offer the following comments.

First, in view of the County's failure to respond to your 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, 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, sections 1401.5(d) and 1401.7(c)]

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 Freedom of Information Law is applicable to all agency records. From my perspective, the issue in terms of rights of access is whether the videotape in question constitutes a "record" subject to rights of access. 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."

Based upon the foregoing, the Freedom of Information Law generally includes within its scope any information regardless of its physical form or characteristics.

As you are aware, the County Attorney has contended that the videotape is not a "record" but rather that it is the physical product prepared pursuant to an agreement between you and the County. Somewhat related to that contention is a decision involving a request for "physical evidence," such as tools and clothing. The court held that those items were not "records" within the meaning of the Freedom of Information Law [see Allen v. Strojnowski, 129 AD 2d 700 (1987)]. If the County Attorney's contention is accurate, the Freedom of Information Law would be irrelevant to your request. On the other hand, a videotape, by its nature, is an information storage medium.

In short, if the videotape is considered to be the physical product of an agreement, the Freedom of Information Law would not apparently apply; conversely, if it is considered an agency record, rights conferred by the Law would, in my opinion, apply. Due to the absence of judicial decisions involving situations similar to yours, unless the County determines to disclose the videotape, it appears that the issue could be resolved only by a court.

Lastly, assuming that the videotape is a "record" for purposes of the Freedom of Information Law, I believe that it would be available to you, as the maker of the tape. 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. Again, since you are familiar with its contents, none of the grounds for denial would, in my view, apply.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: James W. Hitchcock, Clerk of the Legislature
George J. Pulver, Jr., County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5801

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

November 2, 1989

Mr. and Mrs. Albert Nunn
[redacted]

Dear Mr. and Mrs. Nunn:

I have received your letter of October 13, as well as the materials attached to it. Since you also sent letters to certain members of the Committee on Open Government, I point out that the Committee has authorized the staff to respond to inquiries on its behalf.

Once again, the issue deals with your attempts to obtain records for New York City agencies concerning the death of your son in October of 1987. The matter was considered at length in an opinion addressed to you on August 21. Your more recent correspondence involves appeals of denials of access addressed to the New York City Health and Police Departments. Your appeals were forwarded to those agencies on August 3 and October 13 respectively. As of the date of the letter addressed to this office, you had not received responses to your appeals.

In this regard, I offer the following comments.

First, as indicated in my previous letter to you, following a denial of access to records, an applicant may 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."

Further, it has been held that when an appeal is made but no determination is rendered within ten business days of the receipt of the appeal, the appeal may be considered to have been denied and the applicant may initiate a challenge to the denial under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

Second, I have contacted representatives of both the Police and Health Departments on your behalf to learn more about the status of the matter. I was informed by an assistant to Ms. Eileen Millet, the Police Department's Appeals Officer, that your appeal is in the process of being reviewed and that a determination will likely be rendered by the end of next week.

Third, on the basis of your correspondence, it appears that you have obtained a variety of records from New York City. However, I am unaware of the contents of the records in your possession. Similarly, I am unfamiliar with the contents of the records falling with the scope of your request that are maintained by the agencies in receipt of your requests. In a discussion of the matter with Ms. Millett's assistant, it was suggested that you have obtained, either through the Freedom of Information Law or by other methods, many of the records maintained by the Department relating to your son's death. I was also informed that the Kings County Office of the District Attorney is still investigating the matter. In addition, an investigation is currently being conducted by the Internal Affairs Division of the Police Department. As such, the matter remains under investigation.

I have also spoken with the General Counsel to the Health Department and its Appeals Officer, Mr. Irwin Davison, concerning your appeal. Mr. Davison indicated that he recently responded to the appeal. While I have not yet received a copy of his determination, he indicated to me by phone that the report that you requested has been withheld based upon representations by the Police Department that the investigation is ongoing.

Since the issue remains under investigation, of continuing significance is section 87(2)(e)(i) of the Freedom of Information Law, which states that an agency may withhold records compiled for law enforcement purposes which if disclosed would "interfere with law enforcement investigations...". Since the investigations remain open, it would appear that the provision cited above represents a valid basis for withholding certain records at this time. It is noted that the provision in question may be asserted appropriately based upon the presence of certain facts and the

potential for interference with an investigation should records be disclosed. Although records might justifiably be withheld now on the basis of section 87(2)(e), when the investigation has been terminated, that provision might no longer serve as a means of withholding the records. When an investigation has ended, no longer would disclosure interfere with the investigation. Stated differently, records withheld with justification today may become available at some point in the future.

I do not mean to suggest that all of the records that you have requested must of necessity be disclosed when the investigation ends. A different ground for denial, section 87(2)(g), might continue to serve as a basis for withholding certain of the records or perhaps portions of those records even after the investigation has ended. As stated in the letter sent to you in August, 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

Records prepared by police officers or other employees of the Police Department and maintained or communicated within the Department could be characterized as intra-agency materials. Records communicated between the Police Department and other agencies, such as the Office of the District Attorney or the Health Department, could be characterized as inter-agency materials. While some aspects of those records, such as factual information, should be disclosed unless a different ground for denial applies [i.e., section 87(2)(e)], others, such as those portions consisting of advice, opinion, recommendation or conjecture could in my view be withheld, notwithstanding termination of the investigation.

The preceding comments concerning section 87(2)(g) are intended to avoid misleading you. Even though the investigation will at some point be closed, that fact alone will not necessarily require that all of the records that you have requested be disclosed in their entirety.

Lastly, although irrelevant to the requirements of the Freedom of Information Law, based upon my discussions with New York City officials, it is clear that they are aware of your requests. I do not believe that the delays in response have been the result of an intent to evade the law. On the contrary, I believe that those officials are conducting an exhaustive search and review of the records that you have requested and that they have every intent to respond to your requests in a manner consistent with 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: Hon. Stan Lundine
Hon. Gail S. Shaffer
John F. Hudacs, Commssioner
Dall W. Forsythe, Director
Irwin Davison
Eileen Millett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5802

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

November 2, 1989

Mr. Tom Hall
[redacted]

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

Dear Mr. Hall:

I have received your recent letter, which reached this office on October 23.

In brief, you wrote that you have encountered a series of problems in your efforts to gain public employment through the Onondaga County Department of Personnel. In conjunction with those problems, you have apparently attempted without success to obtain the "names of successful applicants" for positions filled following civil service tests and the preparation of an eligible list, as well as the names of "any provisional employees appointed since the establishment of the eligibility list."

In this regard, I offer the following comments.

First, you did not indicate whether you requested the information in question under the Freedom of Information Law. If you have not, it is suggested that you do so. Such a request should be made to the agency's "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records. You could call the County or its Personnel Department to ascertain the name of the person to whom a request should be made.

It is noted, too, that section 89(3) of the Freedom of Information Law enables an agency to require that a request be made in writing. The same provision requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate the records.

Third, section 71.3 of the rules and regulations promulgated under the Civil Service Law indicate that eligible lists are accessible. With respect to access to the other records in which you are interested, 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 my opinion, to the extent that records identify successful applicants or provisional employees appointed to positions, such records would be available.

Relevant, in my opinion, is section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Since your inquiry pertains to information pertaining to public employees, I point out that, 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 Capital Newspapers v. Burns, 109 AD 2d 92, aff'd 67 NY 2d 562 (1986); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY ed 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Steinmetz v. Board of Education, East Moriches, Sup. Ct. Suffolk Cty., NYLJ, Oct. 30, 1980]. Conversely, it has been held that records concerning public employees that are not relevant to the performance of their official duties may be denied on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1984.

From my perspective, records identifying applicants hired or promoted would be relevant to performance of the duties of those individuals, as well as the duties of appointing agency.

Viewing the issue from a somewhat different perspective, section 87(3)(b) of the Freedom of Information Law requires that each agency maintain and make available "a record setting forth the name, public officer address, title and salary of every offi-

cer or employee of the agency. Since names and titles of employees must be disclosed in the payroll listing, the equivalent information must, in my view, be disclosed in other records, such as those 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:saw

cc: Records Access Officer, Onondaga County Department of Personnel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5802

162 WASHINGTON AVENUE, ALBANY, NEW YO
(518) 474-2

November 2, 1989

Mr. Alan De Lyons
#71-A-0408
NYS ID - 0610718-K
Southport Correctional Facility
Pine City, New York 14871

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

Dear Mr. De Lyons:

I have received your letter of October 19 in which you complained that a response to a request had been delayed.

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 cannot compel an agency to grant or deny access to records.

Second, the Freedom of Information Law and the regulation 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 th 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 o 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 th acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, secti

1401.5(d) and 1401.7(c)]

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)].

If you have made a request under the Freedom of Information Law that has not been answered in accordance with the time periods described above, it would appear that your request has been constructively denied and that you may appeal on that basis. I believe that the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department in Albany.

Lastly, as you requested, enclosed is a copy of the New York State Constitution.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw
Encl.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5804

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

November 3, 1989

Mr. James A. Schondebare
Town Attorney
Town of Southold
Town Hall, 53095 Mail Road
Post Office Box 1179
Southold, New York 11971

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

Dear Mr. Schondebare:

I have received your letter of October 20 in which you raised two questions concerning a request made under the Freedom of Information Law.

Specifically, you wrote that the Town of Southold has received a request from the St. Petersburg Times, a Florida newspaper, for copies of a vendor's proposal made as a result of the Town's request for proposals to build a municipal solid waste facility under section 120-W of the General Municipal Law.

In conjunction with the foregoing, you asked whether the Freedom of Information Law may be used by "an out of state news media." Further, since "a number of pages submitted by all the vendors, including the one in question, have pages marked 'confidential' and contain the vendors 'trade secrets'," you asked whether those pages should be "excluded under the Freedom of Information Law."

In this regard, I offer the following comments.

First, the language of the Freedom of Information Law does not distinguish among applicants for records, and judicial interpretations of the Law indicate that accessible records should be made available, regardless of the status, interest or residence of an applicant [see e.g., Burke v. Yudelson, 368 NYS 2d 799,

aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976); Duncan, Matter of, (Bradford Central School District), 394 NYS 2d 362; M. Farbman & Sons v. New York city, 62 NY 2d 75 (1984)]. Further, although the applicant's status was not an issue in the case, an out of state newspaper prevailed in a decision that reached the Court of Appeals [see Washington Post v. Insurance Department, 61 NY 2d 557 (1984)].

Second, the fact that records may be marked "confidential" or as "trade secrets" is, in my opinion and in view of judicial determinations, generally irrelevant. An assertion of confidentiality, absent specific statutory authority, may be all but meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, 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, notwithstanding an assertion or promise of confidentiality [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, supra; Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)].

Third, the preceding comments do not necessarily lead to a conclusion that the records must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, the records 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 under the circumstances 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."

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.).

I am familiar with neither the records that are the subject of your inquiry nor the extent to which the information contained in those records may be known within the solid waste industry. Under the circumstances, you appear to be faced with the task of determining whether or the extent to which the records in question could properly be characterized as trade secrets which, if disclosed, would result in "substantial injury to the competitive position" of a vendor or vendors. It might be worthwhile to contact the vendor in an effort to elicit additional information concerning claims that the information is unique and that disclosure would in fact result in competitive harm. Further, the proposals might be reviewed as a group in an attempt to distinguish those aspects of the records that are unique as opposed to those that appear to be generally known within the industry.

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:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5805

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

November 3, 1989

Mr. Glen Gary Sneyd
Assistant Building Inspector
Yorktown Town Hall
363 Underhill Avenue
P.O. Box 703
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 Mr. Sneyd:

As you are aware, your letter of October 11 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 your capacity as Code Enforcement Officer for the Town of Yorktown, you wrote that requests are often made for copies of architects' or engineers' plans submitted to the Town. You added, however, that the licensed professionals who create the plans have contended that "a sealed design specification or drawing belongs only to the professional who sealed it and the person he sold it to". In view of the foregoing, you have raised the following question:

> "Does the registered seal and signature of a New York State licensed architect or engineer, when appearing on building or engineering plans held in public records by a municipal agency, constitute or effect copyright or other protection or exemption for copying and release under Freedom of Information Law?"

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 the term "record" expansively 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."

Based on the foregoing, architects plans and similar or related documents in my view clearly constitute "records" subject to rights conferred 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial could likely be asserted to withhold the records in question. Further, section 87(2) of the Freedom of Information Law states that accessible records must be made available for inspection and copying. Further, section 89(3) indicates that an agency is obliged to make a copy of an accessible record if the applicant pays the appropriate fee for copying.

Second, 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.

Third, additional considerations become relevant if the records in question bear a copyright, and the question, in my view, involves the effect of a copyright appearing on a document. In order to offer an appropriate response, I have discussed the matter with a representative of the U.S. Copyright Office and the Office of Information and Privacy at the U.S. Department of Justice, which advises federal agencies regarding the federal Freedom of Information Act (5 U.S.C. section 552), the federal counterpart of the New York Freedom of Information Law.

The Copyright Act has been substantially revised since New York courts rendered decisions involving circumstances similar to those that you presented. Specifically, the Federal Copyright Act of 1976, 17 U.S.C. section 101 et seq., appears to have supplanted the earlier case law on the subject. Further, I am unaware of any judicial decisions rendered in New York concerning the relationship between the Copyright Act and the New York Freedom of Information Law.

Useful to the inquiry is a federal court decision in which the history of copyright protection was discussed, and in which reference was made to notes of House Committee on the Judiciary (Report No. 94-1476) referring to the scope and intent of the revised Act. Specifically, it was stated by the court that:

> "The power to provide copyright protection is delegated to the Congress by the United States Constitution. Article 1, section 8, clause 8, of the Constitution grants to Congress the power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'
>
> Copyright did not exist at common law but was created by statute enacted pursuant to this Constitutional authority. See Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460, 98 L.ed. 630 (1954); see also MCA, Inc., v. Wilson, 425 F.Supp. 443, 455 (S.D.N.Y. 1976); Mura v. Columbia Broadcasting System, Inc., 245 F.Supp. 587, 589 (S.D.N.Y. 1965), and cases cited therein.
>
> Prior to January 1, 1978, the effective date of the revised Copyright Act of 1976, there existed a dual system of copyright protection which had been in effect since the first federal copyright statute in 1790. Under this dual system, unpublished

> works enjoyed perpetual copyright protection under state common law, while published works were copyrightable under the prevailing federal statute. The new Act was intended to accomplish 'a fundamental and significant change in the present law by adopting a single system of Federal statutory copyright...(to replace the) anachronistic, uncertain, impractical, and highly complicated dual system.' H.R. Rep. No. 94-1476; 94th Cong. 2d Sess. 129-130, reprinted in [1976] 5 U.S. Code Cong. & Ad. News 5745. This goal was effectuated through the bed-rock provision of 17 U.S.C. subsection 301, which brought unpublished works within the scope of federal copyright law and preempted state statutory and common law rights equivalent to copyright. Id. at 5745-47. Thus, under subsection 301(a), Congress provided that Title 17 of the United States Code, the Federal Copyright Act, preempts all state and common law rights pertaining to all causes of action which arise subsequent to the effective date of the 1976 Act, i.e., January 1, 1978:
>
> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." [Meltzer v. Zoller, 520 F.Supp. 847, 853 (1981)]

Based upon the foregoing, "common law" copyright appears to be a concept that has been rejected and replaced with he current statutory scheme embodied in the revised Federal Copyright Act.

In view of the language of the Copyright Act, case law and discussions with a representative of the Copyright Office, it is clear in my opinion that architectural plans and similar documents may be copyrighted.

To be copyrighted, 17 U.S.C. section 401(b) states that a work must bear a "notice," which:

> "shall consist of the following three elements:
>
> (1) the symbol c (the letter C in a circle), or the word 'Copyright,' or the abbreviation 'Copr.'; and
>
> (2) the year of the first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and
>
> (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner."

If those elements do not appear on the work, I do not believe that it would be copyrighted, and that it could be reproduced in response to a request made under the Freedom of Information Law.

Assuming that a work is subject to copyright protection, such a work that includes the notice described above is copyrighted. It is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. section 408(a)] be registered with the Copyright Office. No action for copyright infringement can be initiated until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use the Freedom of Information Law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to section 87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statutes." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall, 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure... by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to section 87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. section 107, which codifies the doctrine of "fair use." Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under section 107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. section 107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secrets exception "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant

with its broad purpose of protecting the commercial interests of those who submit information to the government...Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. [section] 107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information Act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with section 87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work should be duplicated.

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-5806

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

November 3, 1989

Mr. John R. Ingram
Village Clerk
Village of Westbury
235 Lincoln Place
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. Ingram:

I have received your letter of October 23 in which you requested an advisory opinion concerning the Freedom of Information Law.

You wrote that you have received a request for a copy of a resume submitted by a person appointed to the Village Board of Appeals. You indicated further that "there are no specific requirements or qualifications for such appointments".

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 grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, since your inquiry focuses upon a record pertaining to a particular individual, it is noted that section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof which, if disclosed, would result in "an unwarranted invasion of personal privacy". With regard to public employees, it has been held that disclosure of records that are relevant to the performance of a public employee's official duties 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]. On the other hand, 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].

When there are specific criteria or qualifications that must be met in order to serve in a position, it has been advised that records or portions thereof, such as resumes, that indicate that an individual meets the requisite qualifications for the position should be available, for disclosure would represent the only means by which the public could ascertain whether an individual meets the appropriate requirements. Conversely, personal information that is not relevant to a public employee's qualifications may constitute an unwarranted invasion of privacy if disclosed. If there are no specific requirements or qualifications for appointment to the position in question, it would appear from my perspective that disclosure of the resume would result in an unwarranted invasion of personal privacy.

It is also noted that section 89(2)(b) of the Freedom of Information Law provides a series of examples of unwarranted invasions of personal privacy, the first of which includes the disclosure of employment histories.

Lastly, the Freedom of Information Law is permissive; although an agency may withhold records when disclosure would constitute an unwarranted invasion of personal privacy, it is not required to do so [see Capital Newspapers v. Burns, 67 NY 2d 562, 567 (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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5807

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

November 8, 1989

John M. Striker, Esq.
President
Brownstone Publishers, Inc.
304 Park Avenue South
New York, NY 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, unless otherwise indicated.

Dear Mr. Striker:

I have received your letter of October 24, as well as correspondence related to it.

You wrote that you have requested from the New York City Department of City Planning copies of all ULURP and CEQR applications, and that the Department "has refused to provide more than four files, once a week". You added that you are "in fact, seeking about 80 records, each a few pages long", that you wish to receive copies of similar records on an ongoing basis, and that you "estimate that about five to eight such records are filed each week with the Department". Your question is whether "an agency [may] restrict the number of documents which will be made available pursuant to a request made under New York's Freedom of Information Law to four documents per week based upon 'the voluminous amount of records' requested".

In this regard, I have received a letter on the same subject from Mr. William Valletta, Counsel to the Department of City Planning, and have contacted him on your behalf to discuss the matter. Mr. Valletta informed me that the number of applications in question varies from week to week, and that the length of the applications also may vary. Some may indeed be a few pages; others may be voluminous.

I do not believe that an agency may fix the number of documents that it will make available to a certain number per week. Further, restricting the number of files to be disclosed per week to four is, in my view, arbitrary. Nevertheless, an expectation that an agency has the capacity in every instance to engage in quick retrieval, review and disclosure of a large volume of records that come into the possession of the agency during a particular period may be equally unreasonable.

As you are aware, section 89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of its receipt. Further, if additional time is needed to locate records or determine rights of access, an agency may, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401.5) and the Uniform Regulations promulgated by the Mayor, acknowledge the receipt of a request and thereafter take up to ten business days from the acknowledgement to grant or deny access to requested records. So long as the Department discloses records within the time periods specified in the Law and the regulations, I believe that it would be acting in compliance with the Law.

Based upon my conversation with Mr. Valletta, his intent is to develop a structure that guarantees ongoing service to you. He agreed that the limitation on disclosure to four files per week may be arbitrary, and efforts will be made to make available a reasonable number of files per week. Mr. Valletta also indicated that the Department will continue to consider your requests as a "running appointment" and will make the records available at a mutually agreeable weekly time period.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-95
FOIL-AO-5808

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

November 8, 1989

Dr. Beulah D. Jones
[redacted]

The staff of the Committee on 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. Jones:

I have received your letters of October 24 and November 3, as well as various related materials.

As I understand the matter, it is your belief that the City of Yonkers Police Department has engaged in various activities that you have characterized as "illegal surveillance." As such, you have attempted without apparent success to obtain records from several entities under the Freedom of Information Law and the "Privacy Act." Certain portions of the correspondence attached to your letters indicate that the records that you have requested do not exist.

In this regard, I offer the following comments.

First, in an effort to put matters into perspective, the Freedom of Information Law applies to records of an "agency." For purposes of that statute, section 86(3) defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally includes within its scope records maintained by units of state and local government in New York. However, it does not include the courts or court records. Access to records of federal agencies is governed by the provisions of separate statutes, the federal Freedom of Information and Privacy Acts.

Second, the New York counterpart of the federal Privacy Act is the Personal Privacy Protection Law. For purposes of that statute, the term "agency" is defined to include state agencies; it specifically excludes records maintained by units of locate government, such as the City of Yonkers [see Personal Privacy Protection Law, section 92(1)]. Moreover, rights conferred by the Personal Privacy Protection Law do not apply to "public safety agency records" [see section 95(7)]. That phrase is defined in section 92(8) to include:

> "a record of the commission of correction, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of parole, the crime victims board, the division of probation or the division of the state police or of any agency or component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order..."

Therefore, to the extent that the records in which you are interested are maintained by state agencies, the Personal Privacy Protection Law would not, in my view, apply.

Third, the Freedom of Information Law pertains to existing records. Therefore, if records sought do not exist, the Freedom of Information Law would be inapplicable. Further, section 89(3) of the Law specifies that an agency need not create a record in response to a request.

Having discussed your requests with the records access officer of the Executive Chamber and an assistant corporation counsel for the City of Yonkers, it appears that neither agency maintains records that you have requested. I believe, however, that the City of Yonkers is continuing its search for any such records.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3809

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

November 9, 1989

Mr. Lamonte Johnson
87-B-0601
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. Johnson:

I have received your letter of October 25, as well as the correspondence attached to it.

According to the materials, you submitted a request for records under the Freedom of Information Law to the New York City Police Department on February 14. Although the receipt of your request was acknowledged on February 24, you have not yet apparently been granted or denied access to the records sought.

You have requested assistance in 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 aspects of the Law (see attached 21 NYCRR Park 1401). In turn, section 87(1) requires each agency to adopt regulations "pursuant to such general rules as may be promulgated by the committee on open government in conformity with the provisions of this article" (the Freedom of Information Law).

Second, the Freedom of Information Law and the Committee's regulations provide guidance concerning the procedural requirements 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

It is noted, too, that the "Uniform Rules and Regulations Pertaining to the Administration of the Freedom of Information Law" promulgated by Mayor Koch are consistent with those adopted by the Committee on Open Government. The Mayor's regulations, which became effective in 1979, state in part in section 5(d):

> "If because of unusual circumstances, an agency is unable to determine within five days whether to grant, deny or otherwise respond to a request for inspection and copying, the records access officer shall, within such five day period, acknowledge receipt of the request in writing to the requesting party, stating the approximate date, not to exceed ten business days from the date of the acknowledgement, by which a determination with respect to the request will be made. If the agency does not make a determination with respect to the request within ten

> days from the date of such acknowledgement, the request may be deemed denied and an appeal may be taken to the person or body designated in the agency to hear appeals."

As such, the Mayor's regulations applicable to agencies within the jurisdiction of his office, including the Police Department, in my view specify the time limits for responding to requests and that those periods have been exceeded.

The foregoing should be construed to pertain to the issue that you raised; it is not intended to deal with rights of access to the records sought or to suggest that all of the requested records exist, can be found, or are accessible under the Law.

Lastly, since you initiated your request, the Department has designated new records access and appeals officers. They are, respectively, Sgt. John G. Sultana and Eileen D. Millett. In an effort to enhance compliance with the Freedom of Information Law, copies of this letter will be forwarded to them.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. John G. Sultana
Eileen D. Millett, Assistant Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1676
FOIL-AO-5810

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

November 9, 1989

Mr. Harold G. Otley
[redacted]

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

Dear Mr. Otley:

I have received your recent letter which reached this office on October 30. You have raised a series of questions relating to the Freedom of Information Law and the Open Meetings Law.

The first area of inquiry involves the custody of town records. Specifically, you asked whether the town's records access officer and/or town clerk have the authority "to require all Town mail to come through that office so that it can be opened, copied, and then copies sent to the respective Town offices and/or departments with the original placed in the Town files". You also asked whether such official or officials can "arbitrarily mail copies of Town records and/or letters of any official and/or Department to any person...without a request or directive to do so under any circumstance".

In this regard, some of the issues raised do not deal with the Freedom of Information Law and are outside the scope of the jurisdiction of this office. However, several provisions of law may be relevant to those issues. First, section 30 of the Town Law describes the duties of town clerks. Subdivision (1) of that section states in part that the town clerk "Shall have the custody of all the records, books and papers of the town". Second, section 57.19 of the Arts and Cultural Affairs Law, which includes the "Local Government Records Law" (Article 57-A), states that the town clerk is the "records management officer". Third,

with respect to duties imposed by the Freedom of Information Law, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, specify the responsibilities of the designated records access officer. I have enclosed a copy of those regulations for your review.

It is noted that section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate such regulations. In turn, section 87(1)(a) of the Freedom of Information Law requires the governing body of a public corporation, i.e., a town board, to promulgate regulations consistent with the Law and the Committee's regulations.

A second area of inquiry involves executive sessions held to discuss litigation. Here I point out that the Open Meetings Law 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..."

With respect to litigation, 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". It has been held that the purpose of the "litigation" exception for executive session "is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983); also Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Board, 83 Ad 2d 612, 613, appeal dismissed, 54 NY 2d 957 (1981)]. Therefore, if a public body seeks to discuss litigation with its adversary in the litigation, I do not believe that an executive session could appropriately be held. Further, the Court in Weatherwax, in its discussion of a claim that litigation might possibly ensue, added that:

> "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" (id. at 841).

Moreover, with respect to the nature of a motion to enter into executive session pursuant to section 105(1)(d), it has been determined 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" [emphasis added by court; Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981)].

Based upon the foregoing, I believe that a motion to enter into executive session that merely characterizes the subject to be discussed as "litigation" is inadequate. As indicated in the decision cited above, the motion should refer to the particular lawsuit under discussion.

You also asked whether a motion to enter into an executive session must "state the names and/or positions of other than board members authorized or requested to stay in the executive session". Section 105(2) of the Open Meetings Law states that:

> "Attendance at an executive session shall be permitted to any member of the public body and other persons authorized by the public body."

I am unaware of any judicial decisions indicating that persons authorized to attend executive sessions other than the members of a public body must be identified. I believe that there should be some indication in such a motion to the effect that persons other than members are permitted to attend.

With respect to minutes, I direct your attention to section 106 of the Open Meetings Law. 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 of summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

In view of the foregoing, minutes of meetings 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.

Further, 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 to the extent required by the Freedom of Information Law.

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

Lastly, you asked that I "explain how Section 105(1) and Section 106(1) of...[the] Open Meetings Law apply to each other". Although your question is unclear, section 105(1), as stated earlier, requires that a motion to enter into an executive session be made during an open meeting. Section 106(1) requires that minutes include reference to motions. As such, a motion to enter into an executive session must in my view be referenced in minutes.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5811

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

November 9, 1989

Mr. Paul W. Karpowich
[redacted]

Dear Mr. Karpowich:

I have received your letter of October 30 and the materials attached to it.

As I understand your comments, it appears that you believe that the failure on the part of officials of the Town of Milan to respond to your inquiries represents a failure to comply with the Freedom of Information Law. You referred to certain "exhibits" attached to your letter that were never answered.

In my opinion, the issue is the same as that raised in our previous correspondence, and it appears that you misunderstand the Freedom of Information Law. Again, the Freedom of Information Law requires agencies to respond to requests for existing records and to disclose those records is accordance with the requirements of the Law. From my perspective, the exhibits indicate that you raised questions and requested answers or information in response to those questions.

For example, in exhibit 10A, you wrote to a member of the Town Board as follows:

> "Would [you] be able to operate a plumbing well drilling business from a R5A zone. This business would comprise of six or seven vehicles, three of which could be large tonage of the ten wheel type, and employ five to six employees. All equipment and vehicles to be stored and operated from the R5A zoned property in the town of Milan."

The foregoing represents a request for information and for an answer to a question; I do not view it as a request for records. As such, I do not believe that a failure to respond could be equated with a denial of access to records or that the inquiry should have been considered as a request for records made under the Freedom of Information Law. To reiterate, the Freedom of Information Law does not require agencies to answer questions.

I hope that my comments serve to clarify your understanding of the Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5812

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

November 9, 1989

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 October 27 in which you requested an advisory opinion concerning the Freedom of Information Law.

You wrote that you were recently involved in an automobile accident. Soon thereafter, you requested a copy of the accident report from the Police Department of the Town of Ticonderoga. Although the report was made available, you were charged a fee of five dollars. You have questioned the propriety of the fee.

In this regard, by way of background, section 87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the

> word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation, for instance, establishing a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, or a fee that exceeds the actual cost of reproducing records that cannot be photocopied. Moreover, a recent decision confirmed that a fee of more than twenty-five cents per photocopy may be assessed only pursuant to authority conferred by a statute, an act of the State Legislature [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. It is noted that the Sheehan decision dealt specifically with fees for accident reports. Consequently, unless an act of the State Legislature authorizes the fees in question, the Town, in my opinion, cannot charge more than twenty-five cents per photocopy.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief, Ticonderoga Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5813

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

November 9, 1989

Mr. Tim O'Brien
Reporter
The Times-Union
News Plaza
Box 15000
Albany, NY 12212

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

Dear Mr. O'Brien:

I have received your recent letter, which reached this office on October 31.

Your inquiry concerns a request for records of the Office of the Sheriff of Rensselaer County. The request was denied by Undersheriff Edward J. Phillips on the ground that the material in question "is relevant to an active criminal investigation". He added that: "Therefore, your requests are denied, and, as such, there are no appeals". It is your view that the preceding statement is inconsistent with the Freedom of Information Law, for it denies your right to appeal.

You have requested my opinion on the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law clearly provides the right to appeal a denial of a request for records. Specifically, section 89(4)(a) of the Law states in relevant part that:

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

Second, I have made several calls on your behalf to determine the identity of the person to whom an appeal should be directed. That person must, in my view, be designated pursuant to an agency's rules and regulations.

By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law. The Committee has done so, and its regulations appear in 21 NYCRR Part 1401. In turn, section 87(1) of the Freedom of Information Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

One aspect of the Committee's regulations includes a requirement that a person or body be designated to determine appeals regarding denials of access to records [see 21 NYCRR section 1401.7(a)].

Based on conversations with representatives of the executive and legislative branches of Rensselaer County government, I have been led to believe that the Sheriff, as an independently elected official, considers his office to be separate from other entities of County government and that the procedures and regulations concerning access to records applicable to the executive and legislative branches do not apply to the Office of the Sheriff. If that is so, as an agency, I believe that the Office of the Sheriff should have adopted the appropriate regulations under the Freedom of Information Law, and that those regulations should include the designation of a person to render determinations following appeals.

If there are no existing regulations applicable to the Office of the Sheriff, I believe that an appeal could be made to the Sheriff as the head of the agency in accordance with section 89(4)(a) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: W. Warren McGreevy, Sheriff
Edward J. Phillips, Undersheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5814

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

November 10, 1989

Mr. John Anthony
[redacted]

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

Dear Mr. Anthony:

I have received your letter of October 29, which is addressed to the Chair and other members of the Committee on Open Government. As indicated above, the staff of the Committee is authorized to respond on its behalf.

Your inquiry pertains to a request for records sent via certified mail to the records access officer for the Village of Croton-on-Hudson. As of the date of your letter to this office, you had received no response to the request. You have requested an advisory opinion concerning the matter.

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), 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

Second, I point out that each agency including a village, is required to adopt rules and regulations consistent with the Freedom of Information Law and the Committee's regulations. Section 87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In the event that the Village has not promulgated the appropriate regulations, copies of this opinion, the Committee's regulations and model regulations designed to enable agencies to easily adopt proper procedures will be sent to the Village.

Please note that I have not telephoned or otherwise contacted any official of the Village of Croton-on-Hudson since the receipt of your letter.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Village of Croton-on-Hudson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1679
FOIL-AO-5815

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

November 13, 1989

Mr. Steven Tiska
[redacted]

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

Dear Mr. Tiska:

I have received your letter of October 29, as well as the materials attached to it.

As I understand the matter, you have attempted without success to obtain records reflective of an "agreement" into which the Town of Masonville has entered concerning property located in the Town. It appears that you were given a copy of a record containing the Town Assessor's notarized signature on the Town's letterhead; however, the remainder of the document has been deleted.

While the nature of the documentation in which you are interested is not entirely clear, I offer the following general comments.

First, the Freedom of Information Law is applicable to all agency records, and section 86(4) of the Law 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."

Therefore, if the information sought is kept, held, filed, produced or reproduced by the Town, I believe that it would constitute a "record" 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. Assuming that the record sought is an agreement into which the Town has entered, I believe that it would be available, for none of the grounds for denial would apply. If such an agreement was approved by the Town Board, as you inferred, the action to approve the agreement should, in my view, have occurred at a meeting of the Board. Further, any vote on the matter should be memorialized in minutes of the meeting in which the vote was taken. It is noted that the Open Meetings Law, section 106, requires that minutes include reference to motions, proposals, resolutions, action taken, the date and the vote of the members. Subdivision (3) of section 106 specifies that minutes must be prepared and made available within two weeks of the meetings to which they pertain.

Third, if in response to a request for a record, any portion of the record is withheld, the regulations promulgated by the Committee on Open Government specify that the reasons for the denial must be given in writing (see 21 NYCRR Section 1401.2). Further, an applicant may appeal such denial pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

Lastly, in the event that a response to a request indicates that the record cannot be located, section 89(3) of the Freedom of Information Law states that an applicant may ask that they agency "certify that it does not have possession of such record or that such record cannot be found after diligent search."

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to the Town Clerk.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Pam Johnson, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5816

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

November 14, 1989

Mr. Leonard Mott
#86-C-0269
Collins Correctional Facility
Helmuth, New York 14079-0200

The staff of the Committee on Open 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 letter of October 30, as well as the correspondence attached to it.

You inquiry concerns a denial of a request for a record mentioned during a parole release hearing. The record, which was sent by the Monroe County District Attorney's Office to the Parole Board, according to the correspondence, "contains the District Attorney's recommendation concerning parole." The request was denied by Monroe County under sections 87(2)(e) and (g) of the Freedom of Information Law.

You have requested an advisory opinion concerning the matter. 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, while one of the grounds for denial cited in the correspondence would, in my view, be of questionable validity, I believe that the other constituted a proper basis for withholding withholding.

Second 87(2)(e) of permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

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

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

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

As I understand the circumstances surrounding the preparation of the record in question, section 87(2)(e) likely would not be applicable, unless the record includes "confidential information" relating to the investigation that resulted in your conviction.

Section 87(2)(g) of the Freedom of Information Law enable 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;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

external audits 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.

If indeed the record sought consists of the District's recommendation or opinion, it appears that the County had the authority to withhold the record.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5817

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

November 15, 1989

Ms. Judith A. Michaels
Chairman, Village Committee
Depew/Cheektowaga Taxpayers
Association
c/o 6 Park Place
Depew, New York 14043

The staff of the Committee on 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. Michaels:

I have received your letter of October 30, as well as the materials attached to it.

According to your letter, you requested from the Village of Depew a subject matter list and a record indicating the name, title and salary of every officer or employee of the Village of Depew. In response to the request, Joseph J. Schultz, the Village Attorney, wrote that:

> "This request is too broad and unreasonable and you must specify exactly what you are requesting since there are items which cannot be made available such as death certificates, birth certificates, personnel records which are privileged and as such this request has to be denied.
>
> "In regard to your request for salary schedules, the Village Clerk will contact you to let you know the cost concerning the titles and salaries of all employees and if, at that time, you wish to secure these records, you will have to bring in a check for whatever the amount is prior to then for issuance to you."

Further, although the Village disclosed a record indicating salaries accorded to certain job titles, for reasons to be discussed later, I believe that the documentation provided to you is incomplete.

You have requested clarification concerning issues involving the records described above and the Village Attorney's response, with respect to the fees that may be imposed by the Village relative to "inspection, clarification, or search for records," and concerning the Village's responsibility to "make known" the identities of a records access officer and a person to whom an appeal may be made.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records and an agency need not create a record in order to satisfy a request, unless direction to the contrary is provided. Such direction is included in the Law concerning the two records that you requested. The last sentence of section 89(3) of the Freedom of Information Law states 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..."

Relevant to your requests are paragraphs (b) and (c) of subdivision three of section eighty-seven. The cited provisions state that:

> "Each agency shall maintain....
>
> (b) a record setting forth the name, public office address, title and salary of every officer of 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."

Based upon the foregoing, the Village is obliged to create, maintain and disclose a "subject matter list" and a record identifiable to all Village officers and employees that includes their public office addresses, titles and salaries.

As such, I do not believe that your requests could be characterized as "too broad" or "unreasonable." On the contrary, the records sought are required to be prepared and maintained by the Village on an ongoing basis. Further, there have been requirements that those records must be maintained since the Freedom of Information Law was enacted in 1974.

It appears, too, that the Village Attorney's comments represent a misunderstanding of the function of a subject matter list. The list, in my view, is not required to identify every record of an agency. However, I believe that it must refer, by category, in reasonable detail, to the kinds of records maintained by an agency, "whether or not available" under the Freedom of Information Law. While certain records of the Village might justifiably be withheld under the Freedom of Information Law, such as birth and death certificates, I believe that a subject matter list must nonetheless refer to those kinds of records. Stated differently, the subject matter list involves references to the kinds of records maintained by agencies; those references do not necessarily mean that the records are accessible under the Law.

The remaining issues relate to various provisions of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government. By way of background, section 89(1)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law and fees. The Committee has done so, and its regulations appear in 21 NYCRR Part 1401. In turn, section 87(1) of the Freedom of Information Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

One aspect of the regulations requires that the governing body of a public corporation, such as the Board of Trustees, "designate one or more persons as records access officer by name or specific job title" [see section 1401.2(c)]; another requires the designation of a person or body to determine appeals following denials of access to records [see section 1401.7(b)]. In addition, section 1401.7(b) states in relevant 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. The records access officer shall not be the appeals officer."

Lastly, with respect to fees, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy, unless a statute, an act of the State Legislature, permits a different fee. Similarly, section 1401.8(a) of the regulations states:

> "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.

Enclosed is a copy of the regulations promulgated by the Committee. The regulations and a copy of this opinion will be forwarded to Village officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Encl.

cc: Board of Trustees, Village of Depew
Joseph J. Schultz, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5818

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

November 2, 1989

Ms. Rose J. Moore
[redacted]

The staff of the Committee 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. Moore:

I have received your letter of October 20 and the correspondence attached to it.

According to your letter, you requested information from the Department of Social Services concerning "a breakdown of the services provided by Northern Adirondack Planned Parenthood." Although you specified that your request did not involve names or other identifying details, you wrote that the information was "refused on the grounds that it would be violating confidentiality." You asked whether a denial on that basis was "legal."

You also referred to request for the 1988 report by the same organization made to the Office of Charities Registration. The request was apparently returned to you with a statement that the report had not yet been submitted. You asked whether there is a deadline for the submission of the report.

In this regard, I offer the following comments.

First, having reviewed the response to your request prepared by the Records Access Officer at the Department of Social Services, I do not believe that the request was denied for reasons of confidentiality. Rather, the Department apparently does not maintain the information sought in a manner that permits its retrieval. As indicated by the Records Access Officer, section 89(3) of the Freedom of Information Law states in part that an agency is not required to create or prepare a record in response

to a request. My understanding of the matter is that the Department does not have the capacity, due to the method by which it maintains information in its computers, to generate the information in which you are interested. If that is so, I believe that the response to you request was appropriate and consistent with the Freedom of Information Law.

Second, I have contacted the Office of Charities Registration on your behalf in an effort to obtain information relating to your comments. I was informed that the deadline for submission of the kind of report to which you referred is May 15, and that an extension of the time for filing until November 15 may be requested. Nevertheless, I was also told that the report in question was received by the Office of Charities Registration in April and that it will be disclosed to you on request. It was indicated further that there had been no record of your having made a request since 1986.

I hope that the foregoing serves to clarify the matter and that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5819

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

November 16, 1989

Mr. Warren Brown
Freedom of Information Officer
Troy Housing Authority
Administrative Offices
Martin Luther King Apartments
One Eddy's Lane
Troy, New York 12180

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

Dear Mr. Brown:

As you are aware, I have received your letter of November 2 and the correspondence attached to it.

You have sought an advisory opinion concerning a request made under the Freedom of Information Law. The request involves a "list of all employees of the Troy Housing Authority, their race and their compensation."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records, and an agency need not create a record in order to satisfy a request, unless direction to the contrary is provided. The last sentence of section 89(3) of the Freedom of Information Law states 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..."

As such, if no record is maintained by the Authority containing the information sought, there would be no obligation to create such a record on behalf of an applicant.

Second, however, a record similar to that requested must be maintained by the Authority pursuant to paragraph (b) of subdivision three of section eighty-seven of the Freedom of Information Law. The cited provision 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..."

Based upon the foregoing, the Authority is obliged to create and maintain a record identifiable to all officers and employees that includes their public office addresses, titles and salaries.

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.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." While the courts have found in a variety of contexts that records relevant to the performance of public employees' official duties are available, an indication of the race of a public employee would not, in my view, be relevant to the performance of one's duties. Consequently, to the extent that records identify a public employee by race, I believe that disclosure would result in an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5820

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

November 16, 1989

Mr. E.G. Britt
[redacted]

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

Dear Mr. Britt:

As you are aware, I have received your letter of October 28 and the materials attached to it.

According to the materials, the New York Times reported on November 7, 1970, that on the preceding day "an identified youth plunged from the 67th floor of the Empire State Building." You requested the name of the youth from the New York City Police Department. Your request was denied, and on appeal, the denial was affirmed, citing sections 87(2)(b) and (e)(iii) of the Freedom of Information Law.

You have requested an advisory opinion "explaining...how this denial could be valid." 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, based upon the sparse facts that have been provided, it is unclear whether the death occurred as a result of an accident, a suicide, or criminal activity.

If the death was the result of an accident or criminal activity, it would appear that a record identifying the victim should be disclosed. One of the provisions cited by the Department, section 87(2)(e)(iii), enables an agency to withhold records compiled for law enforcement purposes and which, if

disclosed, would "identify a confidential source of disclose confidential information relating to a criminal investigation." The assertion of the quoted provision is, in my view, premised upon the fact that a criminal investigation was conducted. If that was so, records relating to the investigation might justifiably be withheld. However, it would be difficult in my view to justify withholding the identity of the victim. If the death was caused by an accident, section 87(2)(e) would not apparently apply.

If the death was the result of a suicide, the other basis for denial offered by the Department, section 87(2)(b), might conceivably apply. That provision permits an agency to withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy. It has been held that "when rights of personal privacy are involved, the exercise of the rights are limited to the living..." [see Tri-State Publishers v. City of Port Jervis, 523 NYS 2d 954 (1988)]. However, it might be contended that disclosure of the identity of a suicide victim might result in an unwarranted invasion of personal privacy with respect to the victim's family members due to the close relationship between the victim and the family. In essence, it might be argued that a suicide of an individual represents an intimate personal detail regarding the lives of that person's family. I am unaware of any judicial decisions dealing specifically with the issue. As such, unless the Department chooses to disclose, it appears that the matter can be resolved only by means of litigation.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Eileen Millett, Assistant Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5821

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

November 20, 1989

Mr. Robie J. Drake
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. Drake:

I have received your letter of November 1, which relates to a request for records of the Erie County Department of Central Police Services (ECDPS).

According to your letter, in a request dated August 20, you sought from ECDPS copies of records prepared by that agency relating to People v. Drake. The Laboratory Director of the agency responded on October 5, stating that your request had been forwarded to the County Attorney's office. You added that the services provided by ECDPS involved ballistics tests performed at the request of the Niagara County Sheriff's Department and/or the District Attorney's Office. It is your view that the records sought should be disclosed, for the "matter has been disposed of by the courts", and because disclosure would not result in any of the damaging effects described in section 87(2)(e) of 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, from my perspective, two of the grounds for denial may be relevant to your inquiry.

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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. 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. It would appear that the records in question consist, at least in part, of statistical or factual information that should be disclosed unless a different ground for denial may be asserted.

The other provision of potential 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..."

Under the circumstances, it appears that most relevant is section 87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information (see Frankl v Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v Brennan, 476 F2d 699, 702; Hawkes v Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "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 de-

> tection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel..." [47 NY 2d 568, 572 (1979)].

To the extent that the records in which you are interested were "compiled for law enforcement purposes" and disclosure would enable people to evade law enforcement activities, they could in my view be withheld. Other aspects of the records, however, would likely be available.

Lastly, in view of the 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 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, sections 1401.5(d) and 1401.7(c)].

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, 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Dujanovich, Laboratory Director
Daniel Kane, Office of the County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-96
FOIL-AO-5822

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

November 20, 1989

Mr. Kevin L. Brewington
#87-D-0034
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. Brewington:

I have received your letter of October 29.

You wrote that you requested information under the Freedom of Information Law and the "Privacy Act" from the Albany Medical Center, the Albany County Rape Crisis Center and the Albany County Probation Department. According to your letter, none of those entities responded to your requests.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records. For purposes of that law, the term "agency" is defined to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [see section 86(3)].

Based upon the foregoing, the Law generally applies to records maintained by entities of state and local government, including county agencies. However, the Freedom of Information Law does not extend to records of private entities, such as the Albany Medical Center.

Second, the Personal Privacy Protection Law pertains to state agencies. The definition of "agency" in that statute [section 92(1)] specifically excludes units of local government and offices of district attorneys. As such, the Personal Privacy Protection Law would not be applicable to any of the entities identified in your letter.

Third, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency subject to the Freedom of Information Law designate one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests for records, and requests should be directed to the records access officer. While I an unaware of the identity of the records access officer designated by the Albany County District Attorney, I believe that the records access officer for other Albany County agencies is the County Clerk, Thomas Clingan.

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.

Lastly, 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 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, sections 1401.5(d) and 1401.7(c)]

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 and the regulations promulgated by the Committee. This office has the authority to advise with respect to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5823

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

November 20, 1989

Mr. Robie J. Drake
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. Drake:

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

According to the materials, on August 20, you requested from the Niagara County Sheriff's Department "all records which that agency prepared, produced or duplicated, and relate to the matter of People v. Drake, Indictment No. 7205...". In response to that request, Chief Deputy Sheriff John T. Taylor informed you that the Department did not investigate the matter and maintained no records falling within the scope of your request. You followed that response with a second request dated September 27 in which you described certain events and facts that led you to contend that the Department does maintain the records sought. In response to that request, Chief Deputy Taylor wrote on October 24 that: "It is the policy of the Niagara County Sheriff's Department not to release criminal investigative reports to interested persons without a court order or subpoena". He added that the request was sent to the County Attorney for further review and that he would inform you of the result upon "notification of a decision by that office".

In this regard, I offer the following comments.

First, I believe that the "policy" described by Chief Deputy Taylor is inconsistent with the Freedom of Information Law. That statute is applicable to all agency records, and section 86(4) of the statute 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 on the foregoing, documentation maintained by the Sheriff's Department that fall within the scope of your request are, in my view, "records" subject to rights of access conferred by the Freedom of Information Law.

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 grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unfamiliar with the contents or the effects of disclosure of the records sought, I cannot offer specific guidance concerning rights of access to the records. However, the following paragraphs will review the grounds for denial that may be significant.

Of potential 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". It might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to investigative records maintained by a law enforcement agencies 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."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e).

Another possible ground for denial is section 87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is section 87(2)(g). The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Investigative records prepared by employees of a law enforcement agency could in my view be considered as "intra-agency materials". Those records might include opinions or recommendations made by police officers or others that could be withheld under section 87(2)(g).

In sum, as suggested in the preceding commentary, rights of access to records, as well as an agency's authority to withhold records, are largely dependent upon the contents of the records and the effects of their disclosure.

Lastly, as indicated in previous correspondence, 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Chief Deputy Taylor.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John T. Taylor, Chief Deputy Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5824

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

November 20, 1989

Mr. Bora Jozic
85-A-5432
Woodbourne Correctional Facility
Pouch 1
Woodbourne, NY 12788

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

Dear Mr. Jozic:

I have received your letter of October 28, in which you requested that this office investigate what you characterized as "misconduct" on the part of the Ulster County District Attorney.

According to your letter, you directed requests under the Freedom of Information Law to the District Attorney on June 14 and September 7. Neither request was answered.

In this regard, I offer the following comments.

First, the Committee on Open Government has neither the authority nor the resources to conduct an "investigation". Nevertheless, the Committee is authorized to advise with respect to the Freedom of Information Law.

Second, in conjunction with the facts as you described the, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, require that each agency designate one or more "records access officers". The records access officer has the duty to coordinate an agency's response to requests, and a request should be made to the records access officer.

Second, for future reference, 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

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. Since I am unfamiliar with the contents or the effects of disclosure of the records sought, I cannot offer specific guidance concerning rights of access to the records. However, the following paragraphs will review the grounds for denial that may be significant.

Of potential 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". It might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to investigative records maintained by a law enforcement agencies 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."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e).

Another possible ground for denial is section 87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is section 87(2)(g). The cited provision permits an agency to withhold records that:

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

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Investigative records prepared by employees of a law enforcement agency could in my view be considered as "intra-agency materials". Those records might include opinions or recommendations made by police officers or others that could be withheld under section 87(2)(g).

In sum, as suggested in the preceding commentary, rights of access to records, as well as an agency's authority to withhold records, are largely dependent upon the contents of the records and the effects of their disclosure.

Lastly, since one aspect of your request involved an opportunity to view "tangible evidence", it is noted that the Freedom of Information Law pertains to records. Further, it has been held that physical evidence is not subject to the Freedom of Information Law [see Allen v. Strojnowski, 129 AD 2d 700 (1989)].

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to the Ulster County District Attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Kavanagh, Ulster County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5825

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

November 20, 1989

Ms. Audrey G. Hochberg
Westchester County Board of Legislators
800 Michaelian Office Building
148 Martine 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 Ms. Hochberg:

I have received your letter of November 3 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, news articles indicate that "the State Investigation Commission completed a study of Westchester County's Commissioner of Public Safety Anthony Mosca, and sent the completed report to County Executive O'Rourke and to Commissioner Mosca." Both of them have refused to release the report. You haved asked whether they can "be required to make the report available 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, I believe that records maintained by the Commission can be withheld on the ground that they are specifically exempted from disclosure by statute in accordance with section 87(2)(a) of the Freedom of Information Law. The statutes pertaining to the Commission are found in the Unconsolidated Laws, and section 2(11)(d) of Chapter 254 of the Unconsolidated Laws states in part that:

> "Unless otherwise instructed by resolution adopted by a majority of the members of the commission, every witness attending before the commission shall be examined privately and the commission shall not make public the particulars of such examination."

Further, section 5 of Chapter 254 states that:

> "Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined, or any information obtained or given upon such examination or investigation, except as directed by the governor or commission, shall be guilty or a misdemeanor."

Under the circumstances, it appears that the Commission has in its discretion chosen to disclose its report to the County Executive and to Commissioner Mosca. In my opinion, once the report comes into the possession of those officials, it becomes subject to the general provisions of the Freedom of Information Law and would not be exempted from disclosure by statute.

This is not to suggest, however, that the report must necessarily be disclosed. Although I am unfamiliar with the contents of the report in question, there may be several grounds for denial that could appropriately be asserted.

Of potential 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." It is noted that there are numerous decisions that pertain to the privacy of public employees. In brief, 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); Capital News-

papers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of State Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); 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].

Another ground for denial of possible 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Based upon the provisions described above and the judicial determinations cited earlier, I believe that a record reflective of final disciplinary action taken against a public employee 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, when allegations or investigations of misconduct have not yet been determined or did not result in disciplinary action, or have resulted in recommendations, the records relating to such an investigation might justifiably be withheld, for disclosure might, depending upon the circumstances, result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

Also relevant to rights of access to investigative records 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."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e).

In sum, as suggested in the preceding commentary, rights of access to the report, as well as an agency's authority to withhold it, are largely dependent upon its contents and the effects of its disclosure.

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:saw

cc: Andrew O'Rourke, County Executive

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5826

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

November 21, 1989

Mr. Damon Hayes
[redacted]

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

Dear Mr. Hayes:

I have received your letter of November 2. You wrote that you are incarcerated at the Sullivan County Jail and asked for assistance in obtaining a copy of your medical records from the Jail.

In this regard, I offer the following comments.

First, it is suggested that you confer with officials at the jail to ascertain the identity of the person to whom a request for medical records should be made.

Second, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by a county jail. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appear in section 87(2)(a) through (i) of the Law.

With respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personal could be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Third, on January 1, 1987, a new statute, section 18 of the Public Health Law, became effective. In brief, that statute generally grants rights of access to medical records to the subjects of the records.

It is noted that when copies of medical records are requested, section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of inability to pay."

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Coordinator
New York Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

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-5827

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

November 21, 1989

Mr. John J. Coughlin
[redacted]

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

Dear Mr. Coughlin:

I have received your letter of November 4, as well as the materials attached to it.

Your inquiry focuses upon a request for copies of bills that were apparently submitted by the Superintendent of the Deer Park Union Free School District involving expenditures incurred by or for his wife. You wrote that "Although the Special Counsel hired by the school board has confirmed that Dr. Paras did indeed charge his wife's personal expenses against the taxpayers of [your] community and did not pay the money back until after the school board found out about it, the school board told the residents...that this allegation was 'groundless and unsubstantiated.'"

You have requested my comments on the matter. 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.

From my perspective, records pertaining to billing are accessible, except to the extent that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, sections 87(2)(b), 89(2)(b)]. If, for example, records include social security numbers or home addresses, those

details could be deleted to protect privacy, while the remainder would be accessible. However, I believe that records involving reimbursements for travel and other expenses incurred by public employees, such as vouchers, would be accessible.

Although travel vouchers and similar or related records might identify specific officers or employees, the courts have made it clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986); 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].

In my opinion, bills, vouchers, contracts and similar records involving payments to or expenditures by public employees are relevant to the performance of their official duties. As such, those types of records would in my view be available on the ground that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. Again, however, some aspects of those records may be deleted as an unwarranted invasion of personal privacy, as in the case of public employees' home addresses or social security numbers, which may have no relevance to the performance of one's official duties.

Second, records prepared by School District officials for use within the District could be characterized as "intra-agency materials." Those materials fall within the scope of section 87(2)(g), which is one of the grounds for denial. Nevertheless, due to the structure, that provision often 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;

> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits 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. Vouchers, bills and similar records would likely consist in great measure, if not in their entirety, of statistical or factual information. As such, section 87(2)(g) would not, in my view, serve as a basis for withholding those kinds of records.

Lastly, in terms of its intent, scope and utility, the Court of Appeals has held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 79). 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 government officers (Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [citing Public Officers Law section 84]).
>
> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically

> exempted (see, Public Officers Law section 87 [2]; Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY2d 75, 79-80, supra). This presumption specifically extends to intraagency and interagency materials, such as the report sought in this proceeding, comprised of 'statistical or factual tabulations or data' (see, Public Officers Law section 87 [2] [g] [i]). Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 80, supra; Matter of Fink v Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566).

On the basis of the decision rendered in Capital Newspapers, supra, other decisions and the language of the Freedom of Information Law, I believe that records reflective of expenditures are generally 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:saw

cc: Geraldine Musachio, District Clerk
Ronald F. Paras, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5828

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

November 21, 1989

Mr. Gregory J. Eldridge
Alpha Omega Productions
1 Star Route
No. Lawrence, New York 12967

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

Dear Mr. Eldridge:

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

You have described a series of problems relating to the Olympic Regional Development Authority, including an inability to obtain records from the Authority that have been requested under the Freedom of Information Law. You asked that a "full scale investigation" be conducted and that the "guilty...be punished and reprimanded accordingly."

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 neither the resources nor the jurisdiction to "investigate," nor is it empowered to compel an agency to grant or deny access to records.

Second, having reviewed your requests, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) states that an agency generally need not create a record in response to a request. Therefore, if, for example, there is no record indicating the "percent of total budget spent for advertising for each event or performance," the Authority would not in my opinion be obliged to prepare such a record on your behalf. One aspect of your request, however, involves a record that must be prepared and made available. Specifically, with respect to your request for payroll information, section 87(3)(b) of the Freedom of Information Law provides 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."

Further, section 89(3) requires that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate the records. While some aspects of your requests are quite specific, others, i.e., "all financial records for the Olympic Center" concerning the period of 1981 to the date of your request, might be overbroad and might not "reasonably describe" the records. It is suggested, too, that it might be worthwhile to narrow the scope of your requests.

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. I would conjecture that many of the records that you requested and that exist should be disclosed, for none of the grounds for denial could appropriately be asserted. Some of the records, however, such as "inter-office memos" could likely be withheld pursuant to section 87(2)(g), which permits an agency to withhold "inter-agency or intra-agency materials" under circumstances specified in that provision.

Lastly, 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 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, sections 1401.5(d) and 1401.7(c)]

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 with the Freedom of Information Law, copies of this opinion will be sent to Authority officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Ted Stratford
Laurie Harkness

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5829

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

November 22, 1989

Mr. Mathew V. Tebbens
[redacted]

Dear Mr. Tebbens:

I have received your letter of November 2, as well as the correspondence attached to it.

In brief, in response to a request for the subject matter list prepared by the New York Power Authority, you were informed that the list consists of "in excess of 925 pages" and that the cost of a copy would be $231.25. You were also told that you could inspect the list at no cost either in New York City or White Plains. You have asked whether the Authority can charge the amount quoted to you, or whether it must make a copy available to you free of charge.

In this regard, I offer the following comments.

First, section 87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy. Therefore, the fee sought to be assessed by the Authority was, in my view, consistent with the Law. It is also noted that no fee may be charged for the inspection of accessible records and that the Authority's offer to permit inspection at its offices at no charge was, in my view, fully appropriate.

Second, having contacted Ms. Wagner-Findeisen on your behalf, I was informed that the subject matter list is voluminous due in part to indexing requirements imposed upon the Authority by the Nuclear Regulatory Commission.

I hope that the foregoing serves to clarify the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Anne Wagner-Findeisen, Secretary to the Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5830

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

November 22, 1989

Mr. Louis de Jesus
83-A-3945
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. de Jesus:

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

According to the materials, a request was made under the Freedom of Information Law and directed to the records access officer of the Office of the Bronx County District Attorney on October 16. As of the date of your letter to this office, you has received no response to the request. You have asked whether, under the circumstances, the request was denied.

In this regard, I offer the following comments.

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 Freedom of Information 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, sections 1401.5(d) and 1401.7(c)]

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Records Access Officer, Office of the Bronx County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML - AO - 1680
FOIL - AO - 5831

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

November 22, 1989

Mr. Milton Goldin
The Milton Goldin Company
266 Crest Drive
Tarrytown, New York 10591

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

Dear Mr. Goldin:

I have received your letter of October 31 and the report attached to it.

You referred to our earlier correspondence concerning an action initiated against the Village of Tarrytown that resulted in part in an order that the terms of the determination not be made public. When you inquired as to the cost of the determination to taxpayers, the Village Administrator indicated that the decision would not affect taxes.

In relation to the foregoing, you attached a report which you assume was prepared by a political organization that refers to an increase in taxes and problems in the Village Police Department. You express concern over "how far a government can go in New York restricting information on public matters." Further, you asked how you "can obtain -- in writing -- accounts of what is happening."

In this regard, I offer the following comments.

There are two statutes within the area of advisory jurisdiction of this office that might serve to enable you to be better informed. The report that you enclosed indicates that Village taxes were increased "for two good reasons: not as much new income came in and expenses continued to go up."

The Freedom of Information Law is a vehicle under which any taxpayer may review a variety of records. 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. Records reflective of the expenditures of public monies, as well as revenues, are generally accessible under the Law, for none of the grounds for denial could be asserted. As such, books of account, ledgers, contracts and related records involving Village finances would be available. Similarly, the current Village budget and preceding budgets are also available for review and comparison.

It is reiterated, however, that the Freedom of Information Law does not require an agency to answer questions or prepare records. As such, if there is no analysis or study that details the reasons for an increase, the Village would not, in my view, be required to create new records on your behalf.

The other vehicle that enables the public to be informed with respect to the governmental activities of the Village is the Open Meetings Law. While that Law does not require the production of records, other than minutes of meetings, it provides the right to attend and listen to the deliberations that are part of the decision-making process.

Like the Freedom of Information Law, the Open Meetings Law is based upon a presumption of openness. Meetings of the Board of Trustees, for example, must be conducted open to the public, unless the subject matter may appropriately be considered during a closed or executive session. Paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. In addition, the Village Law requires that a tentative budget be disclosed and that a public hearing be held prior to the adoption of a budget [see Village Law, section 5-508].

Enclosed for your review are copies of both the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5832

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

November 22, 1989

Ms. Barbara Wartelle
Assistant General Counsel
Gannett
P.O. Box 7858
Washington, D.C. 20044

The staff of the Committee on 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. Wartelle:

I have received your letter of November 8, as well as the correspondence attached to it.

According to the materials, the Utica Observer-Dispatch in February requested records from the State Department of Transportation indicating "the amount of money paid by the state to property owners for land needed for the Marcy-Utica-Deerfield (MUD) program, a major highway construction project." The Department's Regional Director in Utica, Philip D. Barnes, denied the request on February 27, and wrote that:

> "A policy which would have us [the Department] make public the agreed upon price for some of the parcels while others on the same project are being negotiated would be inconsistent with our obligation to conserve public resources."

He added that "some of the acquisitions are in litigation and comment is inappropriate."

The denial was appealed on March 16. The receipt of the appeal was acknowledged by Darrell W. Harp, Assistant Commissioner for Legal Affairs, on April 7. Mr. Harp indicated that the Department would reply "within thirty days." Having received

no further response, several ensuing letters were sent to Mr. Harp. As of the date of your letter to this office, you have not yet apparently received a determination of the appeal.

You have requested an advisory opinion concerning the matter in an effort to "facilitate the settlement of this issue without extensive litigation." In this regard, I offer the following comments.

First, an agency cannot, in my opinion, withhold records based upon the establishment of "policy." 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 Court of Appeals, the state's highest court, has held on several occasions that records may be withheld only to the extent that one or more of exceptions to rights of access may properly be asserted [see Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979); Washington Post v. NYS Insurance Department, 61 NY 2d 557, 564 (1984); Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 79-80 (1984); Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986)].

Second, from my perspective, only one of the grounds for denial relates to the facts at issue. Specifically, section 87(2)(c) permits an agency to withhold records or portions thereof that:

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

In my view, the key word in section 87(2)(c) is "impair," and the potential for harm or impairment 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 is involved in the process of seeking bids concerning the purchase of goods and services. If, for example, an agency seeking proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders

might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. 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, 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)].

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, NY 2d 888 (1982)].

Although appraisals sought prior to the consummation of the transactions to which they related were found to be deniable under section 87(2)(c), the Court of Appeals in Murray 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. at 890). Once the transactions to which the appraisals related had been consummated, any impairment that would have arisen as a result of disclosure has been eliminated. Similarly, in the matter at issue, while appraisals and related records concerning particular parcels might justifiably be withheld prior to the sale of the parcels, once a parcel has been sold and the transaction involving that parcel has been consummated, I believe that a contract or equivalent document indicating the amount paid by the state to a property owner is accessible under the Freedom of Information Law.

In another decision that may have a bearing on the issue, the facts involved rights of access to a compilation of salary and fringe benefit data concerning teachers and school district administrators from a number of school districts. The data was apparently prepared based upon the terms of a series of collective bargaining agreements and related records indicating the salaries and benefits of school district officials. Although it was contended that the records could be withheld pursuant to section 87(2)(c), the Court of Appeals found that there was no basis for denial [Doolan v. BOCES, 48 NY 2d 341 (1979)]. I believe that the records that were used in the preparation of the data in Doolan, collective bargaining contracts, would clearly be available, individually, from the school districts that participated in the study. The fact that collective bargaining negotiations might be conducted within a district or districts did not

permit an agency to withhold a contract then in force or information apparently derived from such a contract. In the situation at hand, various agreements have been consummated. As in Doolan, in which records based upon contractual agreements were found to be available, I believe that the terms of the agreements that have been requested here must be disclosed.

Third, the fact that "some of the acquisitions are in litigation" is, in my opinion, irrelevant to rights of access to the records in question. Records indicating monies paid to property owners by the state would not have been prepared for litigation. Further, while materials prepared solely for litigation would in my opinion be exempted from disclosure by statute [see CPLR, section 87(2)(d) when read in conjunction with the Freedom of Information Law, section 87(2)(a)], it has been found that records prepared for multiple purposes, one of which might include eventual use in litigation, cannot be withheld in on the basis of section 3101(d) of the CPLR [see Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)]. As you pointed out in correspondence with the Department of Transportation, the mere fact that records relate to or are the subject of litigation does not constitute a valid basis for withholding records under the Freedom of Information Law (see Farbman, supra). Moreover, if litigation has been commenced, records maintained by the courts, although not subject to the Freedom of Information law, are generally available under other provisions of law (see e.g., Judiciary Law, section 255). I would conjecture that public court records would include the kind of information in which the newspaper is interested. If that is so, there would apparently be no basis for withholding that information maintained by the Department. In a different context, it was recently held that records that could ordinarily be withheld from a defendant by a district attorney become available from the district attorney after the records have been disclosed in a public judicial proceeding. As stated in Moore v. Santucci, "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [543 NYS 2d 107, ___ AD 2d ___ (1989)].

Lastly, the failure of the Department to respond to your appeal is inconsistent with the requirements of the Freedom of Information Law. Section 89(4)(a) states in relevant part that:

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

> shall within ten business days of the receipt of such apeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination theron."

Further, it has been held that when a determination following an appeal is not rendered within the statutory time period, the appeal is considered to have been denied, the applicant has exhausted his or her administrative remedies, and that person may initiate a proceeding under Article 78 of the CPLR [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982). It is my hope, however, that this opinion will serve to negate the necessity of commencing litigation.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Darrill Harp, Assistant Commissioner
Philip A. Barnes, Regional Director
John S. Marsh, Executive Editor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOIL-AO-5833

November 27, 1989

Mr. Herbert B. Gordon
Vice Chancellor for Governmental
and University Relations
State University of New York
State University Plaza
Albany, New York 12246

Dear Vice Chancellor Gordon:

I have received a copy of your determination of an appeal made under the Freedom of Information Law by Ms. Alice Steckiewicz.

The request involved access to time sheets pertaining to two employees of the SUNY College of Environmental Science and Forestry and was denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In defense of the denial, you cited the decision rendered in Bahlman v. Brier, 119 Misc. 2d 110 (1983), which held that the Freedom of Information Law does not require the release of personally identifiable sick leave information concerning individual employees.

Please be advised that the holding in Bahlman was essentially reversed by the Court of Appeals in Capital Newspapers v. Burns, 109 AD 2d 292, affirmed 67 NY 2d 562 (1986). That decision also dealt with records involving sick leave claimed by a particular employee. In holding that the records must be disclosed, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the right of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining

> agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of personal privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985); aff'd 67 NY 2d 562 (1986)].

Further, in affirming the decision of the Appellate Division, the Court of Appeals held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75, 79). 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 government officers (Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571 [citing Public Officers law section 84]).
>
> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (see, Public Officers Law section 87[2]; Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY

> 2d 75, 79-80, supra). This presumption specifically extends to intra-agency and inter-agency materials, such as the report sought in this proceeding, comprised of 'statistical or factual tabulations or data' (see, Public Officers Law section 87 [2][g][i]). Exemption s are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (see Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75, 80, supra; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566).

On the basis of the decision rendered in Capital Newspapers, supra, it is my view that the records in question should be made available.

I hope that the foregoing serves to clarify the issue. If there are questions, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Alice Steckiewicz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1681
FOIL-AO-5834

162 WASHINGTON AVENUE, ALBANY, NEW YORK 1
(518) 474-2518,

November 27, 1989

Ms. Donna B. Amberman
[redacted]

The staff of the Committee on 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. Amberman:

I have received your letter of November 10, which pertains to the status of the board of trustees of a county historical Society under the Open Meetings Law.

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and section 102(2) of the Law defines the phrase "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."

Second, historical societies are "type B" not-for-profit corporations according to section 1408 of the Not-for-Profit Corporation Law. "Type B" not-for-profit corporations:

> "...may be formed for any one or more of the following non-business purposes: charitable, educational, religous, scientific, literary, cultural or for the prevention of cruelty to children or animals" [Not-for-Profit Corporation Law, section 201(b)].

In addition, it appears that the visitation and inspection of the premises and records of such a corporation are conferred only upon a justice of the Supreme Court (Not-for-Profit Corporation Law, section 114).

In view of the foregoing and particularly section 201(b) of the Not-for-Profit Corporation Law, I would conjecture that a board of a historical society is not a public body, for it likely does not conduct what may be characterized as "public business," nor does it perform what may be considered a "governmental function." If those contentions are accurate, such a board is not a public body and is not subject to the Open Meetings Law.

Based upon the foregoing, issues involving the disclosure of minutes of meetings of the a historical society, as well as its other records, would in my view be governed by its board, rather than by the Open Meetings Law. In essence, I believe that the board in this instance may choose to disclose or withhold its records.

Lastly, concerning the matter from a different vantage point, the statute that deals with access to government records is the Freedom of Information Law. That statute pertains to agency records, and section 86(3) of the Freedom of Information Law defines "agency" to mean:

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

As in the case of the Open Meetings Law, the Freedom of Information Law is generally applicable to records maintained by governmental entities that perform a government function. Since a historical society is not-for-profit, rather than governmental entity, I do not believe that the Freedom of Information Law would govern access to its records.

I hope that the foregoing serves to clarify the matter. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5835

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

November 28, 1989

Mr. Reinaldo Paredes
#89-A-3523
Adirondack Correctional Facility
Box 110
Raybrook, New York 12977-0110

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

Dear Mr. Paredes:

I have received your letter of November 3 and the materials attached to it. The correspondence reached this office on November 13.

In brief, you wrote that you have experienced difficulty and delay in obtaining records from the various offices, particularly the New York City Police Department. The correspondence indicates that several requests were made pursuant to the Freedom of Information Act, 5 U.S.C. 552 and the Privacy Act, 5 U.S.C. 552a. In this regard, I offer the following comments.

First, for purposes of background, I point out that the two statutes referenced above are federal acts that apply to records maintained by federal agences. Those acts do not apply to records maintained by entities of state and local government.

The statute that generally is applicable is the New York Freedom of Information Law, which pertains to agency records. Section 86(3) of the Freedom of Information Law defines the term "agency" to include:

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

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

In turn, 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 is applicable to the New York City Police Department. While court records may be available under other provisions of law, they are not subject to the Freedom of Information Law.

Second, 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 within which an agency must respond 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 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, sections 1401.5(d) and 1401.7(c)]

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, if you have not yet been granted or denied access to the records sought, I believe that you may consider the request to have been constructively denied, and that you may appeal on that basis. For your information, the person at the Police Department designated to determine appeals is Eileen D. Millett, Assistant Commissioner for Legal Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-97
FOIL-AO-5836

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

November 28, 1989

Ms. Sophie Czysz
[redacted]

Dear Ms. Czysz:

I have received your letter of November 17 in which you asked that this office send "personal information" about you.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law and the Personal Privacy Protection Law. The Committee does not maintain records generally, such as those in which you are interested. However, in an effort to assist you, I offer the following comments and suggestions.

First, a request for records should generally be directed to the agencies that you believe maintain records about you. Requests made under the Freedom of Information Law should be made to the "records access officer". The records access officer has the duty of coordinating an agency's response to requests made pursuant to the Freedom of Information Law. A request made under the Personal Privacy Protection Law should be forwarded to the "privacy compliance officer". Often the functions of records access officer and privacy compliance officer are carried out by the same person.

Second, the Freedom of Information Law is applicable to records of an agency. For purposes of that statute, the term "agency" is defined to include entities of state and local government [see Freedom of Information Law, section 86(3)]. 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 Personal Privacy Protection Law is also applicable to agencies. However, for purposes of that law, the term "agency" is defined to include state agencies; units of local government are not subject to the Personal Privacy Protection Law [see Personal Privacy Protection Law, section 92(1)]. The Personal Privacy Protection Law generally grants rights of access to records pertaining to an individual, a "data subject", to that person.

Third, both the Freedom of Information Law and the Personal Privacy Protection Law require that an applicant "reasonably describe" the records sought [see respectively, Freedom of Information Law, section 89(3); Personal Privacy Protection Law, section 95(1)]. A request for information about yourself, without additional description, would not likely reasonably describe the records. Therefore, a request should include sufficient detail to enable agency officials to locate the records.

Enclosed for your consideration are copies of the Freedom of Information Law and the Personal Privacy Protection Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5837

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

November 28, 1989

Mr. Harold G. Otley
[redacted]

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

Dear Mr. Otley:

I have received your letter of November 12 in which you raised questions concerning both the Freedom of Information Law and the Open Meetings Law.

Your first area of inquiry involves the propriety of a public body, while in an executive session, "agreeing to agree" concerning a motion to be made and voted upon during an open meeting. In a related vein, you questioned the practice of "informal" polling of a board during an executive session to determine whether a motion and vote would be made during an open meeting.

In this regard, as you are aware, a public body may generally vote during a proper executive session, unless the vote is to appropriate public monies. When a vote is taken in an executive session, minutes of the executive session must be prepared and made available to the extent required by the Freedom of Information Law that indicate the nature of the action taken, the date and the vote of the members. On the other hand, if a public body takes no final action during an executive session, there is no requirement that minutes of the executive session be prepared.

In my view, it is often difficult to distinguish between an informal agreement to bring an issue to a vote based upon what may be a meeting of the minds reached during an executive session, as opposed to the equivalent of a vote that is, in reality, final. There is one decision that dealt with the issue of action taken by "consensus". Specifically, in Previdi v. Hirsch, the Court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of ex- haustion of remedies" [524 NYS 2d 643, 646 (1988)].

Based on the foregoing, if a consensus vote represents a final determination of an action, I believe that minutes would be required to be prepared in accordance with section 106(2) of the Open Meetings Law.

Your second area of inquiry involves rights of access to records following the completion of litigation. You asked whether in that circumstance "letters and/or documents which lead to the litigation [are] public record". I believe that the answer to your question would be dependent upon the nature of the records and/or the purpose for which they were prepared. The first ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". Attorney work product is confidential pursuant to section 3101(c) of the Civil Practice Law and Rules. Material prepared solely for litigation is generally confidential pursuant to section 3101(d). Similarly, communications between an attorney and a client that fall within the attorney-client relationship are considered privileged pursuant to section 4503 of the Civil Practice Law and Rules. In my view, the fact that litigation has ended would not require records falling with the scope of those exemptions to be made available. However, other records, such as those exchanged between adversaries or that are submitted to a court and become part of public court records would in my opinion be available. There may be other kinds of records that are generated prior to litigation. Without familiarity with the particular records, I cannot offer specific guidance concerning rights of access. Nevertheless, if records are prepared in the ordinary course of business and would otherwise be available under the Freedom of Information Law, the fact that they might relate to litigation would not in my view affect rights of access to the records.

Your final area of inquiry involves the authority of a town clerk to require that all town mail "come through" the office of the clerk where the mail is opened even if it is addressed to a person other than the clerk. As suggested to you in previous correspondence, that issue is unrelated to the Freedom of Information Law. If, for example, the clerk is authorized by the town board to engage in the activities that you described, I believe that the clerk's actions would be fully valid.

Lastly, you referred to part 1401, the rules and regulations of the Committee on Open Government, that were sent to you, and you asked if the rest of that publication is also available. The regulations forwarded to you represent the entirety of the regulations promulgated by the Committee on Open Government under the Freedom of Information Law. The publication to which you referred is the New York Code of Rules and Regulations, which consists of dozens of volumes. The volume in which the Committee's regulations are found is entitled "Miscellaneous," and it contains numerous regulations promulgated by other agencies that are unrelated to the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5838

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

November 29, 1989

Ms. Katherine P. Safiani
[redacted]

The staff of the Committee on 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. Kafiani:

I have received your letter of November 12 in which you requested assistance.

According to your letter, your fiance has been preparing an appeal in a criminal case. In conjunction with the appeal, he has attempted, apparently without success, to obtain various records from the New York City Police Department. In addition, some of the records in which you are interested are maintained by a public defender who has refused to disclose the records.

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. Without the knowledge of the contents of the records or the effects of their disclosure, I cannot advise with certainty with respect to the extent to which the records must be disclosed.

Second, 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 within which an agency must respond 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 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, sections 1401.5(d) and 1401.7(c)]

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, if you have not yet been granted or denied access to the records sought, I believe that you may consider the request to have been constructively denied, and that you may appeal on that basis. For your information, the person at the Police Department designated to determine appeals is Eileen D. Millett, Assistant Commissioner for Legal Matters.

Lastly, it is possible that some of the records in question may be maintained by a court. Although the courts and court records are not subject to the Freedom of Information Law, court records are often available under other provisions of law (see e.g., Judiciary Law, section 255). As such, it may be worthwhile to submit a request to the clerk of the appropriate court.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-98
FOIL-AO-5839

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

November 29, 1989

Ms. Marilyn Trudell
[redacted]

The staff of the Committee 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. Trudell:

I have received your letter of November 8, which pertains to requests made under the Freedom of Information Law and the Personal Privacy Protection Law for records of the Department of Social Services.

As I understand the matter, you were permitted to review your "Affirmative Action case file." Thereafter, having requested copies of certain records in that file, you received "all but one requested document." Although that document was denied under the Freedom of Information Law on the ground that it constitutes "intra-agency material," no reference was made to any basis for denial under the Personal Privacy Protection Law. You also referred to our conversation in which I suggested that if the document was disclosed to you for the purpose of inspection, you should have the right to copy that record. You added that your are "the data subject and the document is accessible by [your] name."

In this regard, I offer the following comments.

First, having contacted the Department to learn more of the matter, I was informed that the record in question was prepared by an attorney for the Department and directed to another Department attorney. As such, the document could in my view properly be characterized as "intra-agency material" that falls within the scope of section 87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

Assuming that the record does not contain the kinds of information described in subparagraphs (i) through (iv) of section 87(2)(g), I believe that the record could have been withheld under the Freedom of Information Law.

Second, as you are aware, section 95(1) of the Personal Privacy Protection Law generally grants rights of access to a data subject to records identifiable to him or her that are retrievable by means of that person's name or other identifier. However, section 95(6)(d) of that statute states that rights conferred by section 95 do not apply to:

> "attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivisions (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena issued in the course of a criminal action or proceeding, court ordered or grand jury subpoena, search warrant or other court ordered disclosure."

The representative of the Department with whom I spoke indicated that the record in question consists of material prepared in contemplation of litigation as described in section 95(6)(d). Therefore, although you might have inspected the document, it appears that you had no right to do so under the Personal Privacy Protection Law.

Third, it was suggested in my discussion of the matter with the Department's representative that the document in question was likely disclosed inadvertently when a variety of other records were made available for your review. In a situation that might have been analogous, records were reviewed and followed by a request for copies. Among the records inspected was a document that the agency believed was exempted from disclosure and which should have been withheld. In that case, it was held that an inadvertent disclosure of an exempt record did not create a right to copy the record [McGraw-Edison Co. v. Williams, 509 NYS 2d 285 (1986)]. If indeed the record in question may justifiably be withheld, and if it was inadvertently made available for inspection, it would appear that the Department could properly deny a request that the record could be copied.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5840

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

November 29, 1989

Mr. Jim Farnsworth
Farnsworth Development Corp.
4132 Canal Road
Spencerport, New York 14559

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

Dear Mr. Farnsworth:

I have received your letter of September 10 in which you raised a series of questions concerning the Freedom of Information Law.

You asked initially whether section 87(2)(g) is "currently effective" and, if so, whether it will be "eliminated as of January 1, 1994." Section 87(2)(g) is and has been in effect since January 1, 1978. Only subparagraph (iv) concerning external audits will be repealed in 1994. However, external audits, such as those prepared by the state comptroller, are public and likely will remain so, notwithstanding the eventual repeal of section 87(2)(g)(iv). As you may be aware, 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;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Second, you referred in your second and fifth questions to the provision within section 89(3) that enables an agency to acknowledge the receipt of a request if more than five business days are needed to respond. You suggested that the provision is "open-ended" and subject to abuse. In this regard, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law. A copy of the regulations (21 NYCRR Part 1401) is enclosed. In turn, section 87(1) of the Law requires each agency to adopt its own regulations consistent with the Freedom of Information Law and the Committee's regulations. The Law and the regulations provide time limits within which agencies must respond to requests. Specifically, section 89(3) of the 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, sections 1401.5(d) and 1401.7(c)]

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 section 89(4)(c)(i), you requested legal references concerning the criteria regarding the authority to award attorney's fees under the Freedom of Information Law. There are relatively few cases that have dealt with the issue, and none include what may be viewed as unequivocal standards. However, enclosed is a copy of the Committee's latest annual report, which includes summaries and citations concerning decisions, and subject matter index that identifies decisions dealing with the subject in question. In addition, a recent decision on the subject is Powhida v. City of Albany, 147 AD 2d 236 (1989).

Fourth, you requested guidelines regarding the "subject matter list" required to be maintained pursuant to section 87(3)(c). The enclosed regulations, section 1401.6, refer to the list in question.

Lastly, you suggested that a town supervisor is the official in a town who is "ultimately responsible for compliance." In my view, the governing body of a municipality, such as a town board, is responsible for ensuring compliance. The board has the duty to promulgate the appropriate procedural regulations, and section 1401.2(a) of the Committee's regulations states that the governing body of a public corporation is responsible for ensuring compliance with its regulations.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1682
FOIL-AO-5841

162 WASHINGTON AVENUE, ALBANY, NEW YOR
(518) 474-25

November 29, 1989

Mr. Dennis O'Dea
[redacted]

The staff of the Committee 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. O'Dea:

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

According to you letter, while serving as a member of the Board of the Broome County Resource Recovery Agency, which is an independent public benefit corporation created by section 2047-e of the Public Authorities Law, you participated in both open and closed meetings and possess "personal and official notes" regarding its business. During your term with the Agency, bids for a resource recovery facility were received and evaluated. Following the award of a contract to the Foster Wheeler Corporation, various persons and organizations requested copies of the evaluations of the bids. You also indicated that requests have been made to review the criteria used in the evaluations. Those requests have been denied for the reason that the "information no longer exists." You added that:

> "Without this information there can be no verification by citizen organizations or the Legislature that the evaluation process did comply with the New York State Municipal Law, Part 360 of the Department of Environmental Conservation Regulations or even the requirements of the Request for Proposal, and the 1988 State Solid Waste Management Plan."

In conjunction with the foregoing, you raised a series of questions. Specifically, you asked whether:

> "As a past Broome County Resource Recovery Agency member, can [your] personal files be opened to the public in regard to the bid evaluation? What information would remain confidential after the contract has been executed? Under what grounds could the Agency destroy information used in making the bid evaluation. Are files of consultants such as Hawkins, Delafield and Wood that contain bid evaluation methodology and presentations subject to the Freedom of Information Law? Can the Agency cause [you] to surrender [your] files to them?"

In this regard, I offer the following comments.

First, according to our conversation, there has been no effort or intent on the part of the agency to maintain control over your "personal files," which are apparently duplicates of records distributed to other members of the agency. It is noted that the scope of the Freedom of Information Law is broad, for it pertains to all records of an agency. 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, I believe that the materials that you received during your term with the Agency clearly constitute "records." Whether those records remaining in your possession are still within the custody or control of the Agency is, in my view, conjectural. If there was no effort or intent on the part of the Agency to retrieve the records, and if there is no legal prohibition concerning their disclosure, I would conjecture that you may do with the records as you see fit.

I point out, too, that the Freedom of Information Law is permissive. 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. However, the introductory language of section 87(2) states that an agency "may" withhold records falling within the grounds for denial that follow. There is no requirement that records must be withheld, even though a basis for denial may be applicable. As stated by the Court of Appeals:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose the records..." [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

The only instances in which records cannot be disclosed involve situations in which statutes prohibit disclosure. I am unaware of any statute that would, under the circumstances presented, prohibit disclosure.

Second, the materials that you forwarded, all of which were prepared by consultants retained by the Agency, are marked "confidential." In other contexts, it has been found that even though records might be marked as "confidential," such notations or claims are generally irrelevant. An assertion of confidentiality, absent specific statutory authority, may be all but meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, 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, notwithstanding the fact that they are marked "confidential" [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)].

Third, even though the Freedom of Information Law permits the disclosure of any records, subject to the qualification mentioned earlier, several of the grounds for denial may be or have been relevant to the records in question.

Section 87(2)(c) permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards..." Since the contract has already been awarded, it is unlikely, in my view, that section 87(2)(c) would serve as a basis for denial.

Section 87(2)(d) permits an agency to withhold records that:

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

While records submitted by bidders might have contained "trade secrets," it is doubtful in my view that the records in question, evaluations and related materials prepared by consultants or Agency officials, would consist of trade secrets that would, if disclosed, cause substantial injury to the competitive position of a bidder.

With respect to records prepared by the Agency or its consultants, I believe that section 87(2)(g) of the Freedom of Information Law would be most relevant. Based upon the judicial interpretation of the Law, records prepared for an agency by a consultant should be treated as "intra-agency" materials that fall within the scope of 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. 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.

In a discussion of the issue of consultant reports, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional material, prepared to assist an agency decision maker***in arriving at his decision' (Matter of McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Creat Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (See, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

The court, however, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held 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 or 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 the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

Having reviewed the materials that you forwarded, which, as indicated earlier, were prepared by consultants, I believe that a great deal of their contents consist of factual information that would be available under section 87(2)(g)(i). In addition, in a situation in which opinions and factual materials were "intertwined," Ingram v. Axelrod, a decision rendered by the Appellate Division, Third Department, indicated 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 (ambualnce records, list of intervies, and reports of interview) should be disclosed as 'factual data.' They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 AD 2d 176, 181, mot for lv to app den 48 NY 2d 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 AD 2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [9- AD 2d 568, 569 (1982); see also Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979); Xerox Corporation v. Town of Webster, a65 NY 2d 131, 490 NYS 2d 488 (1985)].

In short, even though factual information contained within a record may be "intertwined" with opinions, the factual portions, if any, would in my opinion be available under section 87(2)(g)(i), unless a different ground for denial applies.

Further, if "criteria" regarding the evaluations were developed or used, it appears that would be available, for they might be viewed as "instructions to staff that affect the public" accessible under section 87(2)(g)(ii) or as an agency policy accessible under section 87(2)(g)(iii). In essence, the criteria would represent the standards to be met by the bidders.

Fourth, issues involving the destruction of records do not deal directly with the Freedom of Information Law. However, a relatively new provision of law, the "Local Government Records Law" (Arts and Cultural Affairs Law, Article 57-A), is likely relevant. The phrase "local government" for purposes of that law is defined to mean:

> "any county, city, town, village, school district, board of cooperative educational services, district corporation, public benefit corporation, public corporation, or other government created under state law that is not a state department, division, board, bureau, commission or other agency, heretofore or hereafter established by law" [Arts and Cultural Affairs Law, section 57.17(1)].

The Agency, as indicated earlier, is a public benefit corporation. Further, section 57.25(2) states in part that:

> "No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education."

In conjunction with the foregoing, the Commissioner is authorized to develop schedules that include minimum retention periods for certain classes of records. I am unaware of any such retention schedules that may be applicable to the Agency. However, it would appear that the Agency may destroy records only with the consent of the Commissioner or pursuant to a retention schedule.

In a related vein, I point out that the Freedom of Information Law pertains to existing records. If records are no longer maintained by the Agency, the Freedom of Information Law would have no application. Whether records were properly disposed of or destroyed is, in my view, a separate issue. It is noted that an amendment to the Freedom of Information Law that became effective on November of this year, section 89(8), states that:

> "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."

Based upon your correspondence, I have no knowledge of whether the amendment is relevant to the matter.

Lastly, in our conversation, you questioned the propriety of executive sessions held by the Agency to consider evaluations prepared and presented by consultants. In this regard, like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Public bodies, such as the board of a public benefit corporation, must conduct meetings open to the public, unless a topic may appropriately be discussed during an executive session. Paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the topics that may be considered during executive sessions.

Of likely relevance is section 105(1)(f), which permits a public body to inter 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."

The extent to which the cited provision could have been asserted would have been dependent upon the nature of a discussion. For instance, if a discussion involved consideration of the financial history of a particular corporation, i.e., a bidder, I believe that an executive session would have properly been held.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to agency officials.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: John Guinan
John E. Murray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5849

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

November 6, 1989

Mr. George C. Weimer, 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. Weimer:

I have received your letter of October 14, which reached this office on October 26. You have sought assistance concerning a request for records made to the Village of Nissaquogue.

Based upon a review of the materials attached to your letter, a request for a variety of records relating to the construction of a police building was received by the Village Clerk on August 22. On September 12, the Clerk informed you that they were not in his possession but rather were being kept by the Mayor at a location other than the Village Hall. On that date, since you had not received the records, you submitted an appeal. As of the date of your letter addressed to this office, you apparently had not yet obtained a response to the appeal. You also enclosed a news article of October 12 in which the Clerk stated that he would permit inspection of the records if they were at the Village Hall. However, he added that "They've never been kept here. The Mayor has them somewhere," and that he (the Clerk) did not know where the records are located.

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 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."

Since the documents that you requested are "kept" or held by the Mayor for the Village, which is an agency, I believe that they constitute "records" that fall within the scope of the Freedom of Information Law, irrespective of the location of the documents. Further, while there may be no specific requirement that the records be kept in the Village Hall, I believe that they must nonetheless be available for review in accordance with the direction provided by the Freedom of Information Law at a different location, such as the Mayor's home [see Town of Northumberland v. Eastman, 493, NYS 2d 93 (1985)].

Second, pursuant to section 4-402 of the Village Law, subject to the direction and control of the Mayor, the Village Clerk has "custody of the corporate seal, books, records and papers of the Village and all the official reports and communications of the Board of Trustees." Further, under the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law and have the force of law, the designated records access officer has the duty of coordinating an agency's response to requests for records [see section 1041.2(a)]. In addition, under the new Local Government Records Law, the Village Clerk is the "records management officer" (see Arts and Cultural Affairs Law, section 57.19). As such, I believe that the Village Clerk bears some of the responsibility for ensuring the effective management of the Village's records, particularly if the Clerk has been designated as records access officer for purposes of the Freedom of Information Law.

Third, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government 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, sections 1401.5(d) and 1401.7(c)]

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, while its relevance in this instance is conjectural, a new subdivision 8 of section 89 of the Freedom of Information Law became effective on November 1. That provision states that "Any person who, with intent to prevent public inspection of a record willfully conceals or destroys any such record shall be guilty of a violation."

Fifth, based upon a review of your letter, your request is quite broad, and you asked the Mayor to respond to a series of questions. In this regard, I point our that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to permit agency officials to locate the records. Although the request involes records idenfitied with specificity, I am unfamiliar with the filing system or systems in which the records may be kept. If it is determined that certain parts of the records cannot be located based upon the terms of the request and due to the nature of the Village's filing systems, it is suggested that you discuss the matter with the Village's records access officer. Among the duties of the records access officer is providing assistance to a requester in identifying the records sought, if necessary [see regulations, section 1401.2(b)(2)]. It is also noted that the Freedom of Information Law pertains to existing records and that section 89(3) states in part that an agency need not create a record in response to a request. Therefore, while the Mayor may answer your questions, I do not believe that the Freedom of Information Law would require him to do so.

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. In my opinion, it appears that most if not all of the records sought should be disclosed, for none of the grounds for denial could at this juncture be asserted.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to Village officials.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Hon. Warren Riis, Mayor
Hon. Joseph Schroeher, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5843

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

December 1, 1989

Mr. Thomas Muller
89-B-1631
P.O. Box 500
Elmira, New York 14902-0500

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

Dear Mr. Muller:

I have received your letter of November 10.

Having requested records from the Superintendent of the Elmira Correctional Facility, records were disclosed and you paid a fee for six pages plus the cost of retrieving the records. However, you wrote that three pages were missing. Further, there was apparently no written reason for withholding the records question.

You have requested advice concerning the matter. In this regard, I offer the following comments.

First, it is possible that the three pages were erroneously excluded from the records that were made available. As such, it is suggested that you contact the Superintendent or the person who disclosed the records to determine whether such an error was made.

Second, if no error was made, it would appear that certain records falling within the scope of your request were denied. As a general matter, when a request or portion of a request is denied, the reason for the denial should be provided in writing, and the applicant should be informed of the right to appeal.

The right to appeal a denial of a request is conferred by section 89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department in Albany.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5844

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

December 1, 1989

Mr. Robert Rodriguez
83-B-2844
Box 338
Napanoch, New York 12458-0338

Dear Mr. Rodriguez:

I have received your letter of November 13, as well as the documentation attached to it.

You referred to earlier correspondence concerning a request and ensuing appeal made under the Freedom of Information Law to the New York City Police Department. As of the date of your letter, you apparently had received no response to the appeal. In additional, the document attached to your letter is an affidavit signed by your co-defendant in which he waived "any privacy/confidentiality privileges" that might be asserted to withhold records pertaining to him that you have requested. You have asked that I send the affidavit to the Department's appeals officer, Mr. Thomas Slade.

In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law requires that a determination be made within ten business days of an agency's receipt of an appeal. Specifically, section 89(4)(a) states in relevant part that:

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

Second, although this office does not have the duty to forward the affidavit, I will do so as a service to you. It is noted that Mr. Slade is no longer the Department's appeals officer. The person now performing that function is Eileen D. Millett, Assistant Commissioner for Legal Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Eileen D. Millett, Assistant Commissioner for Legal Matters

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5845

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

December 1, 1989

Mr. Neal Eugene Wiesner
87-T-0119
Clinton Correctional Facility
Box 367-A
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. Wiesner:

I have received your letter of November 11.

In brief, following a denial of a request for records maintained by the Office of the District Attorney of Richmond County, you appealed on August 29 to the person designated to determine appeals. Despite your efforts to elicit a determination of the appeal, as of the date of your letter to this office, no determination had been rendered.

You have requested assistance in the matter. 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. The Committee is not empowered to compel an agency to comply with the Law.

Second, the Freedom of Information Law requires that a response to an appeal be made within a specified period. Section 89(4)(a) of the Law states in relevant part that:

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

> chief executive, or governing body, who shall within 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 provides access to the record sought."

Further, when an appeal is made and the agency fails to respond within the appropriate period, it has been held that the applicant has exhausted his administrative remedies any may commence a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD 388, appeal dismissed, 57 NY 2d 774 (1982)].

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the appeals officer.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: David W. Lehr, Chief Assistant District Attorney

Richmond County Office of the District Attorney
30 Richmond Terrace
Staten Island, NY 10301

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1686
FOIL-AO-5846

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

December 4, 1989

Mr. Frank J. Ginther
[redacted]

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

Dear Mr. Ginther:

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

You have asked for assistance "in obtaining the voting record of the Albany Port District Commission on the Lease Option Agreement between the Port Commission and Ultra Cogen Systems, Inc.". You indicated that the agreement was signed for the Port Commission by its Chairman, Guy N. Childs, on April 24, 1989.

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 Freedom of Information Law, section 89(3)], an exception to that rule involves votes taken by public bodies. Specifically, 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 state or municipal board [see section 86(3)], such as the Commission, 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 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 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."

Lastly, in an Appellate Division decision, it was found that "The use of a secret ballot for voting purposes was improper". In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law (section) 87[3][a]; (section) 106[1], [2]" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)].

In an effort to assist you, copies of the opinion will be sent to representatives of the Commission.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Guy N. Childs, Chairman
Frank W. Keane, General Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5847

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

December 4, 1989

Mr. Lamonte Johnson
#87-B-0601
P.O. Box 0051
Comstock, New York 10821

The staff of the Committee 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. Johnson:

I have received your letter of November 10 in which you referred to earlier correspondence concerning your unsuccessful efforts to obtain records from the New York City Police Department.

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 cannot compel an agency to grant or deny access to records. As such, I cannot indicate wither the Department will disclose or withhold the information sought.

With respect to procedure, the information offered in my letter of November 9 represents the procedure for requesting records. It is reiterated that if an agency fails to respond to a request within the appropriate time periods, an applicant may consider the request to have been denied and may appeal on that basis. Further, although I did not speak with them, copies of the opinion of November 9 were sent to the Department's records access and appeals officers in an effort to assist you.

Having reviewed your earlier correspondence, which describes the information sought, 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 an agency need not create a record in response to a request. Based on a review of your request, it is possible that certain of the information sought might not exist in the form of a record or records. To that extent, the Freedom of Information Law, in my view, would not apply.

Second, to the extent that records exist, 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, under the circumstances, it appears that two provisions of the Freedom of Information Law would likely be relevant to rights of access.

First, section 87(2)(g), one of the grounds for denial, states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

The other provision of potential significance is section 87(2)(e)(iv), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would...reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

The leading decision concerning section 87(2)(e)(iv) is Fink v. Lefkowitz, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information (see Frankl v Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v Brennan, 476 F2d 699, 702; Hawkes v Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

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

To the extent that the records in which you are interested were "compiled for law enforcement purposes," such as forensic reports and related records, and disclosure would enable people to evade law enforcement activities, they could likely be withheld. The remainder, in my view, would likely be available, unless a different ground for denial applies.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Sgt. John Sultana
Eileen D. Millett, Assistant Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5848

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

December 5, 1989

Ms. Angela M. Elefante
Attorney at Law
Genesee-Watson Building
1508-1512 Genesee Street
Utica, New York 13502

The staff of the Committee on 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. Elefante:

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

You wrote that you are attempting "to review information from files requested in Oneida County from the Oneida County Industrial Development Corporation, the Utica Industrial Development Corporation, and city and county CETA, concerning a now defunct corporation called Primoshield." You have asked, based upon the attached correspondence, who the proper records access officers for those entities might be.

In this regard, I offer the following comments.

First, the Committee on Open Government maintains no list of records access officers. As such, I cannot identify the appropriate persons. As a general matter, requests should be made to the records access officers at the agencies that you believe maintain the records in which you are interested.

Second, by way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see attached regulations, 21 NYCRR Part 1401). In turn, section 87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

As such, an agency's regulations should be consistent with those promulgated by the Committee.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, section 1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more personas as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or

(ii) deny access to the records in whole or in part and explain in writing the reasons therefore.

(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 request to copy those records..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests. Further, there may be one records access officer for all agencies within a county, for example; however, there may be a number of records access officers designated to deal with requests made to particular agencies within county government.

Lastly, one of your requests was made to a local development corporation. In my view, the status of such a corporation under the Freedom of Information Law is unclear.

The scope of the Freedom of Information Law is determined in part by section 86(3), which defines "agency" to include:

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

In view of the language quoted above, the question is whether a local development corporation, such as the Oneida County Industrial Development Corporation, the Utica Industrial Development Corporation is a "governmental" entity performing a "governmental" function.

Specific reference to local development corporations is found in section 1411 of the Not-for-Profit Corporation Law. The cited provision describes the purposes of local development corporations and states in part that:

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

Therefore, due to its status as a not-for-profit corporation, it is not clear that a local development corporation is a governmental entity; however, it is clear that such a corporation performs a governmental function.

In an effort to learn more about local development corporations generally, it has been found that their relationships to government are inconsistent. Some are apparently analogous to chambers of commerce and, in great measure, carry out their duties independent of government. Others appear to be partners with or extensions of government that carry our their duties in conjunction with government. In am unfamiliar with the activities of the Oneida County Development Corporation and the Utica Industrial Development Corporation or the background concerning its creation.

Although I am unaware of any judicial determination that deals specifically with the status of a local development corporation under the Freedom of Information Law, it is noted that there is precedent regarding the application of the Freedom of Information Law to certain not-for-profit corporations. Specifically, in Westchester Rockland Newspapers v. Kimball, [50 NYS 2d 575 (1980)], the Court of Appeals found that volunteer fire companies, which are not-for-profit corporations, are subject to the Freedom of Information Law. In so holding, the Court stated that:

> "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' (emphasis added; Public Officers Law, section 84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, sections 560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. the phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [id. at 579].

In sum, the status of local development corporations under the Freedom of Information Law is unclear. However, case law rendered under the Freedom of Information Law suggests that, to give effect to the intent of the Law, a not-for-profit entity that performs "an essential governmental function" might be found to be subject to the requirements of the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: James Gilroy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1687
FOIL-AO-5849

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

December 5, 1989

Mr. Ross Strober
[redacted]

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

Dear Mr. Strober:

I have received your letter of November 17, as well as the correspondence attached to it.

You have raised a series of issues concerning the implementation of the Open Meetings Law by the Board of Education of the Hauppauge School District.

Your first area of inquiry pertains to the status of committees designated by the Board. Each committee apparently includes at least one member of the Board of Education. In this regard, the Open Meetings Law is applicable to meetings of public bodies. The phrase "public body" is defined in section 102(2) of the Law 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."

While early decisions rendered under the Open Meetings Law found that citizens' advisory committees were subject to the Open Meetings Law (see e.g., Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978), other more recent decisions rendered by the Appellate Division, Second Department, which

includes Suffolk County, indicate that entities having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, ___ AD 2d ___ (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989)]. It was also held that "groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies]' subject to the Open Meetings Law... " (Poughkeepsie Newspaper, supra, 69). On the basis of the decisions cited above, it appears that the committees in question may not be public bodies required to comply with the Open Meetings Law. It is noted, however, that there are no decisions of which I am aware that deal specifically with entities that have the authority to recommend, but which include members of a governing body, such as a board of education. Nevertheless, at this juncture, once again, meetings of the committees in question do not appear to be governed by the Open Meetings Law based upon recent court decisions.

Second, you provided examples of what you characterized as "illegal meetings". One situation involved the preparation of a "moratorium for approval". You wrote that there is no record that the Board discussed the issue at either an open or a closed meeting and that "therefore, it is apparent that an illegal meeting must have occurred". The next situation pertained to an announcement by the Superintendent "that a new organizational pattern has been formed". The reorganization "had never been discussed or voted on by the School Board". As such, you alleged that a "secret meeting" must have taken place. A third situation concerns a statement by the President of the Board in which he indicated that he had the authority to amend a lease "because he had received a 'sense of the Board' over the telephone earlier that day". You added that there has been "no official meeting to discuss or vote on this topic". A fourth example concerns a purchase of sound equipment by a Board member on behalf of the Board. There is, however, "no record of a discussion or vote enabling him to do so."

In this regard, I offer several points.

It is emphasized initially that I have no knowledge of whether the Board held meetings or otherwise with respect to the allegedly "illegal meetings" that you described.

However, as a general matter, it is noted that the courts have interpreted the term "meeting" expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, 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 may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Court affirmed a decision rendered by the Appellate which dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also stated that:

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'" (id. at 416).

In addition, in its consideration of the characterization of meetings as "informal", the court found that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a

> public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id. at 415).

Based on the foregoing, if indeed a majority of the Board met for the purpose of discussing public business, any such gatherings would in my view have constituted "meetings" subject to the Open Meetings Law that should have been preceded by notice given in accordance with section 104 of the Law and conducted open to the public to the extent required by the Law.

With respect to action effectively taken by means of telephone polling, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring by telephone. However, a series of telephone calls among the members which results in a decision, without benefit of a meeting, would in my opinion violate the Law.

I point out that the definition of "public body" [see Open Meetings Law, section 102(2)] refers to entities that are required to conduct public business by means of a quorum. In this regard, the term "quorum" is defined in section 41 of the General Construction Law, which has been in effect since 1909. The cited provision states 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."

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at 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, i.e., to vote, 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 assembly syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

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

I also 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 by 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 short, while I believe that Board members may consult with one another by phone, I do not believe that the Board could validly engage in "telephone polling" or make collective determinations by means of telephonic communications. Similarly, a public body may in my opinion take action only in the context of a meeting during which a quorum is present, and only by means of an affirmative vote of a majority of its total membership.

The next area of inquiry pertains to "abuses of executive sessions", and you described several topics which were, in your view, discussed during executive sessions in a manner inconsistent with the Open Meetings Law.

Again, without knowledge of the actual discussions, I cannot advise that each executive session that you enumerated was inappropriately held. However, if your description of the subject matter is accurate, several, if not the great majority of the discussions should, in my view, have occurred in public.

It is emphasized that section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. 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, 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 such, an executive session is not separate and distinct from an open meeting, but rather is a part of an open meeting from which the public may be excluded. In addition, it is clear that a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

Since the minutes that you enclosed indicate executive sessions are frequently held to discuss "personnel", I point out that under the Open Meetings Law as originally enacted, the "personnel" exception differed from the language of the analogous 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..."

Based on 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 that might relate to personnel indirectly or as a group.

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 <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).

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be conducted 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.

Further, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session or "personnel", "litigation", "legal matters" or "negotiations", 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..." [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; please note that the Open Meetings Law was renumbered after Doolittle was decided].

With respect to "negotiations", the only ground for entry into executive session that mentions that term is section 105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which

pertains to the relationship between public employers and public employee unions. As such, section 105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union.

In terms of a motion to enter into an executive session held pursuant to section 105(1)(e), it has been held that:

> "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, supra].

The provisions in the Open Meetings Law concerning "litigation" are found in section 105(1)(d). The cited provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been 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 to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). 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 be 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" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the language quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Further, since "possible" or "potential" litigation could be the result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a "potential" for litigation.

With regard to the sufficiency of a motion to discuss "litigation" or "possible litigation", it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

In short, the topics that may be discussed during executive sessions are limited. Further, based upon case law, the motions for entry into executive sessions should not be vague.

The last aspect of your letter pertains to technical violations or inaccurate minutes and include a variety of contentions. With respect to certain of your contentions, the Open Meetings Law does not specify who must take minutes; no reference is made in the Law to agendas or a public body's duty to prepare or follow an agenda; the Open Meetings Law does not refer to any requirement that a motion be seconded. Those issues in my view relate to rules of procedure that may have been adopted by the Board. Further, I know of no law that precludes a new member or a member absent from previous meetings from voting on issues arising at meetings during which they may vote and are present.

Other issues, however, in my view, relate to specific areas of law.

For example, section 106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings 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 foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting. Further, although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken.

With respect to executive sessions, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law section 105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to section 106(2). It is noted that under section 106(3) of the Open Meetings Law minutes of both open meetings and executive sessions are available in accordance with the Freedom of Information Law. Nevertheless, various interpretations of the Education Law, section 1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive (see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d

897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County 7AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157 aff'd 58 NY 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session. Further, if no action is taken in an executive session, minutes of the executive session need not be prepared. It is noted that one of the instances in which a Board must take action during an executive session arises under section 3020-a of the Education Law. Subdivision (2) of that section states in part that a school board "in executive session, shall determine" whether charges should be made against a tenured person.

Lastly, since its enactment in 1974, the Freedom of Information Law has contained an "open meetings" requirement with regard to voting by members of public bodies. 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..."

Consequently, when a school board takes action, a record must be prepared, i.e., by means of a roll call vote, that indicates the manner in which each member cast his or her vote. That record ordinarily should, in my opinion, be included as part of the minutes.

In an effort to enhance compliance, copies of this opinion will be sent to District officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Dr. Arnold B. Goldberg, Superintendent of Schools
Carol Platt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5850

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

December 11, 1989

Mr. Henry Joseph Vega
#85-A-3105
P.O. Box 51
Comstock, New York 12821
B-1-28

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

Dear Mr. Vega:

I have received your letter of November 17 in which you raised questions concerning access to records.

You wrote that you were informed that you can no longer acquire medical records under the Freedom of Information Law, and that access to those records is governed by new provisions of law.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by the Department of Correctional Services and its facilities. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions there of fall within one or more of the grounds for denial appear in section 87(2)(a) through (i) of the Law.

With respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that

fall within the scope of section (2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

On January 1, 1987, a new statute, section 18 of the Public Health Law, became effective. In brief, that statute generally grants rights of access to medical records to the subjects of the records. I know of no judicial decision, however, that specifies that medical records are not subject to the Freedom of Information Law or that they are exclusively available under section 18 of the Public Health Law.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Coordinator
New York Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

You also expressed an interest in obtaining copies of records prior to your release from a correctional facility. As indicated earlier, the Freedom of Information Law pertains to records of the Department and its facilities.

Pursuant to regulations promulgated by the Department of Correctional Services under the Freedom of Information Law, a request for records kept at a facility may be made to the facility superintendent. For records kept at the Department's Albany offices, a request may be made to the Deputy Commissioner for Administration. In the event of a denial of request, the regulations indicate that an appeal may be made to Counsel to the Department in Albany.

As you requested, enclosed is the brochure concerning the Personal Privacy Protection Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5851

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

December 13, 1989

Mr. Jones R. Woods
88-T-1181
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

Dear Mr. Woods:

I have received your letter of December 11 in which you requested various records from the Committee on Open Government.

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 maintain records generally, such as those in which you are interested. In short, I cannot provide access to the records requested, because this office does not maintain them. Nevertheless, I offer the following comments and suggestions.

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. Further, each agency should 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. Consequently, a request should be made to the records access officer at the appropriate agency.

Second, it appears that some of the records sought may be maintained by a court. Here I point out that the Freedom of Information Law pertains to records of an agency, and that 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."

Although the Freedom of Information Law does not apply to court records, other statutes often confer rights of access to those records. It is suggested that any request for court records be directed to the clerk of the appropriate court.

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-5552

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

December 13, 1989

Mr. Alfred Mower
87-A-8232-H-5-35
Clinton Correctional Facility
Box 367-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. Mower:

I have received your letter of November 17 in which you requested assistance.

In brief, you were denied access to police reports maintained by the City of Elmira on the basis of section 50-b of the Civil Rights Law. It is your view that the denial represents a "violation of [your] constitutional and due process rights."

In this regard, I offer the following comments.

First, I am not an expert with respect to issues involving constitutional or due process rights. As such, I cannot effectively comment concerning your contention.

Second, section 50-b of the Civil Rights Law states in relevant part that:

> "1. The identity of any victim of a sex offense, as defined in article one hundred thirty of the penal law, who was under the age of eighteen at the time of the alleged commission of such offense, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall

> be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."
>
> 2. The provisions of subdivsion one of this section shall not be construed to prohibit disclosure of information to:
>
> a. Any person charged with the commission of a sex offense against the same victim..."

Based upon the foregoing, section 50-b generally states that records tending to identify victim of sex offenses under the age of eighteen are confidential. Therefore, those records would generally be confidential with respect to the public in conjunction with 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."

Third, as indicated above, section 50-b(2)(a) indicates that the confidentiality restrictions imposed by section 50-b(1) shall not be construed to prohibit disclosure to a person charged with a sex offense against a victim under the age of eighteen. In my view, while the foregoing does not constitute a prohibition, it does not appear to create a right of access to the records in question on the part of the person charged. Further, even if section 50-b does not preclude disclosure to you, there may be grounds for withholding records under the Freedom of Information Law. As you may be aware, while the Freedom of Information Law provides broad rights of access, it permits agencies to withhold records pursuant to the grounds for denial appearing in paragraphs (a) through (i) of section 87(2) of that statute.

In short, whether your constitutional or other rights have been violated involves a matter beyond the scope of the jurisdiction of this office. Further, I do not believe that section 50-b necessarily confers a right of access to the records sought.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Hon. James Hare, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5853

162 WASHINGTON AVENUE, ALBANY, NEW YORK 1
(518) 474-2518,

December 13, 1989

Mr. Alan Flacks
[redacted]

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

Dear Mr. Flacks:

I have received your note of November 15 and the memorandum attached to it.

The memorandum consists of a commentary transmitted among officials of the New York City Department of Housing Preservation and Development concerning fees. You have asked for my thoughts concerning its contents.

In this regard, I am in general agreement with points made in the memorandum. As stated therein, section 87(1)(b)(iii) of the Freedom of Information Law permits agencies to charge up to 25 cents per photocopy up to 9 by 14 inches, "except when a different fee is otherwise prescribed by statute." The term "statute" has been judicially interpreted to mean an enactment of the State Legislature [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. As such, absent an act of the State Legislature authorizing an agency to charge more than 25 cents per photocopy, the agency would be limited to charging no more than that figure.

Reference was also made to section 327(2) of the Multiple Dwelling Law, which states that:

> "The department shall have power to charge and collect fees for searches, and to make rules governing charges for certification of pending violations."

The language quoted above does not refer to fees for copies. Therefore, in my view, the Department may not assess fees for photocopies in excess of twenty-five cents per photocopy.

However, since section 327, a statute, specifically authorizes the assessment of fees for searches and certification of pending violations, I believe that fees concerning those services could validly be established, so long as those fees are reasonable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5854

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

December 14, 1989

Mr. Harold G. Otley
[redacted]

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

Dear Mr. Otley:

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

Your inquiry concerns a series of requests for records directed to the Town of Ticonderoga. You have alleged that the Town has failed to respond "in the legal required time."

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 within which agencies 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, sections 1401.5(d) and 1401.7(c)]

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, having reviewed the correspondence, I point out that section 89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described." Further, the Court of Appeals has held that an applicant has reasonably described the records sought when, based on the terms of a request, agency officials can locate and identify the records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. It is noted that although a request may be quite specific, due to the nature of an agency's filing or recordkeeping system, agency officials might nonetheless be unable to locate a particular record. For instance, if minutes of meetings are not indexed by subject matter and are filed chronologically, it may be difficult to locate a particular resolution or reference to it without reviewing what might be years of minutes of meetings. In short, due to the breadth of some aspects of your requests, it is possible that you might not have met the requirement that the records sought be reasonably described.

Third, several aspects of your requests appear to involve information rather than records. For instance, you requested information reflective of the dates certain activities occurred, or for "authority" for taking certain actions. In this regard, it is emphasized that the Freedom of Information Law, despite its title, is a vehicle under which citizens may request existing records; it is not a vehicle that requires agency officials to answer questions or prepare records in response to requests for information.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Hon. Robert Dedrick, Town Supervisor
Wilma Ryan, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5855

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

December 15, 1989

Mr. Ramon Santos
87-A-8395
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. Santos:

I have received your letter of November 17 in which you requested assistance.

According to your letter, you recently requested copies of the written disposition of a Tier III hearing, as well as investigative reports submitted by a Department officials relating to the hearing. The request was denied on the basis of "section 87" of the Freedom of Information Law; apparently no additional description concerning the rationale for the denial was offered. Based upon case law, you contend that due process and Department regulations require that you be provided "with a written statement of evidence relied upon and the reasons for disciplinary action".

In this regard, I offer the following comments.

First, I am not an expert with respect to Tier III hearings, due process considerations relating to those hearings, or the Department's regulations pertaining to the issue. Further, I am unfamiliar with the specific contents of the records in which you are interested.

Second, however, I believe that reasons for the denial, rather than a citation of section 87 without more, should have been given. The regulations promulgated by the Committee on Open Government (21 NYCRR section 1401.7) and the Department of Correctional Services [section 5.35(d)(5)] indicate that the reasons for a denial must be provided.

Third, I point out that a denial of a request may be appealed 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."

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department in Albany.

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. Again, without knowledge of the contents of the records in question, the effects of their disclosure or the relevant law involving Tier III hearings, I cannot offer specific guidance regarding rights of access.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

5856

Clerical

Error

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5857

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

December 15, 1989

Mr. Gary E. Bogle
86-B-1995
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

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

Dear Mr. Bogle:

I have received your letter of November 16. As you requested, enclosed are copies of the Freedom of Information Law and "Your Right to Know".

You wrote that you have attempted for some time and without success to obtain reports prepared by the Commission of Correction and an inspector general regarding the disturbance that occurred at the Coxsackie Correctional Facility on August 1, 1988. In this regard, I offer the following comments.

First, as a general matter, requests should be directed to the agencies that you believe maintain the records in which you are interested. Further, each agency should have designated one or more "records access officers". A records access officer has the duty of coordinating an agency's response to request for records.

I believe that the records access officer for the Commission of Correction is Mr. Stephen DelGiacco. Assuming that the inspector general's report to which you referred is maintained by the Department of Correctional Services, I point out that the Department's regulations indicate that 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 made to the Deputy Commissioner for Administration in Albany.

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 grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unfamiliar with the contents or the effects of disclosure of the records sought, I cannot offer specific guidance concerning rights of access to the records. However, the following paragraphs will review the grounds for denial that may be significant.

Of potential 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". It might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to investigative records maintained by a law enforcement agencies 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."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e).

Another possible ground for denial is section 87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is section 87(2)(g). The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not;
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Investigative records prepared by employees of an agency could in my view be considered as "intra-agency materials". Those records might include opinions or recommendations that could be withheld under section 87(2)(g).

In sum, as suggested in the preceding commentary, rights of access to records, as well as an agency's authority to withhold records, are largely dependent upon the contents of the records and the effects of their disclosure.

Lastly, 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

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-5858

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

December 18, 1989

Mr. Jim Farnsworth
Farnsworth Realtors
4132 Canal Road
Spencerport, New York 14559

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

Dear Mr. Farnsworth:

I have received your letter of November 22, as well as the correspondence attached to it.

You wrote that you have encountered difficulty in obtaining copies of records from the Town of Ogden. As I understand the situation, your initial request was denied. You subsequently appealed, but the appeals have been ignored.

In this regard, I offer the following comments.

First, the Freedom of Information Law requires that a determination following an appeal must be rendered within ten business days of the receipt of an appeal. Specifically, section 89(4)(a) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body, 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 addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon.

Second, having reviewed the correspondence relating to your request, you sought various records concerning the "McGowan Subdivision," including survey and elevation maps, construction inspection notes, and similar materials. Although the response by the Town Clerk indicates that you can inspect the records, you cannot copy the records, unless the lots that are the subject of the request are owned by you.

Here 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. Further, the cited provision indicates that accessible records are available for inspection and copying. In addition, section 89(3) of the Freedom of Information Law requires that agencies prepare copies of accessible records if the applicant pays the appropriate fees. I point out that, based upon judicial review of the Freedom of Information Law, an agency may require payment in advance of the preparation of copies [see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982].

Notes and related materials prepared by Town employees would appear to constitute "intra-agency materials" that fall within the scope of one of the grounds for denial, section 87(2)(g). However, due to its structure, that provision often requires disclosure. 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

Lastly, the clerk wrote that survey and elevation maps can be seen but cannot be copied due to provisions of the Education Law. 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.

Additional considerations become relevant if the records in question bear a copyright, and the question, in my view, involves the effect of a copyright appearing on a document. In order to offer an appropriate response, I have discussed the matter with a representative of the U.S. Copyright Office and the Office of Information and Privacy at the U.S. Department of Justice, which advises federal agencies regarding the federal Freedom of Information Act (5 U.S.C. section 552), the federal counterpart of the New York Freedom of Information Law.

The Copyright Act has been substantially revised since New York courts rendered decisions involving circumstances similar to those that you presented. Specifically, the Federal Copyright Act of 1976, 17 U.S.C. section 101 et seq., appears to have supplanted the earlier case law on the subject. Further, I am unaware of any judicial decisions rendered in New York concerning the relationship between the Copyright Act and the New York Freedom of Information Law.

Useful to the inquiry is a federal court decision in which the history of copyright protection was discussed, and in which reference was made to notes of House Committee on the Judiciary (Report No. 94-1476) referring to the scope and intent of the revised Act. Specifically, it was stated by the court that:

> "The power to provide copyright protection is delegated to the Congress by the United States Constitution. Article 1, section 8, clause 8, of the Constitution grants to Congress the power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'
>
> Copyright did not exist at common law but was created by statute enacted pursuant to this Constitutional authority. See Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460, 98 L.ed. 630 (1954); see also MCA, Inc., v. Wilson, 425 F.Supp. 443, 455 (S.D.N.Y. 1976); Mura v. Columbia Broadcasting System, Inc., 245 F.Supp. 587, 589 (S.D.N.Y. 1965), and cases cited therein.
>
> Prior to January 1, 1978, the effective date of the revised Copyright Act of 1976, there existed a dual system of copyright protection which had been in effect since the first federal copyright statute in 1790. Under this dual system, unpublished works enjoyed perpetual copyright protection under state common law, while published works were copyrightable under the prevailing federal statute. The new Act was intended to accomplish 'a fundamental and significant change in the present law by adopting a single system of Federal statutory copyright...(to replace the) anachronistic, uncertain, impractical, and highly complicated dual system.' H.R. Rep. No. 94-1476; 94th Cong. 2d Sess. 129-130, reprinted in [1976] 5 U.S. Code Cong. & Ad. News 5745. This goal was effectuated through the bed-rock provision of 17 U.S.C. subsection 301, which brought unpublished works within the scope of federal copyright law and preempted

> state statutory and common law rights equivalent to copyright. Id. at 5745-47. Thus, under subsection 301(a), Congress provided that Title 17 of the United States Code, the Federal Copyright Act, preempts all state and common law rights pertaining to all causes of action which arise subsequent to the effective date of the 1976 Act, i.e., January 1, 1978:
>
> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." [Meltzer v. Zoller, 520 F.Supp. 847, 853 (1981)]

Based upon the foregoing, "common law" copyright appears to be a concept that has been rejected and replaced with he current statutory scheme embodied in the revised Federal Copyright Act.

In view of the language of the Copyright Act, case law and discussions with a representative of the Copyright Office, it is clear in my opinion that architectural plans and similar documents may be copyrighted.

To be copyrighted, 17 U.S.C. section 401(b) states that a work must bear a "notice," which:

> "shall consist of the following three elements:
>
> (1) the symbol c (the letter C in a circle), or the word 'Copyright,' or the abbreviation 'Copr.'; and
>
> (2) the year of the first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or

> derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and
>
> (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner."

If those elements do not appear on the work, I do not believe that it would be copyrighted, and that it could be reproduced in response to a request made under the Freedom of Information Law.

Assuming that a work is subject to copyright protection, such a work that includes the notice described above is copyrighted. It is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. section 408(a)] be registered with the Copyright Office. No action for copyright infringement can be initiated until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use the Freedom of Information Law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to section 87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statutes." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall, 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure... by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to section 87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. section 107, which codifies the doctrine of "fair use." Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under section 107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. section 107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secrets exception "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to the government...Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. [section] 107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information Act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with section 87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work should be duplicated.

In order to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the Town Supervisor and the Town Clerk.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Donald Walzer, Supervisor
Ann Wolfe, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5859

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12
(518) 474-2518, 2

December 18, 1989

Mr. Julio Chabrier
81-A-5633
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. Chabrier:

I have received your letter of November 17, which reached this office on November 27.

According to your letter and the correspondence attached to it, you requested records from the Office of the District Attorney of New York County on February 9. Having received no response, you appealed on March 14. As of the date of your letter to this office, you had not received a response to the appeal.

In this regard, 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 within which agencies 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, sections 1401.5(d) and 1401.7(c)]

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 with the Freedom of Information Law, copies of the letter will be sent to the Office of the District Attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Records Access Officer
Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5860

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

December 18, 1989

Mr. Stephen A. Tiska
[redacted]

Dear Mr. Tiska:

I have received your letter of November 14, which again deals with a request directed to the Town of Masonville.

As you suggested, I have contacted the Town Clerk, Pam Johnson, on your behalf. In brief, although you might not have received all of the information sought, Ms. Johnson informed me that all records that exist that fall within the scope of your request have been made available to you. As such, it does not appear that records have been withheld.

I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency is not required to create or prepare a record in order to satisfy a request. Therefore, to the extent that the information sought does not exist in the form of a record or records, the Freedom of Information Law would, in my view, be applicable.

I hope that I have been of assistance and that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Pam Johnson, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5861

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

December 18, 1989

Mr. LaRoi M. Lawton
87-A-5151 4F-16
Downstate Correctional Facility
Box F
Fishkill, NY 12525-0445

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

Dear Mr. Lawton:

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

Your inquiry concerns a denial of a request for a probation report, which is assumed to be a pre-sentence report, by the New York City Department of Probation.

In this regard, I offer the following comments.

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. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available.

"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 caaes 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."

As such, pre-sentence reports are confidential with respect to the public and may be made available to a defendant only by a court. Consistent with information offered by the Department's First Deputy Commissioner, I point out that the last sentence of subdivision (2)(a) of section 390.50 represents an amendment to the original provision. Further, in a decision concerning the amendment, it was found that:

> "The obvious purpose of the legislature in enacting Chapter 132 of the Laws of 1984 was to make the presentence report generally more accessible to counsel and/or the defendant pro se. The spirit of such amendments was open disclosure and discussion of the information before the Court in sentencing and/or appelative review of sentencing and the need to remedy the mischief created by bureaucratic roadblocks to that process. Therefore, this court holds that the agency should be obligated to make them available pursuant to court order..." [see People v. Zavaro, 481 NYS 2d 845, 846 (1984)].

Based upon the decision cited above, it appears that s probation department must make a pre-sentence report available pursuant to an order of the court.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: J. Marc Hannibal, First Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5862

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

December 18, 1989

Mr. Dwight L. Ford
#49929
Maximum Security Unit B-5
Tucker, Arkansas 72168

Dear Mr. Ford:

I have received your letters of November 15 and November 20. Please note that the earlier letter did not reach this office until today.

You wrote that you are an inmate in Arkansas, and that you would like to obtain information concerning the means by which you can request and obtain your prison record.

In this regard, I offer the following comments.

First, since you wrote that you learned of this office in the "Jailhouse Lawyer's Manual," I point out that the Committee on Open Government is authorized to advise with respect to the New York State Freedom of Information Law. That statute pertains only to records maintained by agencies of government in New York. Each state, however, has enacted a law dealing with access to records. Those laws are all different, and I am unfamiliar with the Arkansas access law. To obtain information concerning that law, it is suggested that you confer with officials at your facility or write to the Arkansas Attorney General.

Second, assuming that the records sought are maintained by the New York State Department of Correctional Services or its facilities, the regulations promulgated by the Department indicate that requests for records kept at correctional facilities may be made to the facility superintendent; for records maintained at the Department's central offices in Albany, a request may be made to the Deputy Commissioner for Administration in Albany.

Lastly, I point out that section 89(3) of the New York 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 and identify the records in which you are interested.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5863

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

December 18, 1989

Mr. James Brown
#75-A-0138
Attica Correctional Facility
P.O. Box 149
Attica, New York 14011

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

Dear Mr. Brown:

I have received your letter of November 25, as well as the correspondence attached to it.

In brief, following an eye examination performed at the Attica Correctional Facility, you requested a copy of the results of the examination. In response to the request, you were informed that you would "be billed at the rate of .05 cents per page for copying and $5.50 per request for personnel costs associated with locating, searching, compiling, reviewing and billing for your records." Since a total fee involved $5.65 for a copy of your prescription, you have asked whether the fee is appropriate.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by the Department of Correctional Services and its facilities. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appear in section 87(2)(a) through (i) of the Law.

With respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personal could be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, on January 1, 1987, a new statute, section 18 of the Public Health Law, became effective. In brief, that statute generally grants rights of access to medical records to the subjects of the records.

With respect to fees, unless another statute permits the assessment of a different fee, records accessible under the Freedom of Information Law may be inspected free of charge, and the agency cannot impose a fee involving personnel costs, for instance. When copies are requested, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing records that cannot be photocopied, unless otherwise provided by a statute other than the Freedom of Information Law. Section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of inability to pay."

In view of the foregoing, it appears that the fees assessed by the Department are being imposed pursuant to the Public Health Law rather then the Freedom of Information Law. There are no judicial decisions of which I am aware that deal with whether fees for the records in question should be properly assessed under the Freedom of Information Law or under section 18 of the Public Health Law. Assuming that the fee could be charged under the latter, it would apparently have been appropriate.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

> Access to Patient Information Coordinator
> New York Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> 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:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5864

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

December 18, 1989

Mr. Thomas L. Macho
Property Tax Reduction Consultants
1240 Iroquois Drive
Suite 404
Naperville, IL 60563

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

Dear Mr. Macho:

I have received your letter of November 22, which pertains to rights of access to assessment records.

Specifically, as a property tax consultant retained to evaluate property taxes, you wrote that the assessor of the Town of Huntington informed you that "property record cards" were not subject to the Freedom of Information Law. According to your letter, the assessor indicated that the cards "were in fact the property of the Town of Huntington and as such he was not obligated to provide the information".

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to the records of an agency, such as the Town, and section 86(4) of the Law defines the term "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."

Based upon the foregoing, it is clear in my view that property record cards "kept" or "filed" by the Assessor constitute "records" subject to rights granted by the Freedom of Information Law. Further, the language of section 86(4) has been interpreted by the state's highest court as broadly as its terms suggest [see e.g., Capital Newspapers v. Whalen, 69 NY 2d 246 (1987); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)].

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, with respect to the records in which you appear to be interested, I do not believe that any ground for denial listed in the Freedom of Information Law could appropriately be asserted to withhold the records. Long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez V. Papontas, 32 AD 2d 948 (1969)].

Moreover, with regard to the index cards containing a variety of information concerning specific parcels of real property, 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 remodeled, as well as details as to any minor buildings" [Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756, 758].

In sum, despite the assessor's contentions, it is my view that the cards are "records" subject to the requirements of the Freedom of Information law, and that, based upon the Freedom of Information Law and judicial decisions involving records kept by assessors, the cards are likely available.

Lastly, I point out that section 574(5) of the Real Property Tax Law states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced above are usually "EA 5217" forms, which include the selling price of a parcel when real property is transferred.

To give effect to section 574(5) of the Real Property Tax Law, I believe that information derived from EA 5217 forms that is transferred to other records should be considered confidential to the same extent as that statute confers confidentiality with respect to the forms. Any different result would, in my opinion, essentially nullify the direction given in section 574(5). Further, while the Freedom of Information Law grants broad rights of access to records, the first ground for denial, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". In this instance, section 574(5) of the Real Property Tax Law, a statute, would exempt the forms or reports from disclosure, except as otherwise provided.

However, the fact that information contained in the 5217 forms may be transferred to other records does not require that those records be kept confidential in their entirety. Records containing information derived from the forms might include a variety of other kinds of information, which, in my opinion, would be available to the extent required by the Freedom of Information Law. For instance, a record might include the key

aspect of the EA 5217, the sale price of real property, as well as other items of information that were not transferred from the EA 5217. In that circumstance, the sale price could be deleted from the record, while the remainder might be available.

Further, EA 5217 forms are not confidential in every situation in which they may be requested. As specified in section 574(5) of the Real Property Tax Law, the forms are confidential, "except for purposes of administrative or judicial review of assessments". Therefore, if the forms or other records containing information derived from the forms are requested in conjunction with a grievance (i.e., the administrative review of an assessment), the confidentiality restrictions otherwise imposed by section 574(5) would not apply. In that kind of case, I believe that the information contained in the form would be accessible.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to the Assessor.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Assessor, Town of Huntington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5865

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

December 19, 1989

Mr. Alan C. Bailey
[redacted]

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

Dear Mr. Bailey:

I have received your letter of November 22, as well as the materials attached to it.

According to the correspondence, in conjunction with a public hearing concerning an application for a variance, you requested from the Town of Erwin copies of the application "along with the plot plan required with the application." The request was denied by the Town Clerk "on the advice of the Town Attorney." One of the attachments is a "fax copy" transmitted by the Town Attorney to the Clerk in which he wrote that:

> "The record requested is deniable because the record is an inter-agency or intra-agency material that is not statistical or factual tabulation of data or a final agency policy or determination."

I disagree with the response to the request. 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 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 foregoing, I believe that an application for a variance or related documentation, once kept or filed by a town, would constitute a "record" subject to rights of access conferred 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law. Therefore, unless one or more of the grounds for denial may appropriately be asserted, records must be disclosed.

Third, under the circumstances, the records submitted to the Town by an applicant for a variance could not, in my opinion, by characterized as "inter-agency or intra-agency materials" that may be withheld under 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

A statement, an application or other written communication submitted by a member of the public to the Town would not in my view constitute inter-agency or intra-agency material, for the member of the public would not be an employee or a member of the staff of an agency, or a paid consultant retained by the agency [see Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)]. On the contrary, since a member of the public is not an agency or an employee of an agency, a record transmitted by such a person to an agency would emanate from outside of an agency. As such, the kinds of records in question could not in my view be characterized as "inter-agency or intra-agency materials." Further, in terms of the intent section 87(2)(g), following the passage of the current version of the Freedom of Information Law in 1977 (Chapter 933, Laws of 1977), the Assembly sponsor of the legislation, Assemblyman Mark Alan Siegel, wrote to me on July 21, 1977, stating that:

> "it is the intent that written communications, such as memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency might not be made available if they are advisory in nature and contain no factual information upon which an agency relies in carrying out its duties. As such, written advice provided by staff to the head of an agency that is solely reflective of the opinion of staff need not be made available."

Assemblyman Siegel wrote further that:

> "It has been suggested that the phrase 'intra-agency' materials within paragraph (g) might include all materials in the possession of an agency. This is not the intent of the phrase. Such a construction would severely detract from existing rights of access and would be absurd when read within the context of [section] 87(2) taken as a whole. Moreover, to reiterate, the intent is to permit an agency to deny access to purely advisory communications by officials within an agency or between agencies..."

A member of the public is not an official of an agency and, therefore, based upon the language of the Freedom of Information Law and the stated intent of the sponsor, the records sought could not in my opinion be denied under section 87(2)(g), for they are not inter-agency or intra-agency materials.

Under the circumstances, I do not believe that section 87(2)(g) or any of the other grounds for denial could justifiably be asserted to withhold the records in which you are interested. Consequently, they must, in my opinion, be disclosed by the Town.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the Town Clerk and the Town Attorney.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Monna C. Treadwell, Town Clerk
David English, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5866

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

December 19, 1989

Mr. Gerald F. Wahl
Fulreader, Rosenthal, Sullivan,
Clifford, Santoro & Kaul
1350 Midtown Tower
Rochester, New York 14604

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

Dear Mr. Wahl:

I have received your letter of November 24. In your capacity as counsel for the Rochester Housing Authority, you have raised a question concerning access to records concerning the disclosure of records identifiable to the Authority's tenants.

Specifically, you asked whether the Authority would be "obligated to disclose certain information from tenant's records such as names, mailing addresses and phone numbers if such a request was made by a third party pursuant to the Freedom of Information [Law]..." It is your view that the records could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

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 initial ground for denial appears to be relevant to your inquiry. That provision, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 159 of the Public Housing Law provides guidance concerning the disclosure of information furnished by applicants for dwellings in projects maintained by public housing authorities. That statute states that:

> "[I]nformation acquired by an authority or municipality or by an officer or employee thereof from applicants for dwellings in projects of an authority or municipality or from tenants of dwellings thereof or from members of the family of any such applicant or tenant or from employers of such persons or from any third person, whether voluntarily or by compulsory examination as provided in this chapter, shall be for the exclusive use and information of the authority or municipality in the discharge of its duties under this chapter and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the authority, municipality or successor in interest thereof is a party or complaining witness to such action or proceeding. Notwithstanding the foregoing, the authority or municipality shall furnish to the commissioner of housing full and complete reports relating to any such applicant or tenant whenever the commissioner of housing shall request such reports. Also, nothing herein contained shall operate to prevent an authority or municipality from making full and complete reports to the commissioner of housing or to the municipality in which an authority operates or to the federal government or any agency thereof relating to the administration of this chapter or of any project or relating to any such applicant or tenant, nor to prohibit an authority or any government or agency receiving such information of an authority, from publishing statistics or other general information drawn from information received from such applicants or tenants."

Based on the language quoted above, it appears that the Legislature determined that disclosure of information concerning tenant applicants would constitute an improper or "unwarranted" invasion of personal privacy unless records are made available to the federal government or an agency involved in the administration of state and federal laws and rules.

Second, even if section 159 of the Public Housing Law is inapplicable with respect to the records in question, as you suggested, the provisions concerning unwarranted invasions of personal privacy appearing in section 87(2) and 89(2)(b) of the Freedom of Information Law would likely serve as basis for denial.

From my perspective, a disclosure that permits the public determine the general income level of a participant in a grant program or a tenant in public housing, for example, based upon income eligibility would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., 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, by means of their names or addresses, tenants may be identified as "low income" persons, it is likely that disclosure of records indicating their identities might justifiably be withheld. On the other hand, if tenancy is not conditioned on an income qualification, disclosure of the identities of those persons might represent a "permissible" invasion of personal privacy.

Lastly, notwithstanding section 159 of the Public Housing Law, section 89(2)(b)(iii) of the Freedom of Information Law states that an unwarranted invasion of personal privacy includes the sale or release of a list of names and addresses, if the list would be used for commercial or fund-raising purposes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:sew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5867

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

December 19, 1989

Mr. Melvin Berger
Ms. Elaine Berger
[redacted]

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

Dear Mr. and Ms. Berger:

I have received your letter of November 28 as well as the materials attached to it.

By way of background, in May of 1988, the Mayor and Board of Trustees of the Village of Kensington advised residents by letter that the Village had "undertaken a program of real property inventory". To carry out the program, the Village engaged Goodman-Marks Associates, Inc. to collect data and report to the Board of Trustees. The letter sent to residents indicates that data collectors would gather information for the inventory pertaining to each parcel of real property, including "items such as external building measurements, number of rooms, bathrooms, etc." The letter also specifies that the data collectors "are not appraisers".

On October 2, you requested "a copy of the full, final report, indicating the recommended assessed value of each property in the village, identified by street number". The Mayor denied the request and you appealed. In response to the appeal, the Board of Trustees upheld the denial:

> "on the ground that the information requested is exempt from disclosure as inter-agency and intra-agency reports preparatory to a policy determination, and further on the grounds

> that the material requested consists of opinions, evaluation, proposals, and recommendations, in preparation for policy determination."

In addition, it was stated that "portions of the information which you seek are privacy information which is exempt from disclosure pursuant to Public Officers Law [section] 87(2)(b)".

You have requested an opinion "concerning the merits of [your] request". 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 noted, too, 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. The phrase quoted in the preceding sentence indicates that a single record or report might contain both accessible and deniable information. It also imposes an obligation upon agencies to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Second, it is unclear on the basis of the materials whether the records sought were prepared in part by Village officials or whether the data collecting firm could be characterized as a consultant. In either case, the records would, in my view, consist of intra-agency materials that fall within the scope of section 87(2)(g) of the Freedom of Information Law, which is one of the provisions cited by the Board of Trustees in its determination of your appeal.

While section 87(2)(g) represents one of the grounds for withholding records, due to its atructure, it often requires disclosure. Specifically, 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;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. 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. As such, to the extent that the records sought include opinions, evaluations, proposals or recommendations, it appears that the denial was proper.

In a discussion of the issue of consultant reports, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional material, prepared to assist an agency decision maker***in arriving at his decision' (Matter of McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (See,

> Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

The court, however, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held 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 or 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 the appellant" (id. at 133).

Therefore, a record prepared by an agency or a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

Under the circumstances, it appears that significant portions of the records sought, including the inventory, constitute statistical or factual information accessible pursuant to section 87(2)(g)(i). In addition, in a situation in which opinions and factual materials were "intertwined," Ingram v. Axelrod, a decision rendered by the Appellate Division, Third Department, indicated 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 objec-

> tive reality.' (10 NYCRR 50.2 [b]) Additionally, pages 7-11 (ambulance records, list of intervies, and reports of interview) should be disclosed as 'factual data.' They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 AD 2d 176, 181, mot for lv to app den 48 NY 2d 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 AD 2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [9- AD 2d 568, 569 (1982); see also Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979); Xerox Corporation v. Town of Webster, a65 NY 2d 131, 490 NYS 2d 488 (1985)].

In short, even though factual information contained within a record may be "intertwined" with opinions, the factual portions, if any, would in my opinion be available under section 87(2)(g)(i), unless a different ground for denial applies.

Third, based upon my understanding of the contents of the records, it is unlikely that section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy", could properly be asserted. While the records pertain to real property that may be privately owned, they relate to the details of property rather than details involving people.

Further, long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez V. Papontas, 32 AD 2d 948 (1969)].

Moreover, with regard to the inventory, which apparently contains a variety of information concerning specific parcels of real property, 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 remodeled, as well as details as to any minor buildings" [Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756, 758].

In sum, despite the Board's contentions, it is my view that the inventory, and perhaps portions of other records are likely available, for they constitute statistical or factual information.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to Village officials.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Kensington
Hon. Steven B. Randall, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5868

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

December 20, 1989

Mr. Bradshaw Samuels
81-A-2838 S-14
Shawangunk Prison
Box 700
Wallkill, NY 12589

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

Dear Mr. Samuels:

I have received your letter of November 27 in which you raised a question concerning the Freedom of Information Law.

According to your letter, you requested various records pertaining to yourself from your correctional facility. Although some were disclosed, you indicated that you were "not allowed to see certain things that certain counselors wrote on [you]". You have asked why you cannot see those records.

In this regard, I offer the following comments.

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. Although I am unfamiliar with the nature and content of the records that have been withheld, it appears that one of the grounds for denial may be of particular relevance.

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;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

In my view, records prepared by counselors for use within the Department could be characterized as "intra-agency materials". Therefore, even though they might pertain to you, I believe that the records in question, insofar as they consist of advice, opinions, evaluative information and the like could be withheld.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5869

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

December 20, 1989

Mr. John Vagianelis
South Colonie Central Schools
100 Hackett Avenue
Albany, New York 12205

The staff of the Committee 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. Vagianelis:

I have received your letter of December 5, as well as the materials attached to it.

By way of background, you serve as the editor of Sandscript, the Colonie Central High School student newspaper. In that capacity and in conjunction with issues arising with respect to a Student Senate election, you requested records under the Freedom of Information Law in an effort to verify Student Senate election results. The records sought included election results and registration sheets signed by students. The registration sheets were, according to a Sandscript article, destroyed by Mr. Jack Cramer, the Student Senate advisor. When the High School principal, Mr. Gilkey, was asked "what action he was going to take in regard to the alleged destruction of the registration sheets," he indicated that the issue was "considered a personnel matter" and declined to comment.

Based upon related correspondence forwarded to this office, you have requested other records, some of which, according to the Superintendent of Schools, Dr. Thomas A. Brown, are not "official." Specifically, in response to your letter, Dr. Brown sought to clarify the scope of the Freedom of Information Law and wrote that:

> "Mr. Vroman, as Designated Records Officer for the District, only accesses those records which are maintained as official district records. Official district records are those maintained by the agency, meaning the school district, and are of the type that are directly associated with the district as a whole. Records are also kept by individual buildings that are pertinent to the normal operation of the building but are not forwarded for maintenance as official district records.
>
> "The visitor sign in sheet, the senate election verification sheets, and materials on the Harvard Book Award, may or may not be records that are maintained by the High School. A simple written request to the High School Principal should be able to produce the desired request if the records are maintained and available. There is, to my knowledge, no requirement that these kinds of records be maintained by either the District or an individual building.
>
> "Memorandums that are distributed as inter-agency communications are exempt from the Freedom of Information Law except for memorandums that provide instructions to staff that affect the public. Mr. Gilkey's personal memorandum to the guidance department was excluded under Section 89-2a of the Freedom of Information Law."

A second issue involves the Sandscript's right to cover and report on meetings of the Student Senate. The matter arose because the High School principal advised Sandscript "that co-curricular groups do have the option of excluding Sandscript reporters from covering a meeting or portion of a meeting. A Sandscript article indicates that the Student Senate makes decisions "which affect the student body" and "distribute[s] student monies."

In this regard, I offer the following comments.

First the Freedom of Information Law is applicable to all agency records. Section 86(3) of the Law defines the term "agency" to mean:

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

A school district, a governmental entity performing a governmental function, is, in my view, clearly an "agency" subject to the requirements of the Freedom of Information Law. Further, the District, in my view, includes all school buildings and records kept in those buildings.

Second, 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."

The Court of Appeals, the state's highest court, has construed the definition as broadly as its specific language suggests. The first such 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)] and found that the documents constituted "records." 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 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).

Most recently, the Court of Appeals rendered a decision based upon the language of the definitions of "agency" and "record" and held that the so-called "Corning Papers" constitute agency records, despite claims that some of the records were "personal" or involved the late Mayor acting in his capacity as a political party official [Capital Newspapers v. Whalen, 69 NY 2d 246 (1987)]. In its description of the controversy, the Court stated:

> "At issue in this appeal by petitioners's newspapers is whether two categories of documents in custody of respondent City of Albany should be held to be "records" under FOIL: correspondence of a former Mayor of Albany, the Late Erastus Corning, II, concerning matters of a personal nature and correspondence concerning the activities of the Albany County Democratic Committee. The narrow question of statutory construction presented arises from respondents' contention that although these papers are literally within the FOIL definitions as 'record[s]' being 'kept' or 'held' by an 'agency' (the City of Albany), they are, nonetheless, outside of the scope

> of FOIL because of the private nature of their contents. For reasons to be discussed, we disagree with respondents' contention and conclude that there should be a reversal" (id. at 249).

In determining the issue, it was found that:

> "It is fundamental that in interpreting a statute, a court should look first to the particular words in question, being guided by the accepted rule that statutory language is generally given its natural and most obvious meaning (see, Price v Price, 69 NY2d 8, 15-17; McKinney's Cons Laws of NY, Book 1, Statutes section 94, p. 232). Here, if the terms 'record' and 'agency' are given their natural and obvious meanings, the Corning papers would fall within such definitions. The term 'record' is defined as 'any information kept [or] held * * * by, with or for an agency * * * in any physical form whatsoever' (Public Officers Law section 86[4]). Unquestionably the Corning papers constitute 'information * * * in [some] physical form' stored, 'kept [or] held' by the city, a 'governmental entity' and, as such, an 'agency' for purposes of FOIL..." (id. at 251).

Based upon the specific language of the Freedom of Information Law and its judicial interpretation by the state's highest court, I believe that documents, whether characterized as "official" or otherwise, "kept" or "held" by the District, irrespective of their location, function, origin, or any absence of a duty to maintain them, constitute "records" that fall within the requirements of the Freedom of Information Law. Further, documents kept at various buildings within the District are, in my view, "records" subject to rights conferred 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) of the Law.

In my opinion, records reflective of election results should be disclosed, for none of the grounds for denial could appropriately be asserted.

The voter registration sheets, if they exist, would likely be confidential. The first ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Rights and Privacy Act (20 U.S.C. section 1232g). In brief, that Act provides that records identifiable to a student or students maintained by an educational agency or institution are confidential with respect to the public. Concurrently, the Act confers rights of access to records pertaining to a student to the parents of the student. While the Act might not have envisioned coverage of election registration records, it appears that it would preclude public disclosure of those records.

The Superintendent referred to inter-agency memorandums. Section 87(2)(g) of the Freedom of Information Law pertains to those records and states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

external audits 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. I believe that a memorandum transmitted among or between District officials or employees would constitute "intra-agency materials." However, the contents of the materials would determine the extent to which they must be disclosed or may be withheld.

The Superintendent also referred to section "89-2a of the Freedom of Information Law." Section 89(2) pertains to the authority to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." The fact that document is considered "personal" or that it may involve a personnel matter does not, in my opinion, necessarily involve a finding that records may be withheld.

While the standard in the Freedom of Information Law concerning privacy 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 permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Capital Newspapers v. Burns, 67 NY 562 (1986); 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, for example, 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 by 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)."

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" (67 NY 2d at 566)."

Lastly, the right of Sandscript reporters, students and others to attend meetings of the Student Senate is questionable. The Open Meetings Law is applicable to meetings of public bodies, and section 102(2) of that statute defines the phrase "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."

Recent decisions rendered by the Appellate Division, Second Department, indicate that entities having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, ___ AD 2d ___ (1989);

Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989)]. It was also held that "groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies]' subject to the Open Meetings Law..." (Poughkeepsie Newspaper, supra, 69).

I am unaware of any judicial decisions rendered in New York that deals with the status of a student government body under the Open Meetings law. Similarly, I an unaware of whether the Student Senate in this instance has the power to act on behalf of all students and/or expend or appropriate public monies or monies generated from student activities or fees on behalf of all students.

While I am inclined to advise that a student senate or similar entity is not a "public body," it might be contended that it does "exercise the power of the sovereign (i.e., the Board of Education) if it serves as an extension of the administration and is authorized to purchase or expend monies that are public or generated through mendatory student fees or payments.

As you requested, a copy of this opinion will be forwarded 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

Robert J. Freeman
Executive Director

RJF:saw

cc: Dr. Thomas Brown, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5820

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

December 21, 1989

Mr. Charles 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 recent letter, which reached this office on December 7.

Your wrote that you are "seeking information on the manner or procedures used by the police department towards criminal investigations and on how evidence is secured."

In this regard, I offer the following comments.

It is noted initially that, 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.

In my view, two of the grounds for denial are relevant in determining rights of access to the records in question.

First, section 87(2)(e)(iv) of the Freedom of Information Law permits an agency to 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."

Perhaps the leading decision concerning the provision quoted above is Fink v. Lefkowitz [47 NY 2d 567 (1979)], which involved rights of access to a manual prepared by special prosecutor designated to investigate nursing homes. The manual included a guide to the investigation and audit of nursing homes. In discussing the matter, the Court of Appeals found that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

> "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 possibility 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).

In applying those criteria to specific portions of the manual, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]).

> Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less than exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

I am unfamiliar with the records in question. However, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. Nevertheless, other portions of the records may be "routine" and might not, if disclosed, preclude law enforcement officials from carrying out their duties effectively.

The second ground for denial of 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits 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. Therefore, written procedures or manuals, for example, would be available unless some other ground for denial applies [such as section 87(2)(e)(iv)], for they would consist of instructions to staff that affect the public accessible pursuant to section 87(2)(g)(ii), or final agency policy accessible under section 87(2)(g)(iii).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5871

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

December 21, 1989

Mr. John J. Sheehan
[redacted]

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

Dear Mr. Sheehan:

I have received your letter of December 2, as well as the correspondence attached to it.

You wrote that you have attempted to obtain "copies of expense accounts from the City of Binghamton." In response to the request, Mr. Donald E. Freed, the City's Director of Finance, wrote that:

> "this office files claims on a numerical basis by check number, not by department or type of claim. A computerized listing of these claims is available for your review in this office during normal business hours of 9 A.M. to 5 P.M. Monday through Friday.
>
> "After you have reviewed this listing, you should indicate which specific claims you want copies of. Your requests in present form are too general."

You have requested assistance in gaining access to the records.

In this regard, I offer the following comments.

The problem, based upon my interpretation of the correspondence, involves the method by which the City maintains the records in which you are interested. It appears that you requested expense records identifiable to particular individuals or

activities. While I believe that those records are available under the Freedom of Information Law, the City's filing system does not enable City officials to retrieve the records sought by name or activity; as indicated by Mr. Freed, they are maintained by check number in numerical order.

It is noted that that section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. In brief, it has been held that a request reasonably describes the records when the agency can locate and identify the records based upon the terms of a request [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986); also Johnson Newspaper Corp. v. Stainkamp, 94 AD 2d 825, 826, modified on other grounds, 61 NY 2d 958 (1984)]. Although it was found in the decisions cited above that an agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

From my perspective, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the nature of an agency's filing system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. Based on Mr. Freed's response, although your request might have been quite specific, the City's filing system does not appear to permit retrieval of the records by means of the identifiers used in your request.

While I am unfamiliar with the "computerized listing" to which Mr. Freed referred, it appears under the circumstances that his response was proper in view of the means by which the records are maintained.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Donald E. Freed, Director of Finance

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1691
FOIL-AO-5872

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

December 21, 1989

Mr. John J. Coughlin
[redacted]

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

Dear Mr. Coughlin:

I have received your letter of December 2, as well as the correspondence attached to it.

You referred to a request for various records of the Deer Park Union Free School District made on September 21. In response to two aspects of the request, you were informed that the documentation constituted agency records "to which Freedom of Information Law is not applicable under Section 87 of the Public Officers Law". Thereafter you wrote to this office and sought an advisory opinion, which was prepared and sent to you on November 21, with copies forwarded to the District Clerk and Superintendent. In a second response to your request dated November 30, the Clerk alluded to the two aspects of your request referenced earlier and wrote that "No such document can be identified from the information presented". Consequently, you have contended that the School Board "has changed its reason for denial...".

In addition, a letter sent to you by the Clerk following an appeal indicated in part that "The Board of Education has denied your appeal...". Nevertheless, you wrote that "the school board has not taken any public vote on either of [your] request[s] even though state law requires that all board action must be taken by public vote and entered into the minutes the meeting".

In this regard, I offer the following comments.

First, with respect to the standard for seeking records, it is noted that when the Freedom of Information Law was enacted in 1974, it required that an applicant request "identifiable" records. That standard resulted in problems, for citizens often could not identify the records sought. If the applicant could not specify a requested record, the request would not have identified the record sought. However, the Freedom of Information Law was repealed and replaced with the current law in 1978. Section 89(3) of the Law now requires that an applicant "reasonably describe" the records sought. Judicial decisions interpreting that standard indicate that a request reasonably describes the records when the agency, based upon the terms of a request, can locate the records [see e.g., Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. Assuming that the District can locate the records, I believe that your request would have met the standard of reasonably describing the records. It is noted, too, that regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law and have the force of law, state that an agency's records access officer is responsible for assuring that agency personnel "Assist the requester in identifying requesting records, if necessary" [see 21 NYCRR section 1401.2(b)(2)]. Therefore, I believe that the records access officer has the duty to attempt to aid you in identifying the records.

Second, the initial response to your requests suggests that the Clerk was able to locate the records in question, but that such records could be withheld. I agree with your contention that the second response is inconsistent with the first.

Third, although its relevance under the circumstances in conjectural, I point out that Chapter 705 of the Laws of 1989, added new provisions to the Freedom of Information Law and the Penal Law that became effective on November 1. The amendment to the Freedom of Information Law, a new section 89(8), states that:

> "Any person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."

Lastly, with respect to the right to appeal a denial of a request, 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."

Further, section 1401.7(a) of the regulations promulgated by the Committee on Open Government states that:

> "The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law."

If the Board of Education has not delegated its authority to render determinations regarding appeals and performs that function, I believe that its discussion and action taken concerning your appeal should have occurred during a meeting. Further, minutes of any such action by the Board should appear in minutes required to have been prepared pursuant to section 106(1) of the Open Meetings Law. That provision 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 an effort to enhance compliance, copies of this opinion will be sent to District officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Ronald F. Paras, Superintendent
Geraldine Musachio, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO - 1692
FOIL-AO - 5873

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

December 21, 1989

Mr. Arnold Pilsner
[redacted]

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

Dear Mr. Pilsner:

As you are aware, I have received your letter of December 6 and the materials attached to it.

You have raised a series of questions concerning the process leading to the adoption of a budget by the Nassau County Board of Supervisors (NCBS), particularly as the process might have involved Nassau Community College. You identified issues by "Comments" and "Advisory Questions" in relation to those comments and asked that "I respond to each question by number."

By way of background, as I understand the situation, you and others opposed certain aspects of a course in human sexuality offered at NCC. Due to concerna involving the course, the NCBS refused to vote on NCC's proposed 1989 budget. The budget, however, was subsequently approved following what you described as an exchange of information between NCBS and NCC. Although you have sought records "pertaining to information exchanged between representatives" of NCBS and NCC, neither of those entities have disclosed information or records to your satisfaction.

Comment A of your letter focuses upon the role of Mr. Edward Ward, who is identified in the correspondence attached to your letter as Executive Assistant to the Presiding Supervisor of the Town of Hempstead. I believe that the Presiding Supervisor is a member of NCBS, and it was confirmed in the correspondence that Mr. Ward met with Dr. Sean Fanelli, President of NCC, prior to the adoption of the budget.

You wrote that NCC claims that Mr. Ward "officially acted as a representative" of the NCBS. However, counsel to the NCBS, in your words, "consistently denies that Mr. Ward or anyone else was authorized to represent them at meetings" with NCC. As such, NCC claims that, as an agent of NCBS, its "interaction with Mr. Ward" constituted "inter-agency business" and that, therefore, records exchanged at the meetings could be withheld. You contend that, due to the claim of Counsel to NCBS, Mr. Ward "acted as a private citizen and was not conducting private inter-agency business."

Advisory Question 1 is whether, in my view, Mr. Ward acted as an agent of NCBS or as a private citizen.

In my opinion, although related to issues that you have raised concerning the Freedom of Information Law, the question does not specifically pertain to that statute; it involves Mr. Ward's role. In view of the conflicting views of this role and the absence of personal knowledge of the matter, I cannot in good faith offer an opinion in response to the question.

Advisory Question 2 is based upon the possibility that Mr. Ward acted as a private citizen. If that was so, you asked whether NCC is "obligated under the Freedom of Information Law to provide equal access to other private citizens to the records and information given to Mr. Ward.

As a general matter, it has been held that records accessible under the Freedom of Information Law should be made equally available to any person, with regard to one's status or interest [see e.g., 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 (1976)]. Nevertheless, it does not appear that Mr. Ward obtained records from NCC pursuant to a request made under the Freedom of Information Law. If he sought records under the Freedom of Information Law and the records were made available to him as a result of the request, I would agree with your inference that those records should be made available to anyone. However, in the context of the matter as I understand it, records that might have been received by Mr. Ward were not obtained in conjunction with a request made under the Freedom of Information Law.

Advisory Question 3 relates to NCC's refusal to answer your questions concerning its meetings with Mr. Ward due to its contention that they were "inter-agency" meetings," and you asked whether you could request that NCC "produce the records used at the meetings with Mr. Ward."

In this regard, I offer the following comments.

First, by means of a letter dated August 31, you requested the records described above and other information on the subject from NCC. It is noted that several aspects of your request could, in my view, be characterized as questions or attempts to elicit information (i.e., "How many meetings were held between representatives of" NCBS and NCC; and "For each meeting specify to place, date and time for each meeting held.") Here I point out that the Freedom of Information Law, in terms of its title, may be somewhat misleading.

The Freedom of Information Law is not a vehicle that requires agency officials to answer questions; rather, it is a statute that requires agencies to respond to requests for existing records and to disclose those records in accordance with its provisions. I point out, too, that section 89(3) of the Freedom of Information Law states in part that an agency is generally not required to create or prepare a record in response to a request. Stated differently, despite its title, the Freedom of Information Law is not necessarily an access to information law, but rather an access to records law. If, for example, no records exist that indicate the number of meetings held by representatives of NCBS or NCC, as the term "meeting" is used in the context of your inquiry, neither agency would, in my view, be obliged to prepare such records on your behalf.

Second, in response to your request, NCC's Freedom of Information Officer, indicated that a meeting was held by representatives of NCC with Mr. Ward. However, she appears to have suggested that the information sought did not exist in the form of a record or records and, as you indicated, that NCC considered Mr. Ward to have been a representative of NCBS. Specifically, Ms. Mascolo wrote that, "in the event that correspondence had resulted from that meeting (which was not the case), it also would not be accessible as falling within the exemption as provided in Section 87.2(g) of the Freedom of Information Law." Assuming that any such records were used or exchanged and that Mr. Ward could have been considered an "agency" official, I believe that those records would constitute inter-agency materials that fall within the scope of section 87(2)(g). The cited provision states that an agency may withhold records that:

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

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits 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. As such, the contents of the records would determine the extent to which they would be accessible or perhaps denieble under the Law.

Third, since your inquiry involves records used at the meeting with Mr. Ward, it is noted that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. While that standard does not require an applicant to identify records with particularity, I believe that an applicant must provide sufficient detail to enable agency officials to locate the records. It is questionable, in my view, whether such a request would have reasonably described the records.

Under Comment B, you wrote that:

> "The Nassau County Board of Supervisors (NCBS) contends that neither Mr. Ward or anyone else was authorized to meet with Nassau Community College (NCC). Yet Mr. Mondello states that the NCBS gathered information from the college and made a thorough review of the data, and that this review convinced NCBS that NCC had made appropriate changes to their Family Life Course curriculum. However, not one piece of evidence, in the form of minutes or records is referred to, to demonstrate that the matter was discussed by NCBS. Furthermore, when the public budget meeting was resumed it was announced that the budget issue had already been resolved and then NCBS held a vote on the budget proposal without further public discussion. The public has no idea what NCC officially changed in its Family Life Court curriculum and therefore is uninformed and unable to comment or ask any questions as to what took place."

As such, you wrote that the public has been:

> "asked to accept that although all these activities took place that no minutes and/or records concerning the information gathered from NCC exists in any written form. We do not know when the verbal communication took place and how such a complicated and delicate issue could be discussed without the interaction of the members of NCBS?"

Based upon the foregoing, in Advisory Question 4, you asked whether "the discussion on the NCC budget by the Nassau Board of Supervisors prior to the final budget meeting constitute[d] an executive session and therefore violate[d] the Open Meetings Law."

From my perspective, the question is whether a "meeting," as that term has been construed under the Open Meetings Law, was conducted by NCBS. A "meeting," based upon the language of the Law and its judicial interpretation, involves a gathering of a quorum of a public body held for the purpose of conducting public business, whether or not there is an intent to take action [see Open Meetings Law, section 102(1); also 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)].

If, for example, the staff of NCBS or members of NCBS constituting less than quorum, or any combination thereof, met to discuss the budget, the Open Meetings Law would not, in my opinion, have applied. On the other hand, if a quorum of the NCBS convened, as a body, for the purpose of discussing the budget, I believe that such a gathering would have constituted a meeting subject to the Open Meetings Law. Further, if such a meeting was held, it should have been preceded by notice given in accordance with section 104 of the Open Meetings Law and convened open to the public.

Again, assuming that a "meeting" was held, as you pointed out, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the topics that may properly be considered during an executive session. If indeed a meeting was held to discuss the matters of your interest, I do not believe that any ground for entry into an executive session could justifiably have been asserted.

If a meeting was held, it is likely that minutes should have been prepared. Subdivision (1) of section 106 of the Open Meetings Law 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 of summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

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 executive session, minutes indicating the nature of the action taken, the date and the vote must be prepared and made available within one week to the extent required by the Freedom of Information Law.

Under Comment C, you wrote that "The data gathered from NCC was from all reports transmitted verbally to NCBS." In conjunction with the foregoing, you asked in Advisory Question 4 whether "information which is transmitted verbally and used to resolve a major public issue become[s] de facto a public record and therefore the parties transmitting the information can be called upon to make the data part of the public record by creating a written document for the public to read."

My response, for reasons discussed earlier, must be in the negative. The Freedom of Information Law pertains to existing records; it does not generally require agencies to create records.

Under Advisory Question 5, you raised the following question:

> "Is the deliberate act of NCC and NCBS to choose to pass information verbally so it would not become part of the public budget proceedings record in itself a violation of either the Freedom of Information Law or the Open Meetings Law?"

In my view, it is unlikely that the act that you described would constitute a violation of either the Freedom of Information Law or the Open Meetings Law. I believe that there may be a variety of activities and circumstances during which information is imparted or exchanged that relates to a decision but which is not discussed at a public proceeding. Often the professional staff of an agency confers prior to a meeting or hearing to lay the groundwork for action to be taken at a meeting of a governing body. Often a member of a public body having expertise or interest in a particular area may, as a representative of the body, play a significant role in the steps leading to the making of a decision or the adoption of an action or policy.

In short, while the Freedom of Information Law provides broad rights of access to records, I do not believe that verbal communications constitute records or necessarily result in a requirement that records be prepared. Similarly, although the Open Meetings Law generally requires that meetings involving the presence of a quorum of a public body to discuss public business must be open, gatherings of less than a quorum of a public body or of representatives of public bodies are not, in my opinion, "meetings" that fall within the scope of the Open Meetings Law.

I hope that I have been of assistance and that the foregoing serves to clarify your understanding of the Freedom of Information Law and the Open Meetings Law.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Thomas Carroll, Counsel, Nassau Co. Bd. of Supervisors
Dr. Sean A. Fanelli, President, Nassau Community College
Owen B. Walsh, Chief Deputy County Attorney
Anna Marie Mascolo, Counsel, Nassau Community College

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5804

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

December 22, 1989

Mr. Richard Becker
[redacted]

Dear Mr. Becker:

I have received your letter of November 27, which again pertains to a request for records of the Nassau County Police Department.

Since the receipt of your letter, I also received a copy of a response to your request rendered by Owen B. Walsh, First Chief Deputy County Attorney. As I informed you previously and as Mr. Walsh indicated in his letter, recent decisions specify that records maintained by certain agencies of Nassau County are outside the scope of the Freedom of Information Law.

The first ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". In the decisions cited by Mr. Walsh, it was found that section 2207 of the Nassau County Government Law is a statute that exempts records from disclosure. Although you wrote that you "do not have this problem with Suffolk and we all live in the same state", I point out that section 2207 pertains only to Nassau County agencies and is, from my perspective, unique. It is noted that the Committee on Open Government, in its recent annual report to the Governor and the Legislature, recommended that section 2207 be repealed.

You also asked which office has the reaponsibility of enforcing the Freedom of Information Law. There is no such office. If you are dissatisfied with an agency's response to a request for records, you may seek judicial review in accordance with section 89(4)(b) of the Freedom of Information Law.

Lastly, you asked that I "check again" with respect to an inquiry made to the Department of State's Corporations and State Records Division. Although I made an inquiry on your behalf on a previous occasion, I did so as a service to you. However, my functions do not include "checking" on the kind of matter that you raised. Further, your description of the matter is too vague for me to know what to seek. It is suggested that you communicate directly with the Corporations and State Records Division.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5835

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

December 22, 1989

Mr. Walter L. Henry
81-B-1621
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. Henry:

I have received your letter of December 8 in which you requested assistance.

Although the nature of the information sought is, on the basis of your letter, unclear, you referred to difficulty in obtaining information from municipal governments, particularly the "Board of Education in Monroe County" and public libraries.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and section 86(3) of the Law defines the term "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."

Therefore, as a general matter, the Freedom of Information Law pertains to records of entities of state and local government. All municipalities are subject to the Law, including school district and city libraries, for example.

Second, I do not believe that there is a "Monroe County Board of Education". There are, however, various school districts in the County, each of which is governed by a board of education.

Third, a request made under the Freedom of Information Law should be made in writing and sent to the agencies that you believe maintain records in which you are interested. A request should be directed to an agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests. 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 contain sufficient detail to enable agency officials to locate the records. Further, an agency may generally charge up to twenty-five cents per photocopy when copies are requested.

Enclosed is a copy of the Freedom of Information Law for your review. Statutes pertaining to libraries are found in Article 5 of the Education Law, which is likely maintained by your facility library.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1695
FOIL-AO-5836

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

December 26, 1989

Mr. Claude Phillips
[redacted]

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

Dear Mr. Phillips:

I have received your letter of December 13 in which you requested an advisory opinion.

According to your letter, the Board of Education of the Enlarged City School District of Troy conducted a special meeting in executive session "to discuss what action should be taken, if any, on an incident involving a Troy High School student playing scholastic sports after having been indicted on drug offenses". You added that it was revealed that, during the executive session, "the Board of Education took a vote on whether or not to support the Superintendent's decision of inaction in this matter."

Although it is your view that an executive session could properly have been held to discuss the issue, you contend that the Board should have reconvened in public for the purpose of voting. Further, you requested "a copy of the record of the vote taken to support the Superintendent's decision". Nevertheless, since the vote was taken during an executive session, you wrote that you "are expecting a denial".

In this regard, I offer the following comments.

First, when action is taken at a meeting of a public body, minutes must be prepared pursuant to section 106 of the Open Meetings Law. That provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings 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 foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting. Further, although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken.

With respect to executive sessions, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law section 105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to section 106(2). It is noted that under section 106(3) of the Open Meetings Law minutes of both open meetings and executive sessions are available in accordance with the Freedom of Information Law. Nevertheless, various interpretations of the Education Law, section 1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive (see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County 7AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified

85 AD 2d 157 aff'd 58 NY 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session. Further, if no action is taken in an executive session, minutes of the executive session need not be prepared.

Second, of possible relevance to the issue is a provision of federal law, the Family Educational Rights and Privacy Act (20 U.S.C. section 1232g). In brief, that Act is applicable to educational agencies or institutions that participate in 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.

As the Family Educational Rights and Privacy Act relates to the Open Meetings Law, section 108(3) of the Open Meetings Law exempts from its provisions "any matter made confidential by federal or state law". As such, information discussed by a board of education derived from education records of a student would be confidential and could be considered outside the scope of the Open Meetings Law. However, in this situation, having read local newspapers, the issue and the student's identity were publicly disclosed prior to the Board's meeting. Consequently, the impact of the Family Education Rights and Privacy Act, in terms of the duty to maintain confidentiality is, in my view, unclear.

Lastly, since its enactment in 1974, the Freedom of Information Law has contained an "open meetings" requirement with regard to voting by members of public bodies. 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."

Consequently, when a school board takes action, a record must be prepared that indicates the manner in which each member cast his or her vote. That record ordinarily should, in my opinion, be included as part of the minutes.

Therefore, if the Board voted on the matter, I believe that a record should be prepared that indicates how each member cast his or her vote.

85 AD 2d 157 aff'd 58 NY 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session. Further, if no action is taken in an executive session, minutes of the executive session need not be prepared.

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As the Family Educational Rights and Privacy Act relates to the Open Meetings Law, section 108(3) of the Open Meetings Law exempts from its provisions "any matter made confidential by federal or state law". As such, information discussed by a board of education derived from education records of a student would be confidential and could be considered outside the scope of the Open Meetings Law. However, in this situation, having read local newspapers, the issue and the student's identity were publicly disclosed prior to the Board's meeting. Consequently, the impact of the Family Education Rights and Privacy Act, in terms of the duty to maintain confidentiality is, in my view, unclear.

Lastly, since its enactment in 1974, the Freedom of Information Law has contsined an "open meetings" requirement with regard to voting by members of public bodies. 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."

Consequently, when a school board takes action, a record must be prepared that indicates the manner in which each member cast his or her vote. That record ordinarily should, in my opinion, be included as part of tbe minutes.

Therefore, if the Board voted on the matter, I believe that a record should be prepared that indicates how each member cast his or her vote.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education, Troy Enlarged City School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5872

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

December 26, 1989

Ms. Alicia Culver
NYPIRG
184 Washington Avenue
Albany, NY 12210-2375

The staff of the Committee on 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. Culver:

I have received your letter of December 14 as well as the correspondence attached to it.

Your inquiry relates to a request for records of the Broome County Resource Recovery Agency concerning the selection of the Foster Wheeler Corporation to construct a resource recovery facility. Although it was determined that certain documentation would be available, the Agency's Administrator wrote that the "remainder is inter-Agency material which is not subject to disclosure".

You have asked whether there is "any way to determine whether the material designated as 'inter-Agency material' is properly held from being disclosed or not".

In this regard, I believe that an applicant must initially rely upon an assumption that agency officials have reviewed the materials in good faith in conjunction with an understanding of the requirements of the Freedom of Information Law. If the materials are withheld following the exhaustion of your administrative remedies, you may seek judicial review of a denial in court. In such a proceeding, the court may review the records in camera (in private) to determine the extent to which the denial was proper. However, I offer the following additional comments concerning your question.

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. It is also noted 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. The phrase quoted in the preceding sentence indicates that a single record may be accessible or deniable in whole or in part. That phrase, in my view, 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, even though some aspects of a record may be withheld, the remainder would be available.

Second, the ground for denial to which you referred, section 87(2)(g), due to its structure, often requires disclosure. 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

I point out that it has been held that statistical and factual conformation that may be "intertwined" with opinions, for instance, should be available. Specifically, 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 view of the foregoing, even though statistical or factual information may be "intertwined" with opinions, for instance, the statistical or factual portions should be disclosed, unless different grounds for denial apply.

With respect to the substance of section 87(2)(g) and the capacity to withhold records similar to those at issue, it has been held that:

> "There is no exemption for final opinions which embody an agency's effective law and policy, but protection by exemption is afforded for all papers which reflect the

> agency's group thinking in the process of working out that policy and determining what its law ought to be. Thus, an agency may refuse to produce material integral to the agency's deliberative process and which contains opinions, advice, evaluations, deliberations, policy formulations, proposals, conclusions, recommendations or other subjective matter (National Labor Relations Bd. v Sears, Roebuck & Co., supra, pp 150-153; Wu v National Endowment for Humanities, 460 F2d 1030, 1032-1033, cert den 410 US 926). The exemption is intended to protect the deliberative process of government, but not purely factual deliberative material (Mead Data Cent. v United States Dept. of Air Force, 566 F2d 242, 256, supra). While the purpose of the exemption is to encourage the free exchange of ideas among government policy-makers, it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memo (Wu v National Endowment for Humanities, supra, p 1033). The question in each case is whether production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects..." [Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 182-183; motion for leave to appeal denied, 48 NY 2d 706 (1979)].

In sum, I believe that rights of access to the records sought can be determined only on the basis of the specific content of the records.

Second, as suggested earlier, you have the right to appeal a denial pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

for 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

Robert J. Freeman
Executive Director

RJF:jm

cc: John F. Guinan, Administrator, Broome County Resource Recovery Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5878

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

December 26, 1989

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.

Dear Mr. Deubler:

I bave received your letter of December 8, aa well as the materials attached to it.

The materials consist of correspondence with the Clerk of the Town of Ashland, Ann Dolan, and a request for records. Tbe request is broken down into 115 items. On the basis of your letter, it is apparently your view that the clerk was told not to give you the records sought. As such, you requested assistance and asked:

> "a. Who informed the Town Clerk not to give the records?
>
> b. The reason for not producing these records?
>
> c. Who do I appeal too, to obtain these records?"

In this regard, having reviewed your request, I offer the following comments.

First, in response to your initial question, I am unaware of any information to the effect that the Town Clerk was directed not to provide access to the records. Similarly, I am unaware of the reason for not producing certain of the records in which you are interested.

Second, although the request is voluminous, there is nothing in the Freedom of Information Law that necessarily restricts the scope of a request. Further, the Freedom of Information Law and the regulations promulgated by the Committee in Open Government [21 NYCRR Part 1401] 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, sections 1401.5(d) and 1401.7(c)].

In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the governing body of the agency (i.e., the Town Board) 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, 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Based upon the foregoing, if you have not received any response to your request, I believe that you may consider the request to be denied. Further, an appeal may be made to the Town Board or to the person or body designated by the Town Board to determine appeals. It is noted that regulations adopted by the Town in conjunction with sections 87(1) of the Freedom of Information Law and 1401.7 of the Committee's regulations must indicate the identity of the person or body to whom appeals may be directed.

Third, having reviewed your request, I believe that several points should be offered.

Specifically, the Freedom of Information Law pertains to records of an "agency". Section 86(3) of the Law defines the term "agency" to mean:

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

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."

Some aspects of your request involve records maintained by a court. In my view, based upon the definitions cited above, court records are not subject to the Freedom of Information Law. There may, however, be other statutes that provide rights of access to court records (see e.g., Judiciary Law, section 255; Uniform Justice Court Act, section 2019-a).

In addition, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law specifies that, unless direction is provided to the contrary, an agency is not required to create a record in response to a request. Several aspects of the request involve questions, or requests for information that might not exist in the form of a record or records. For example, in item 34, you asked why a particular individual was permitted to adjourn a town board meeting. In item 32, you requested remarks made by your attorney. If no such records exist, the Town would not be required to prepare such a record on your behalf. Similarly, certain of your requests involve conversations made by phone. Ordinarily, I would conjecture that phone conversations would not have been recorded and that there may not be any record involving the phone calls to which you alluded.

Some of the records in which you are interested were prepared several years ago. Here I point out that an agency may, pursuant to schedules promulgated by the State Education Department, dispose of certain categories of records after specified periods of time. It is possible that some of the records in which you are interested may legally have been destroyed due to their age.

Section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Some aspects of your request might not meet that standard. For instance, in item 53 you requested correspondence between the Town and the County Board of Health from January 1, 1981 through January 1, 1984. The request may be so broad that it does not reasonably describe the records in which you are interested. Further, although a request may be specific, often, due to the nature of its filing system, an agency may not be able to retrieve records.

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.

While I am not familiar with the contents of the records sought, severals of the grounds for denial might be applicable with respect to some aspects of your request. For instance, in conjunction with requests for complaints or witnesses might be withheld under section 87(2)(b) as an unwarranted invasion of personal privacy. Some aspects of your request apparently involve law enforcement activities or investigations. In those instances, section 87(2)(e) might be applicable as a basis for withholding. That provision permits an agency to withhold records compiled for law enforcement purposes under circumstances specified in the Law. Further, some aspects of your request involve communications between the Town and other agencies. In those instances, section 87(2)(g), which permits the withholding of inter-agency or intra-agency materials, depending upon their contents, might be applicable.

Other aspects of your request in my view involve accessible records. Minutes of meetings, resolutions, orders, plans and similar documentation would in my opinions be accessible under the Freedom of Information Law.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the Town Clerk.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ann Doland, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5879

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

December 26, 1989

Mr. Stan Breite
[redacted]

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

Dear Mr. Breite:

I have received your letter of December 14, as well as the correspondence attached to it.

Your inquiry pertains to requests for records directed to the accountant for the Town of Rochester. Specifically, in a letter dated October 20, you requested records reflective of "total payments" made to Town attorneys and the Town accountant for certain periods, "total payments made to the supervisor's office...for bookkeeping and secretary", as well as a record of expenditures by a named individual for attendance at the Association of Towns meetings in 1988 and 1989, and records indicating the "amount received" by that person during those years. Although the accountant indicated by phone approximately ten days after receiving your request that a response would soon be prepared, as of tbe date of your letter, you had not yet received the information sought. As such, you have requested assistance in the matter.

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency generally need not create or prepare a new record in response to a request. Therefore, if, for example, there is no record containing a figure reflective of "total payments" made by the Town to its attorney for a given year, I do not believe that Town officials would be obliged to review payment records, add the figures, and prepare a "total" in order to satisfy your request. If no total exists, you could, however, review individual statements of payment and prepare a total on

your own.

Second, the Freedom of Information Law includes within its scope all agency records. Further, section 86(4) of the Law 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 on the foregoing, even though the documents sought may be maintained by an accountant at a location other than the Town Hall, for example, I believe that they nonetheless constitute "records", for they consist of information "kept" or "held" for an agency, the Town.

Third, it is unclear whether you were directed to transmit your request to the accountant. In any event, I point out that, under the Freedom of Information Law [section 87(1)] and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, the Town Board should have designated a records access officer. The records access officer has the duty of coordinating an agency's response to requests for records [see regulations, section 1401.2(a)]. In most instances, the records access officer for a town is the town clerk, and it is suggested that you contact the clerk to ascertain the status of your request.

Fourth, the Freedom of Information Law and the Committee's regulations 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 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, sections 1401.5(d) and 1401.7(c)].

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, 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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.

With respect to payments to attorneys, I point out that, while the communications between an attorney and client are generally privileged, 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 time sheets, 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 found in the records in question 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 decisions have been rendered under the Freedom of Information Law in which it was held that records indicating payment by a village to its attorney are available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., August 20, 1981; Young v. Virginia R. Smith, Mayor of the Village of Ticonderoga,, Supreme Court, Essex County, Jan. 9, 1987]. In Minerva, supra, the issue involved a request for copies of both sides of cancelled checks made payable to a

municipality's attorney. Although the court held that the front sides of the checks, those portions indicating the amount paid to the attorney, must be disclosed, it was found that the backs of the checks could be withheld, for disclosure might indicate how the attorney "spends his 'paychecks.'"

Further, from my perspective, records pertaining to billing or payments made to employees or others for services rendered are accessible, except to the extent that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, sections 87(2)(b), 89(2)(b)]. If, for example, records include social security numbers or home addresses, those details could be deleted to protect privacy, while the remainder would be accessible. However, I believe that records involving reimbursements for travel and other expenses incurred by public officers or employees, such as vouchers, would be accessible.

Although travel vouchers and similar or related records might identify specific officers or employees, the courts have made it clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986); 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].

In my opinion, bills, vouchers, contracts and similar records involving payments to or expenditures by public employees are relevant to the performance of their official duties. As such, those types of records would in my view be available on the ground that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. Again, however, some aspects of those records may be deleted as an unwarranted invasion of personal privacy, as in the case of public employees' home addresses or social security numbers, which may have no relevance to the performance of one's official duties.

Moreover, in terms of its intent, scope and utility, the Court of Appeals has held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see,

> Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 79). 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 government officers (Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [citing Public Officers Law section 84]).
>
> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (see, Public Officers Law section 87 [2]; Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY2d 75, 79-80, supra). This presumption specifically extends to intraagency and interagency materials, such as the report sought in this proceeding, comprised of 'statistical or factual tabulations or data' (see, Public Officers Law section 87 [2] [g] [i]). Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 80, supra; Matter of Fink v Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566).

On the basis of the decision rendered in Capital Newspapers, supra, other decisions and the language of the Freedom of Information Law, I believe that records reflective of expenditures are generally 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Galandiuk, Accountant
Town Clerk, Town of Rochester

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5880

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

December 27, 1989

Ms. Nancy B. Corr
[redacted]

The staff of the Committee on 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. Corr:

I have received your recent letter, which reached this office on December 19.

According to your letter, you believe that you "have been denied 'Freedom of Information'" by your employer, the Suffolk County Water Authority. Having been denied a position at the Authority, you questioned your right "to see the resume of the person who was awarded this position," including "the other person's specific qualifications."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an agency, and section 86(3) of the Law defines the term "agency" to mean:

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

Since your employer is a public authority, I believe that it is an agency required to comply with 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.

In my view, one of the grounds for denial, section 87(2)(b), is likely relevant to your inquiry. That provision permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Although that standard concerning privacy is flexible and subject to conflicting interpretations, the courts have found in various contexts that public employees enjoy a lesser degree of privacy than other, reasoning that public employees are to be held more accountable than others.

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, 67 NY 2d 562 (1986)]. 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].

It is noted that section 89(2)(b) of the Freedom of Information law provides 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..." [section 89(2)(b)(i)].

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

If, for example, an individual must have certain types of experience or educational accomplishments as a condition precedent to serving in a particular position, those aspects of a resume would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertain, but also the appointing agency or office. In a

different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. However, I do not believe that those portions of a resume indicating age, marital status, social security number or other personal details that are irrelevant to the duties imposed by the position must be disclosed. Those kinds of personal information would, in my view, constitute an unwarranted invasion of personal privacy if disclosed. In short, I believe that portions of a resume indicating that the requisite qualifications have been met would be available, but that those portions containing the kinds of personal information described earlier, for example, could justifiably be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Peter Grant, Jr., Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5881

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

December 27, 1989

Mr. Harold G. Otley
[redacted]

The staff of the Committee 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. Otley:

I have received your letter of December 18, as well as the materials attached to it.

Your inquiry relates to an "Application for Public Access to Records" form that is apparently used by the Town of Ticonderoga and a response to a letter sent to you by Wilma Ryan, the Town Clerk and Records Management Officer.

In this regard, it is noted at the outset that there is nothing in the Freedom of Information law that requires an applicant to complete a form prescribed an an agency. The Law and the Committee's regulations require that an agency respond to a request that reasonably describes the records 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. It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response to or deny a request for records.

It is my understanding, since you often submit requests for Town records, that the Clerk has sent you a supply of the forms for your mutual convenience. If you request records, and the request seeks copies, it is suggested that you could so indicate when completing the form.

You also asked whether a citizen may request information "that would be taken from a record," i.e., excerpted from a record, "without requesting and obtaining a copy." Similarly, you questioned whether a citizen must "call or go to the office...in order to get 'information'."

In my view, an applicant for records has two options. he or she may inspect accessible records at no cost by traveling to the agency where the records are kept; in the alternative, the applicant may request and receive photocopies upon payment of the appropriate fees for copying. If the applicant wants to have copies of records mailed, I believe that the agency could require payment of the cost of postage. Further, the only method of disclosing information excerpted from a record other than inspecting a record would appear to involve the reproduction of a record. In such a case, I believe that an agency could assess a fee for copying the record.

Lastly, having reviewed the Clerk's letter to you, I am in full agreement with her remarks.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Wilma Ryan, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5882

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

December 27, 1989

Mrs. Shirley Rudgers
[redacted]

The staff of the Committee on 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. Rudgers:

I have received your letter of November 20, which, for reasons unknown, did not reach this office until December 19.

[redacted]

In this regard, I offer the following comments.

First, I believe that the Monroe Developmental Center is a facility operated by a state agency, the Office of Mental Retardation and Developmental Disabilities. It is noted that clinical records pertaining to patients at mental health facilities are generally confidential pursuant to section 33.13 of the Mental Hygiene Law. However, in 1987, a new provision, section 33.16 of the Mental Hygiene Law, became effective. That provision describes the procedures for a patient or person authorized to act on behalf of a patient to request inspection or copies of mental health records pertaining to him or her from the mental health facility that maintains the records. While the Law does not specify to whom such a request should be directed, the director of the facility is likely an appropriate person to receive such a request.

Similarly, at the same time that section 33.16 of the Mental Health Law became effective, section 18 of the Public Health Law also went into effect. That statute generally provides patients or persons acting on their behalf with rights of access to medical records pertaining to patients maintained by a hospital or a physician. To obtain additional information on the subject, it is suggested that you contact:

NYS Department of Health
Division of Public Health Protection
Access to Patient Information Coordinator
Corning Tower Building
Empire State Plaza
Albany, New York 12237

I have enclosed a brochure published by the State Department of Health that describes rights conferred by section 18. It is noted that section 18(2)(e) of the Public Health law specifies that a person entitled to medical records "shall not be denied access to patient information solely because of inability to pay."

While I an unfamiliar with organizations in your area that might help you or your daughter, such organizations might be identified by calling the AIDS hotline at 1-800-462-1884.

I regret that I cannot be of greater assistance. Should any further questions arise, please do not hesitate to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5883

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

December 27, 1989

Ms. Linda Williams
[redacted]

Dear Ms. Williams:

I have received your letter of December 20, which reached this office on December 26. You requested all information that this office may have about you.

In this regard, it is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not maintain records generally or serve as a repository of records. Although the Committee does not maintain records pertaining to you, I offer the following comments and suggestions.

First, the Freedom of Information Law is applicable to agency records, and section 86(3) of the Law defines the term "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."

Therefore, as a general matter, the Freedom of Information Law pertains to records of entities of state and local government in New York.

Second, a request made under the Freedom of Information Law should be made in writing and sent to the agencies that you believe maintain records in which you are interested. A request should be directed to an agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests. It is also noted that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate the records. Further, an agency may generally charge up to twenty-five cents per photocopy when copies are requested.

Enclosed is a copy of the Freedom of Information Law for your review.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5884

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

December 27, 1989

Mr. Arthur Schreier
Village Attorney
Village of Harrison
1 Heineman Place
Harrison, NY 10528

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

Dear Mr. Schreier:

I have received your letter of December 15 in which you seek an opinion concerning a request for records made under the Freedom of Information Law.

By way of background, a request dated October 4 was directed to you in your capacity as Village Attorney for the Village of Harrison. The request involved copies of records pertaining to a specific parcel of municipally owned real property that is used as a garage facility, as well as records pertaining to a "1.4 acre landfill/dump site...located immediately north-northeast of the garage facility" on privately owned property. Further, the request included records concerning:

> "(a) the activities and functions associated with the garage facility and any appurtenances, including the existence, location, purpose, size/volume, and contents of any above-ground or underground storage tanks currently or previously located in whole or in part on or under the garage facility and any spills, leaks or releases from such tanks;

(b) the current or previous storage or disposal of hazardous substances and/or petroleum at the garage facility and the origin, identity and quantity of such substances, if any;

(c) the origin, composition, volume and present condition of the waste located at the landfill;

(d) the length of time the landfill has been in existence;

(e) the identity and affiliation of the person(s) who transported or are transporting waste to the landfill;

(f) the identity and affiliation of the person(s) who presently operate and supervise, and who have previously operated and supervised, the landfill and the disposal of waste thereat;

(g) any federal, state or local permits or approvals, or applications therefor, in connection with (i) the operation of the garage facility and its appurtenances and (ii) the landfill, including any such permits or approvals or applications concerning the transportation, handling or disposal of solid or hazardous waste; and

(h) any form of consent given by any past or present owner of the property on which the landfill is located concerning the transportation of waste to, or disposal of waste at, the landfill."

In response to the request, you asked that the applicant "furnish...additional information reasonably describing the documents" sought. Soon after, the applicant wrote to you and contended that the request reasonably described the records as required by the Freedom of Information Law.

In this regard, I offer the following comments.

First, several aspects of the request, in my view, represent an attempt to elicit information in a form similar to that of interrogatories. Despite its title, the Freedom of Information Law is not a vehicle that requires agency officials to answer questions or to develop "information" in response to a request; rather, it is a statute that requires agencies to respond to requests for existing records and to disclose those records in accordance with its provisions. I point out, too, that section 89(3) of the Freedom of Information Law states in part that an agency is generally not required to create or prepare a record in response to a request. Stated differently, the Freedom of Information Law is not necessarily an access to information law, but rather an access to records law.

Second, several aspects of the request are open-ended in terms of time. For instance, items (a) and (b) of the request involve "current or previous" information concerning a variety of activities and functions of the garage facility. I am unaware of the length of time the garage facility has existed or has been used as a garage facility. Nevertheless, due to the open-endedness of the request, it is questionable in my opinion whether those or perhaps other portions of the request "reasonably describe" the records sought as required by section 89(3) of the Freedom of Information Law.

Third, I believe that other aspects of the request likely did reasonably describe the records. For instance, item (g) involves a request for any state, federal or local permits or approvals concerning the operation of the garage facility and the landfill; item (h) involves records reflective of consents given by present or former owners of the landfill concerning the transportation of waste to or the disposal of waste at the landfill. In those instances, I believe that the request is sufficiently detailed to have reasonably described the records sought.

In sum, for the reasons presented in the preceding paragraphs, I believe that portions of the request are broad and unlimited in terms of time and that, therefore, they likely are inconsistent with the standard required by section 89(3) of the Freedom of Information Law; other portions of the request, however, appear to be appropriate. In addition, it is reiterated that the Freedom of Information Law does not require agency officials to create or prepare records in order to satisfy 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: Eliza A. Dolin