STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5885

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

January 2, 1990

Mr. Sean J. Denvir
Ryan, Dall Vechia, Roach & Ryan
115 Green Street
UPO Box 3153
Kingston, NY 12401-0935

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

Dear Mr. Denvir:

I have received your letter of December 18, as well as the correspondence attached to it.

According to your letter, on June 17, Shirley Robinson was shot and killed with her husband's service revolver. Her husband, a police officer who was on duty at the time of the shooting, was also shot during the incident. You added that, soon after the incident:

> "State Police reported their conclusion through the newspapers, that Shirley Robinson argued with her husband, that she grabbed his handgun, that the two drove to the rear of the plaza, that the gun discharged into Shirley's leg while the gun was still in her possession, that she shot her husband in the neck, that she then self-inflicted a fatal chest wound. All of this information was gleaned from the June 23, 1989 Times Union, and the June 26, 1989 Mountain Eagle."

You represent the parents of the deceased, who requested a copy of the investigation report relating to the shooting death of their daughter. In the initial response to the request, you were advised that the Division of State Police "received the final report relating to this investigation" but denied access

based upon a finding that "the records concerned were compiled for law enforcement purposes and, if disclosed, would interfere with a pending judicial proceeding". The denial was appealed, and the Division's Committee on Appeals sustained the determination for the reason offered in response to the initial request and, in addition, "because disclosure is specifically exempted by New York State Criminal Procedure Law Section 160.50, and because disclosure would constitute an unwarranted invasion of personal privacy of those named in the report."

Nevertheless, having contacted the State Police and the Office of the District Attorney, you "learned that the judicial subpoena in question related to the Workers' Compensation claim filed by officer Brett Robinson", that "no criminal charges are being pursued against anyone", and that the investigation is closed. You added that if the records include reference to a confidential source, you have no objection to redaction. Further, with respect to the privacy of those named in the report, you indicated that "the marital discord and infidelity that gave rise to the argument that culminated in Shirley Robinson's death is no secret to the petitioners or other friends and family".

Based upon the foregoing, you have requested an advisory opinion concerning the propriety of the Division's "blanket denial" of the request. In this regard, I offer the following comments.

It is emphasized at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is also 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 the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single report may contain both accessible and deniable information. Further, I believe that the quoted phrase imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

One basis for denial cited by the Division in both the original denial and the determination on appeal is section 87(2)(e). That provision permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:

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

In my view, the authority to withhold records under section 87(2)(e) is dependent upon the effects of disclosure; only to the extent that the potentially harmful effects described in subparagraphs (i) through (iv) apply may an agency deny access to records pursuant to that provision.

Although I am unfamiliar with the contents of the records in question, it appears that the Division's capacity to withhold under section 87(2)(e) is limited. Since the investigation has been closed, disclosure would not apparently interfere with an investigation. Further, since no charges have been or will be initiated, I do not believe that disclosure would interfere with any judicial proceeding. As such, section 87(2)(e)(i) would not, in my view, be applicable as a basis for denial. The only adjudication relating to the incident involves a Workers' Compensation proceeding. Therefore, it does not appear that section 87(2)(e)(ii) could be asserted. With respect to section 87(2)(e)(iii), as you suggested, if the report identifies confidential sources or witnesses, for example, portions of the report identifying those persons might be deleted. In view of disclosures already made by the Division and the statement by the Office of the District Attorney indicating that the investigation has been closed, it is unlikely in my opinion, that section 87(2)(e)(iii) could properly be asserted, except with respect to the possibility of deleting references to confidential sources or witnesses. Section 87(2)(e)(iv) was not cited in the denial and appears to be irrelevant.

Section 160.50 of the Criminal Procedure Law, based upon the facts offered in the correspondence, would not serve as a basis for denial. As you suggested in your letter, that provision pertains to situations in which criminal charges against an accused are dismissed in favor of the accused. In this instance, no criminal charges were filed. If that is so, section 160.50 of the Criminal Procedure Law would not, in my opinion, apply.

The final basis for denial offered by the Division involves a contention that disclosure would constitute "an unwarranted invasion of personal privacy". Again, since I am unfamiliar with the specific contents of the report, I am unaware of the extent to which individuals may be named or otherwise identified. As stated earlier, names or other identifying details concerning witnesses or confidential sources might be deleted under section 87(2)(e)(iii) or perhaps under section 87(2)(b) as an unwarranted invasion of personal privacy. However, the identities of the principals involved in the incident, the deceased and the officer, as well as certain details concerning the incident, have already been disclosed. Further, it has been held that: "Generally, where rights of personal privacy are involved the exercise of the rights are limited to the living and may not be asserted by others after decedent's death" [see Tri-State Publishing Co., Inc. v. City of Port Jervis, 523 NYS 2d 954, 957 (1988)]. Further, in view of your clients' relationship to the deceased and their personal knowledge of events relating to the death, it is questionable in my opinion whether the Division could demonstrate that disclosure of records pertaining to the deceased to her parents would result in an unwarranted invasion of personal privacy.

In sum, several of the grounds for withholding the report upon which the Division of State Police has relied would in my opinion have limited or no application. Therefore, the blanket denial of the report appears to be inappropriate. I believe that only those portions of the report falling within the grounds for denial, in conjunction with the considerations expressed above, could properly have been withheld; the remainder of the report should in my view have been 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: Francis A. De Francesco, Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5886

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

January 3, 1990

Mr. Victor Kilpatrick
#87-A-1374
Great Meadow Correctional Facility
P.O. Box 51 A1-12
Comstock, New York 12821-0051

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

Dear Mr. Kilpatrick:

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

According to your letter, your attorney informed you that a medical examiner's report is missing from his files. Since you wrote that the attorney has ignored your requests that he obtain a new copy of the report or inform you of the means by which you may seek a copy, you asked how you may request the report.

In this regard, I have contacted the Office of the Deputy Chief Medical Examiner in Kings County on your behalf. It was suggested that a request should be directed to:

The Office of the Chief Medical Examiner
Medical Records Department
520 First Avenue
New York, New York 10016

I point out that 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 and identify the record. In addition, it is recommended that you explain the nature of your relationship to the subject of the report and indicate that it had been made available to your attorney but was misplaced. It is noted, too, that the Freedom of Information Law generally permits an agency to charge up to twenty-five cents per photocopy when copies are made.

Lastly, since you wrote that the report represents "a crucial piece of evidence" for your appeal, it is possible that it might be maintained by the court in which your proceeding was conducted. Although the Freedom of Information Law does not apply to the courts or court records, other provisions of law often grant substantial rights of access to court records. If the report was introduced into evidence at your proceeding, a request might alternatively be made to the clerk of the appropriate court.

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-1588

162 WASHINGTON AVENUE, ALBANY, NEW YORK 122
(518) 474-2518, 27

January 3, 1990

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 December 22 in which you indicated that there is confusion on your part involving the meaning of the terms "information" and "record." You referred to earlier correspondence in which it was advised that the Freedom of Information Law does not require agency officials to supply "information" by answering questions.

In my view, although a "record" contains "information," information is not necessarily found within a "record." I believe that a "record" is an information storage medium that has some sort of physical bounds. The term "record" as you are aware, is defined in section 86(4) of the Freedom of Information Law 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."

While "record" is defined to mean "information," the language quoted above refers to information in some "physical form," i.e., papers, books, photos, computer tapes, etc. There are physical characteristics used in the definition to describe the media in which information is contained. On the other hand, personal knowledge or recollection may consist of information; however, those kinds of information stored in one's mind could, in my opinion, hardly be considered to be "records."

Further, as I have pointed out in the past, the Freedom of Information Law pertains to existing records, and section 89(3) states in part that nothing in the Law "shall be construed to require any entity to prepare any record not poasessed or maintained by such entity..." Consequently, it has consistently been advised that an agency is not required to create a record in order to respond to a request for information. In addition, it has been held judicially that "It was never intended that government agencies be burdened with the expense and effort of preparing records..." [Gannett Co. v. County of Monroe, 59 AD 2d 309, 313; aff'd 45 NY 2d 954 (1978)]. Based upon the foregoing, the language of the Law and its judicial interpretation specify that agencies need not create a record in order to satisfy a request for information.

Lastly, you questioned the Committee's policy of sending copies of advisory opinions to others. First, the written opinions rendered by this office are public records. Second, when an opinion relates to a particular agency, a copy is sent to the agency as a matter of fairness. In some instances, agency officials may have different facts than those presented by the person requesting an opinion. Third, section 89(1)(b) of the Law states that the Committee shall furnish advisory opinions to agencies and to any person. Further, an advisory opinion, in my view, is intended to educate and to clarify the understanding of the Law. Forwarding copies of advisory opinions to agencies represents an appropriate method of attempting to achieve those goals.

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

OML-AO-1700
FOIL-AO-5888

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

January 4, 1990

Ms. Rene Gaponiuk
Village Clerk
Village of Fleischmanns
Library Building
Fleischmanns, NY 12430

The staff of the Committee 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. Gaponiuk:

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

You alluded to a telephone conversation in which we engaged several weeks ago concerning your difficulty in obtaining minutes of meetings of a public library's board of trustees. In your letter, you requested assistance in obtaining copies of the minutes and your request for the minutes.

In this regard, I offer the following comments.

First, with respect to your request for minutes, I point out by way of background that the Open Meetings Law applies to meetings of public bodies, and section 102(2) of the Law defines "public body" to mean:

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

In view of the language quoted above, it is clear in my opinion that the Open Meetings is applicable to the board of trustees of a public library.

Further, section 260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Based on the foregoing, under the terms of both the Open Meetings Law and section 260-a of the Education Law, a library board of trustees is, in my opinion, clearly required to comply with the Open Meetings Law.

Second, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, section 106 of that statute provides 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 determinstion of such action, and the date and the 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, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Minutes of executive sessions reflective of action taken, the date and the vote must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. I point out that if a public body conducts an executive session and merely engages in a discussion but takes no action, there is no requirement that minutes of the executive session be prepared.

It is noted, too, that 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. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes 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.

Lastly, with regard to your right to obtain a copy of your request, the request would in my opinion be subject to the Freedom of Information Law, for that statute includes within its coverage all records kept, held or filed by an agency. 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. Since you are seeking a copy of a request that you submitted, I do not believe that any basis for denial could justifiably be asserted.

In an effort to enhance compliance, a copy of this opinion will be sent to the Board of Trustees of the library to which your request was directed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Skene Memorial Library

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1701
FOIL-AO- 5889

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

January 4, 1990

Mr. Frederick H. Monroe, P.C.
Attorney at Law
P.O. Box 455
Lake Country Plaza
Chestertown, New York 12817

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

Dear Mr. Monroe:

I have received your letter of November 21, as well as the materials attached to it. Please accept my apologies for the delay in response.

By way of background, the correspondence indicates that you requested several "technical papers being prepared for the Commission on the Adirondacks in the Twenty-First Century." In response to the request, Judith LaBelle, the Commission's Deputy Director and Counsel, advised that "they have not yet been finalized and are not available for public distribution," and that they "will be available when the Commission delivers its final report to the Governor on April 1st, 1990." She added that "the Commission is not subject to the New York State Freedom of Information Law."

In conjunction with the foregoing, you have raised the following questions concerning the Commission:

"I Is the Commission subject to the Freedom of Information Law?

II Is the Commission subject to the Open Meetings Law?

III May the Commission withhold technical papers from tbe public?

IV. If so, may they withhold the factual information contained in the papers from the public?"

In an effort to learn more about the Commission, soon after the receipt of your inquiry, I contacted George D. Davis, Executive Director of the Commission, as well as Ms. LaBelle. Having discussed the matter with Ms. LaBelle, it was indicated that she would forward to me commentary in which she would explain the rationale for contending that the Commission is subject to neither the Freedom of Information Law nor the Open Meetings Law. Nevertheless, Ms. LaBelle informed me yesterday that written comments would not be prepared.

During our conversation, however, Ms. LaBelle indicated that the Commission was not created by statute or executive order, but rather by means of letters and a news release. She stated that the staff of the Commission consists of people loaned from state agencies or not-for-profit entities, and that its budget is derived from a mix of state and private monies. Ms. LaBelle emphasized that the Governor is not obliged to wait for the Commission's recommendations to act and that the Commission has no power to implement its findings or recommendations.

In this regard, I offer the following comments.

First, with respect to the Open Meetings Law, as you may be aware, that statute 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."

Recent decisions 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 Commission in question is not a public body required to comply with the Open Meetings Law. I point out that the Poughkeepsie Newspaper decision involved an advisory commission created by an executive order. Since that kind of entity likely had a more formal legal status than the entity that is the subject of your inquiry, I do not believe that the Commission would constitute a "public body" required to comply with the Open Meetings Law.

The Commission's status under the Freedom of Information Law is, in my view, less clear. The Freedom of Information Law applies 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."

While the Commission has no authority to assert power on behalf of the sovereign, it would not exist but for the action taken by the Governor to create it. Further, in a discussion of the scope and intent of the Freedom of Information Law, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the Court of Appeals state 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 unmistakeably 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 to 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 Bray v. Mar, it was found that a panel of outside experts designated by the Council on the Arts was part of the agency, i.e., the Council [see 106 AD 2d 311 (1984)]; in Eisenberg v. Goldstein (Sup. Ct., Kings County, February 26, 1988), it was found that a community college foundation, a not-for-profit corporation, is an agency, for "it would not exist but for its relationship with the College."

In short, although the status of the Commission as an "agency" in unclear, judicial interpretations of the Freedom of Information Law have been expansive with respect to the scope of the Law.

Whether the Commission is an agency may not be determinative of issues involving access to its records. As indicated earlier the Freedom of Information Law pertains to agency records. 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."

In my view, the Executive Chamber, the Governor's Office, is clearly an "agency" subject to the Freedom of Information Law. Under the circumstances, I believe that the documentation prepared by the Commission consists of "information...produced...for an agency...," in this instance, the Executive Chamber.

As such, in my opinion, if the Commission is an agency, its records are subject to the Freedom of Information Law; if it is not an agency, its records are nonetheless produced for an agency, thereby bringing those records within the scope of the Freedom of Information Law.

Assuming that the Commission is an agency, the records that it prepares could be characterized as "intra-agency" materials subject to the provisions of section 87(2)(g) of the Freedom of Information Law. If it is not considered to be an agency, in view of the means by which it was created and its charge, the Commission might be viewed as an advisor or perhaps as a consultant. By means of that analysis and a judicial decision concerning the status of the work product prepared for an agency by a consultant, I believe that the records would also be considered as "intra-agency" materials.

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 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, records prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on their contents.

Based upon the foregoing, it appears that the records in question would, at this juncture, be available to the extent that they consist of "statistical or factual tabulationa or data" pursuant to section 87(2)(g)(i) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Gordon Davis, Executive Director
Judith M. LaBelle, Deputy Director and Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5890

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

January 4, 1990

Mr. Duane Coble
87-C-0512
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

Dear Mr. Coble:

I have received your letter of January 2 in which you requested from this office various records pertaining to yourself.

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. Further, the Committee is not empowered to compel an agency to grant or deny access to records. In short, I cannot make the records available to you, for this office does not possess them.

For future reference, a request for records made under the Freedom of Information Law should be directed to the "records access officer" of the agency that maintains the records. The records in which you are interested would most likely be maintained by the police departments to which you referred in your letter and the Office of the Erie County District Attorney. As such, I believe that requests should be made to those agencies.

It is also 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. Further, the Freedom of Information Law generally enables agencies to charge a fee of up to twenty-five cents per photocopy.

Lastly, since you referred to a request for a "Vaughn Index Listing", I point out that the decision pertaining to such an index, Vaughn v. Rosen [484 F2d 820 (1973)], was rendered under the federal Freedom of Information Act. 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. Furtber, 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 tbe purpose of these statutory exemptions which is to preserve tbe confidentiality of tbis information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I bope that the foregoing serves to clarify 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-5891

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

January 5, 1990

Mr. Louis B. Cristo
Gough, Skipworth, Summers,
Eves & Trevett, P.C.
700 Reynolds Arcade
16 East Main Street
Rochester, New York 14614-1803

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

Dear Mr. Cristo:

I have received your letter of December 27 in which you requested an advisory opinion.

In your capacity as Deputy Town Attorney for the Town of Webster, you indicated that meetings of various public bodies of the Town are tape recorded. The tapes are used as an aid in preparing official minutes of meetings, and some of the tapes are "stored," while others apparently are not.

Having received a request for the tape recording of a meeting, you asked whether the Town is "compelled to produce the cassette tapes..."

In tbis 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 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, pamphleta, forms,

papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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

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

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, NYLJ, December 27, 1978].

Lastly, it is noted 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 with the Commissioner's consent. Having contacted the Education Department, I have heen informed that tape recordings of meetings must be retained for a period of four months after transcription and/or approval of 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:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-5892

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

January 5, 1990

Mr. Luis Pinto
82-A-1197
Box 618
Auburn, NY 13201

Dear Mr. Pinto:

I have received your letter of December 27 and the materials attached to it.

Based upon your description of the matter, the nature of your problem or inquiry is not entirely clear. As I understand the situation, however, certain records that had been made available to you by the New York County District Attorney in conjunction with a criminal proceeding were apparently lost or misplaced. As such, you introduced a motion to compel the District Attorney to furnish copies of those records to you free of charge. The District Attorney opposed the motion based upon a contention that the records had previously been made available. However, in the response by the District Attorney, it was indicated that the records would be made available in accordance with the Freedom of Information Law at the rate of twenty-five cents per page. It appears that you are questioning that fee.

In this regard, your rights as a defendant in a criminal proceeding to records of the District Attorney are, in my view, separate and distinct from your rights as a member of the public under the Freedom of Information Law. Rights of access conferred by the Freedom of Information Law are accorded to the public generally, and your status as a defendant or litigant is irrelevant to those rights. Further, pursuant to section 87(1)(b)(iii) of the Freedom of Information Law, an agency may generally charge up to twenty-five cents per photocopy when copies of records are sought. It is also noted that the Freedom of Information Law is silent concerning the waiver of fees.

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-5893

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

January 8, 1990

Mr. Michael Hale
#82-C-425
Box 149
Attica, New York 14011-0149

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

Dear Mr. Hale:

I have received your letter of December 24, in which you allege that the Buffalo Police Department has refused to release records and has falsified records.

Specifically, your complaint pertains to "911 police calls" and "the subsequent transmissions made to and from police radio cars and the dispatcher, September 7, 1981." Although transcripts of certain transmissions and related records were made available, tape recordings of transmissions have, according to your letter, been withheld. Further, you suggested that the times noted on the transcripts indicate that falsifications were made. As such, you asked that this office "obtain the release of the records and cause an investigation as to why the falsifications occurred and to have the same corrected."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not have the power to obtain records on behalf of an applicant or to compel an agency to grant or deny access to records. Further, the Committee does not have the statutory authority to conduct the kind of investigation that you described. It would appear that any such inveatigation might be conducted by either the Police Department of the Office of the District Attorney.

Second, it is possible that the tape recordings or records in which you are interested might no longer exist. Often schedules are devised under which agencies dispose of particular types of records within specified time limits. If, for example, the minimum time period for the retention of the records by the Police Department has expired, the tapes in which you are interested might have been destroyed.

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.

Under the circumstances, assuming that the records exist, several grounds for denial may be relevant.

One such ground for denial might be section 87(2)(b) of the Freedom of Information law, which permits an agency to withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy." It is possible that the recordings, to the extent that they exist and identify individuals other than those known to you, might be withheld under the cited provision, for there might be privacy considerations concerning those persons or others who have no connection with the events in which you are specifically interested.

Another ground for denial of possible relevance 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."

The language quoted above indicates that it is based largely upon potentially harmful effects of disclosure. From my perspective, it is questionable whether a 911 tape recording could be considered a record "compiled for law enforcement purposes," for it

might be viewed as a record compiled in the ordinary course of business. Assuming, however, that section 87(2)(e) would be application, its assertion would be limited to the capacity to withhold in conjunction with the harmful effects described in subparagraphs (i) through (iv) of the provision.

Also of possible significance is section 87(2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Since I am unfamiliar with the events to which the transmissions relate or the effects of their disclosure, the applicability of section 87(2)(f) is conjectural.

A final ground for denial of possible 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 tbat 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 muat 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. Transmissions between a Police Department dispatcher and a police officer, for example, would in my view constitute intra-agency materials that would be available or deniable depending upon the nature and content of the communications.

Lastly, to the extent that the transmissions in question could have been or were heard by members of the public while listening to the police scanners, for example, it is doubtful in my opinion that records reflective of those transmissions could

justifiably be withheld [see Buffalo Broadcasting Co., Inc. v. City of Buffalo, 125 AD 2d 983 (1987)]. It is reiterated, however, that due to the time that has passed since 1981, it is possible that the records in which you are interested no longer exist.

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-5894

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12
(518) 474-2518, 2

January 9, 1990

Mr. Kenneth C. Lanzer
Zoning Enforcement Officer
Town of Shandaken Zoning Department
Town Hall
Shandaken, New York 12480

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

Dear Mr. Lanzer:

I have received your letter of December 26 in which you requested advice concerning a request made under the Freedom of Information Law.

According to your letter, you submitted a request under the Freedom of Information Law to the Town of Shandaken Justice Court more than a month ago concerning cases that were dismissed by the Town Justice. As of the date of your letter, you had received no response to the request.

In this regard, I offer the following comments.

First, I do not believe that the Freedom of Information Law is applicable to the records in question. The Freedom of Information Law pertains 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."

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, in my view, does not apply to the courts and court records.

Second, however, a different provision of law would, in my opinion, generally require disclosure of justice court records. Specifically, section 2019-a of the Uniform Justice court Act, entitled "Justices' criminal records and docket," states in relevant part that:

> "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..."

Therefore, while the Freedom of Information Law might not grant rights of access of the records maintained by a justice court, section 2019-a of the Uniform Justice Court Act does confer rights of access to the records "at reasonable times," except with respect to those records deemed confidential pursuant to other provisions of law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5895

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

January 9, 1990

Ms. Doreen Banks
[redacted]

Dear Ms. Banks:

I have received your letter of January 3, as well as the correspondence attached to it.

Having read that the Committee on Open Government recently submitted its Annual Report to the Governor and the State Legislature, you offered a series of suggestions to make local elections more meaningful and accessible and perhaps less confusing to citizens. In addition, you requested a copy of the annual report and enclosed a copy of a request made under the Freedom of Information Law on December 8, 1989, that had not been answered as of the date of your letter to this office.

In this regard, I offer the following comments.

First, enclosed is a copy of the report. Please note that the duties of the Committee involve providing advice concerning the Freedom of Information Law, the Open Meetings Law and the Personal Privacy Protection Law. Although the issues that you raised involve election procedures and, therefore, relate to open government principles, they are outside the scope of the Committee's jurisdiction or expertise. Since those issues pertain to possible changes in the Election Law, it is suggested that you express your concerns to your state legislator or the State Board of Elections, which is located at 99 Washington Avenue, Albany, New York 12210.

Second, with respect 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) prescribe time limits within which agencies must respond to requ sts. 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. 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-5896

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

January 9, 1990

Mr. Frank L. Gennuso
85-C-0127
Southport Correctional Facility
Pine City, NY 14871-2000

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

Dear Mr. Gennuso:

I have received your letter of January 3 in which you requested a copy of the Committee's recent annual report and asked whether annual financial disclosure statementa filed with the State Ethics Commission are subject to the Freedom of Information Law.

In this regard, first, enclosed is a copy of the Committee's annual report.

Second, as indicated in the report (see pages 30-33), the Executive Law specifies that the Freedom of Information Law does not apply to records maintained by the State Ethics Commission. However, the Ethica in Government Act specifies that certain records of the Commission are available, including:

> "the information set forth in an annual statement of financial discloaure filed pursuant to section seventy-three-a of the public officers law except the categories of value or amount, which shall remain confidential, and any other item of information deleted pursuant to paragraph (h) of subdivision nine of this section" [Executive Law, section 94(17)(a)(1)].

In brief, section 94(9)(h) permits persons required to file to request that items that would otherwise be available he deleted from statements if it is found that those items "have no material bearing on the discharge of the reporting person's official duties".

It is also noted that the Ethics in Government Act states that records accessible under the Act "shall be available for public inspection". As such, on pages 16 and 17 of the report, the Committee recommended that the Act be amended to require the Commissions created by the Act to prepare photocopies of available records upon payment of the appropriate fee.

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-5897

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

January 9, 1990

Mr. Kahlil S. Khair
88-A-0608
Drawer B, C-2-10
Stormville, New York 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. Khair:

I have received your letter of December 25 in which you wrote that you are "in need of information" concerning the records of an attorney assigned under Article 18-B of the County Law, as well as an investigator hired by the attorney.

In tbis regard, while I am not an expert with respect to Article 18-B, it does not appear that the records in question would likely be subject to the Freedom of Information Law. 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."

Based upon section 722 of the County Law, unless you were represented by a public defender, I do not believe that the records would be maintained by or for an agency. If that is so, the Freedom of Information Law would not be applicable.

In the event that the Freedom of Information Law does not apply, you requested information concerning "who [an 18-B attorney] is liable to." The introductory language of section 722 states that:

> "The governing body of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county a plan for providing counsel to persons charged with a crime or who are entitled to counsel pursuant to section two hundred sixty-two or section eleven hundred twenty of the family court act or section four hundred seven of the surrogate's court procedure act, who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense."

Lastly, you requested the name of the person designated to determine appeals for the New York City Police Department. That person is Ms. Eileen D. Millett, Assistant Deputy Commissioner.

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-5898

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

January 10, 1990

Mr. Michael Hajovsky
[redacted]

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

Dear Mr. Hajovsky:

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

According to the materials, on October 5, you requested from the New York City Department of Correction copies of an audit concerning the Department's Division of Management Information Systems and an audit prepared by the New York City Comptroller. Your request for the former was denied pursuant to section 87(2)(g) of the Freedom of Information Law; with respect to the latter, Department officials indicated that no such audit was performed. Consequently, you later requested records relating to the postponement of the performance of the audit by the Comptroller. That request was also denied on the basis of section 87(2)(g). Following an appeal, the Department affirmed the denial of your first request. A second appeal was made on November 27 concerning the postponement. However, you wrote that, 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, the audit that was denied was prepared by the Department of Correction and, therefore, could in my view be characterized as intra-agency material. The records concerning the postponement of the performance of an audit by the Comptroller would likely consist of inter-agency material. Consequently, rights of access to the records in both instances would in my opinion be determined by section 87(2)(g) of the Freedom of Information Law. Although that provision represents a basis for withholding records, due to its structure, it often requires disclosure. Further, the specific contents of inter-agency or intra-agency materials determine the extent to which they may be withheld or must be disclosed.

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.

Without knowledge of the contents of the records, I cannot conjecture as to the extent to which the denials may have been proper. However, to the extent that records consist of the information described in subparagraphs (i) through (iv) of section 87(2)(g), I believe that they must be disclosed.

Third, section 89(4)(a) of the Freedom of Information Law prescribes a time limit within which a determination on appeal must be rendered. 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."

Moreover, it has been held that a failure to render a determination following an appeal within the appropriate time period constitutes a constructive denial and represents the exhaustion of one's administrative remedies [see Floyd v. McGuire, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)]. Therefore, when an agency fails to respond to an appeal in the manner prescribed by section 89(4)(a), a proceeding may be initiated under Article 78 of the Civil Practice Law and Rules.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Daly, General Counsel
Amie H. Kabia, Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-5899

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

January 10, 1990

Mr. Harry Wenzel
83-A-4882
2911 Arthur Kill Road
Staten Island, NY 10309

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

Dear Mr. Wenzel:

I have received your letter of December 18, which reached this office on December 28.

You have asked whether a victim impact statement, a letter from your sentencing judge to the Parole Board and a letter from a district attorney's office to the Parole Board are available under the Freedom of Information Law.

In this regard, I offer the following comments.

First, with respect to a victim impact statement, I believe that such a statement is part of a pre-sentence report as described in section 390.30 of the Criminal Procedure Law. Further, 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 defendent'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. It is possible that your attorney might have received the pre-sentence report, including the victim impact statement. Therefore, it is suggested that you discuss the matter with your attorney or seek the statement from the sentencing judge.

Second, without knowledge of the contents of the letters to which you referred, I cannot offer specific guidance. I point out, however, 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 addition, a letter from an office of district attorney to the Parole Board would consist of "inter-agency material" subject to 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 douhle 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 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-5900

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

January 10, 1990

Mr. Peter LaPella
84-A-6564
Drawer B
Greenhaven Correctional Facility
Stormville, New York 12582

Dear Mr. Pella:

I have received your letter of January 8 in which you requested a variety of information concerning arrests in Georgia.

In this regard, the Committee on Open Government is authorized to advise with respect to the New York Freedom of Information Law. The Committee does not maintain records generally, and this office does not possess records or information falling within the scope of your request.

It is noted that the Freedom of Information Law pertains 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 is generally applicable to records maintained by entities of state and local government in New York. It does not apply to records of other states or the F.B.I., which is a federal agency. Each state has enacted a law concerning access to records, and federal agencies, such as the F.B.I., are subject to the federal Freedom of Information Act. Therefore, your requests should be made under the appropriate statutes and directed to the agencies that maintain the records in which you are interested.

Lastly, in your request, you sought answers to questions (i.e., "What led the F.B.I. to [your] location?"). I point out that neither the New York nor the federal freedom of information statutes require that agencies answer questions. Those statutes pertain to existing records and do not require that records be prepared in response to questions.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5901

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

January 11, 1990

Mr. Henry J. Vega
85-A-3105 F-14
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. Vega:

I have received your letter of January 2 in wbich you raised questions concerning access to records.

When records requested from a correctional facility are denied, you wrote tbat you believe that you "appeal to the counselor [and] he in turn reviews [the] request". If an appeal is denied, you asked whether you can appeal to this office.

In this regard, for purposes of clarification, an appeal following a denial of access to records at a correctional facility should be directed to the Counsel to the Department of Correctional Services in Albany. Section 89(4)(a) of the Freedom of Information Law requires that copies of appeals and determinations of the appeal be forwarded to this office. However, the Committee on Open Government does not render determinations after appeals. The Committee is authorized to advise; it is not empowered to compel an agency to grant or deny access to records. If an appeal is denied, the person denied access may challenge the agency's determination by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

Your second area of inquiry deals with a request made under the Freedom of Information Law for medical records maintained by "two outside hospitals". I point out that 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 applies to records maintained by entities of state and local government. If the hospitals in queation are private, the Freedom of Information Law would not apply.

Moreover, a statute other than the Freedom of Information Law pertains specifically to patients' rights of access to medical records. Section 18 of the Public Health Law generally requires that a hospital provide access to medical records concerning a patient to that patient. Enclosed is a brochure published by the State Department of Healtb that describes your right to medical records.

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-5902

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

January 11, 1990

Mr. Quintin Fair
Monroe County Jail
Rochester, NY 14614

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

Dear Mr. Fair:

I have received your letter of December 31 in which you requested assistance.

In brief, you wrote that you "need to know which court and what judge [you] saw" in conjunction with arrests and convictions that occurred in 1981 and 1982.

It is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office does not maintain possession of records generally, nor does it have the capacity to require that records be disclosed.

Further, 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, 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."

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.

Lastly, it is possible that some of the information may be found in criminal history records pertaining to you. Those records are maintained by the Division of Criminal Justice Services. Therefore, it is suggested that an inquiry be directed to the Division of Criminal Justice Services, Office of Identification and Data Systems, Executive Park Tower, Stuyvesant Plaza, Albany, NY 12203. I am not sure whether criminal history records include reference to judges. However, those records may provide you with sufficient information to request records identifying judges from the courts in which the proceedings occurred.

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-5903

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

January 11, 1990

Mr. Robert J. Williams
84-A-8006
135 State Street
Auburn, NY 13024

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

Dear Mr. Williams:

I have received your letter of December 28, as well as tbe materials attached to it.

The materials involve requests made under the New York Freedom of Information Law and the federal Freedom of Information Act for records maintained by a court or court reporter and by a law firm.

In this regard, the New York Freedom of Information Lsw 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 does not apply to the courts or court records or records maintained by a law firm. Similarly, the federal Freedom of Information Act applies to records maintained by federal agencies; it would not include the records in question within its coverage.

I regret that I cannot be of assistance and hope that the foregoing offers clarification of the scope 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-5904

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

January 11, 1990

Mr. Steven Briecke
85-A-4706
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Briecke:

I have received your letter of January 2 and tbe correspondence attached to it.

According to the materials, a request was made on December 11 to the Mental Health Department at the Green Haven Correctional Facility for records concerning your refusal to take medication. You specified that your request did not involve medical records, but rather a "daily log" pertaining to your conduct in refusing medication. Since, as the date of your letter to thia office, you received no response to the request, you asked that the Committee "pursue the matter on [your] behalf".

In thia 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 to compel an agency to grant or deny access to records.

Second, section 89(1)(b)(iv) of the Freedom of Information Law requires that tbe Committee on Open Government promulgate regulations concerning the procedural aspects of the Law (aee 21 NYCRR Part 1401). In turn, section 87(1) requires eacb agency to adopt regulations consiatent with the Law and the Committee's regulations. The regulations promulgated by the Department of

Correctional Services indicate that a request for records kept at a facility should be directed to the facility superintendent. I have enclosed those regulations, and it is suggested that you renew your request in accordance with the provisions of those regulations.

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, 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have heen 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-5905

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

January 11, 1990

Mr. James V. Patti
[redacted]

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

Dear Mr. Patti:

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

As I understand the matter, you have attempted without success to obtain copies of records maintained by the Town of Poland concerning property that you own. Although the records sought were located and apparently shown to you, your request for photocopies was denied. In conjunction with those facts and others described in the materials, you have requested advice concerning your rights under the Freedom of Information Law and the procedures that might be followed with respect to the review of an assessment of real property, which you believe has been "over assessed...for years".

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, I have neither the jurisdiction nor the expertise to provide advice concerning the means by which you may challenge an assessment. The correspondence indicates that a publication of the State Board of Equalization and Assessment, "How to Challenge Your Assessment", has been made available to you. If you need additional information on that subject, it is suggested that you call or write to the Board.

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. Records involving the assessment of real property, with rare exceptions, have long been public. Further, since your request involves records pertaining to property that you own, and since the records have been shown to you, it is all but certain, in my opinion, that they are accessible under the Freedom of Information Law.

Third, section 87(2) indicates that accessible records must be made available for inspection and copying. Moreover, section 89(3) states in relevant part that: "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record...". Section 87(1)(b)(iii) permits an agency to charge up to twenty-five cents per photocopy. Based on the foregoing, it is clear in my view that the Town is required to prepare photocopies of records accessible under the Freedom of Information Law upon payment of the appropriate fees.

Third, in terms of procedural requirements, 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 he 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 designsted 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, an agency may require that a request be made in writing. 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 to enable Town officials to locate the records. Since the records were located and displayed to you, I believe that you met your responsibilities under the Law. However, since the requests were made several months ago, it is suggested that you renew your request in accordance with the comments offered earlier.

In an effort to enhance complaince, copies of this opinion will be sent to Town 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

Encs.

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5906

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

January 16, 1990

Ms. Ann Fey
[redacted]

The staff of the Committee on 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. Fey:

I have received your letter of January 3, as well as the correspondence attached to it.

According to the materials, you have attempted without success to obtain records containing the "names and annual salaries and ranks and/or title of faculty and administrators at Rockland County Community College" for specific periods of time 1965 through 1991. Your initial request was made to James K. Anderson, Commissioner of Personnel, who wrote that his office does not maintain the information. Mr. Anderson suggested that you should be able to obtain it from tbe College. He added that payroll information is available from the Office of the Commissioner of Finance. Thereafter, you submitted requests to Mr. Harold J. Petterson, the Commissioner of Finance, and to John Grant, the County Executive, neither of whom have responded to your requests.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that "Notbing 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...".

Some of the information that you are seeking involves persons employed as long ago as 1965. If records no longer exist containing the information sought, the Freedom of Information Law would not in my view apply, and no County agency would be required to create such records on your behalf. Similarly, since your request also includes records pertaining to employees for the period of September 1990 to June 1991, it is unlikely that a list of employees for that period exists or could exist.

Second, as indicated above, an exception to the general rule that an agency need not create records involves subdivision three of section eigbty-seven of the Freedom of Information Law. Relevant to your inquiry is paragraph (b) of that provision. Specifically, that provision 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..."

As such, some agency of County government, presumably the Community College or the Department of Finance, is required to maintain records, at least for some of the periods described in your request, identifying employees of the College and including the information prescribed in section 87(3)(b). I am unaware if there is a separate list pertaining to College employees or whether those employees are identified in a list of all County employees. Nevertheless, I believe that there must be records containing the information sought, at least with respect to some of the time periods indicated in your requests. Further, to the extent that those records exist, I believe that they must be disclosed.

Third, in terms of procedural requirements, 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 tbis 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. Similarly, section 1401.7(a) of the regulations requires the designation of a person or body to determine appeals in the event of a denial of a request.

Further, 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)].

Lastly, having briefly discussed the matter with Mr. Anderson, I was informed that the County's procedures indicate that each agency within Rockland County government should have designated records access and appeals officers. I am unaware of who those individuals might be. Mr. Anderson suggested that you contact the County Attorney and describe the situation to him in an effort to resolve the matter. His name and address are: Ilan Schoenberger, County Attorney, County of Rockland, County Office Building, 11 New Hempstead Road, New City, NY 10956.

To attempt to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to County 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: John T. Grant, County Executive
Harold J. Petterson, Commissioner of Finance
Ilan Schoenberger, County Attorney
President, Rockland Community College

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5902

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

January 16, 1990

Mr. Peter B. Lekki, Esq.
St. Lawrence County Attorney
Office of the County Attorney
County Court House
Canton, New York 13617

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

Dear Mr. Lekki:

I have received your letter of January 4, as well as the correspondence attached to it.

Your letter pertains to a request made on October 16 by a representative of the St. Lawrence County Planning Office for records of the Department of Environmental Conservation. The records sought included:

> "1. New York State DEC Memorandum from Commissioner Jorling to Comptroller Regan April 28, 1989 (Identification of nine acquisition targets within the Adirondacks which the Commissioner is personally committee to accomplish.)
>
> 2. Listing of the acquisition projects currently approved by DEC's Executive Review Committee as of 8/30/89. (This information resides with Robert Binnewies, Deputy Commissioner for Lands and Forests.)
>
> 3. New York State DEC Adirondack Park Acquisition Plan, January 27, 1989, including accompanying color-coded map."

The request was denied on November 6 by John M. West, Superintendent of the Department's Bureau of Real Property, who wrote that disclosure "at this time would impair present or imminent contract awards." You predecessor appealed the denial on December 12 and asked that he be notified as to the Department's procedure for determination of the appeal. In response to that communication, Ms. Ann Lapinski, a Department attorney, wrote on December 28 that an appeal need not contain legal arguments. However, she wrote that you "have the option of arguing further the reasons you feel the documents should have been released..." and indicated that if you choose to offer such arguments, a response should be sent to her within two weeks of the receipt of her letter.

You have requested an interpretation and advice concerning the matter.

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. In my view, two of the grounds for denial are likely relevant.

The provision to which Mr. West alluded, section 87(2)(c), permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." That provision has been successfully asserted to withhold records pertaining to real estate transactions prior to their consummation. In Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982), the Court of Appeals upheld an agency's denial of access to appraisals sought prior to the consummation of the transactions to which those records related. In that situation, premature disclosure would have enabled the public to know appraised values of the property, thereby potentially precluding the agency from obtaining an optimal price for the properties. In this instance, the disclosure of records identifying properties that the Department seeks to acquire would likely encourage speculation. Similarly, if the location of the properties becomes known, others may offer or perhaps purchase the properties, defeating the Department's capacity to do so. If disclosure would impair the Department's ability to acquire the properties at prices beneficial to the public, based upon Murray, supra, I believe that the records sought could properly be withheld pursuant to section 87(2)(c) of the Freedom of Information Law.

The other ground for denial of likely significance is section 87(2)(g), which permits an agency to withhold records that:

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

The memorandum transmitted between Commissioner Jorling and Comptroller Regan could, in my view, be characterized as "inter-agency material." The remaining documents would be "intra-agency materials." It would appear that those records are reflective of plans or projections and that, therefore, section 87(2)(g) could be asserted as a basis for denial.

In sum, based upon my understanding of the facts and the nature of the records sought, it appears that, at this juncture, the records could be withheld pursuant to paragraphs (c) and perhaps (g) of section 87(2)(g) of the Freedom of Information Law.

Lastly, section 89(4)(a) of the Freedom of Information Law provides an applicant for records to appeal a denial of a request within thirty days of the denial. There is nothing in that provision that requires an appellant to offer legal arguments concerning rights of access or the sufficiency of a denial.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Ann Lapinski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 1706
FOIL-AO-5908

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

January 18, 1990

Mr. Rick Dobson
[redacted]

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

Dear Mr. Dobson:

I have received your letter of December 19, as well as the materials attached to it. Please note that your correspondence did not reach this office until January 8.

According to the materials, following an incident that occurred while you were on duty for the Danby Fire and Rescue Company, you were suspended for six months. Soon after your suspension, you requested a variety of information from the Company, including a list of members present at the site of the rescue call where the incident occurred, minutes of a business meeting of the company, a list of those who participated in the action taken to suspend you, copies of complaints and witness statements concerning the incident and by-laws of the Department. You indicated in a recent telephone conversation that the president of the Company denied your request due to your failure to use the Company's request form.

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

First, it is noted that judicial decisions indicate that volunteer fire companies are agencies required to comply with the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980) and S.W. Pitts Hose Company v. Capital Newspapers, Sup. Ct., Albany Cty., January 25, 1988].

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, 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.

Fourth, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency is generally not required to create a record in response to a request. If, for example, the Company maintains no list of members present at the scene of the rescue call, I do not believe that it would be obliged to prepare a list in response to a request.

Fifth, 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 portions of records identifying complainants or witnesses might justifiably be withheld as "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)], it is questionable whether there would be significant considerations of privacy in this instance. It is assumed that those records would not have involved persons unknown to you, but rather that they would identify other members of the Company who were present at the scene in the performance of their official duties.

Lastly, since a portion of your request pertains to minutes, as you may be aware, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, section 106 of that statute provides 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."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Minutes of executive session reflective of action taken, the date and the vote must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. I point out that if a public body conducts an executive session and merely engages in a discussion but takes no action, there is no requirement that minutes of the executive session be prepared.

It is also noted that, while the Freedom of Information Law generally does not require that an agency create or prepare records, an exception to that principle involves action taken by public bodies or agencies. 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..."

Ordinarily the record of votes required to be maintained pursuant to the provision quoted above is included in minutes of a meeting.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to the President of the Company.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: President, Danby Fire and Rescue Company

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5909

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

January 18, 1990

Mr. John Anthony
[redacted]

Dear Mr. Anthony:

I have received your letter of January 2 addressed to the Committee on Open Government. As you are aware, I have been authorized to respond on behalf of the Committee.

Your latest inquiry was apparently precipitated by a news article indicating that a donation was recently made to the Westchester housing fund, some of which was made available to the Groton Housing Network, Inc. Based upon that article, you requested records from the Village of Croton-on-Hudson concerning the creation of the Croton Housing Network, records of donations, and "fiscal, bank and general accounting records" of the Croton Housing Network. In addition, in conjunction with your previous requests, you asked why the Village holds the Freedom of Information Law "in contempt."

In this regard, I cannot answer your question concerning the Village's view of the Freedom of Information Law. That issue has been the subject of an exhaustive amount of correspondence. I can only reiterate that you may seek judicial review of the Village's action if you so choose.

With respect to your latest request, I do not believe that the Village maintains any records that fall within the scope of that request. Although I believe that the issue has previously been considered, I contacted the Village Manager, Mr. Richard Herbeck, in order to provide accurate commentary. In short, the Croton Housing Network, Inc. is an entity separate and distinct from the Village of Croton-on-Hudson. The Village did not create the Croton Housing Network, nor does the Village maintain custody or control of financial records pertaining to the Croton Housing

Network. Further, as a not-for-profit corporation that is not a governmental entity, I do not believe that the Croton Housing Network would constitute an agency required to comply with the Freedom of Information Law. Therefore, while a not-for-profit corporation, such as the Croton Housing Network, may choose to disclose its records, the Freedom of Information Law would not impose any obligation to do so.

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-5910

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

January 18, 1990

Mr. Lawrence F. Pereira
Iroquois Central Schools
Elma, NY 14059

Dear Mr. Pereira:

I appreciate receiving a copy of your determination of an appeal concerning a request made by Mr. Charles L. Hunt.

The request apparently involved a stipulation of settlement between the District and one of its employees and was denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

I am unfamiliar with the specific contents of the record sought or the facts leading to its creation. However, from my perspective, which is based upon judicial interpretations of the Freedom of Information Law, the terms of a settlement between an employee and a school district are generally available under the Freedom of Information Law.

In this regard, I offer the following comments.

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

Perhaps the most relevant ground for denial is the provision that you cited, section 87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy".

Although subjective judgments must often of necessity be made when questions concerning privacy arise, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In one of the decisions cited above, 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."

It has been held in other circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug use. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of appeals, it was held that a state agency's...

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt"... [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

Further, another decision may be somewhat analogous to the situation considered herein. In Buffalo Evening News v. Board of Education of the Hamburg Central School District (Sup. Ct., Erie Cty., June 12, 1987), it was held that a settlement agreement between a board of education and a teacher involved in disciplinary proceedings is available under the Freedom of Information Law.

Based on the foregoing, it is my view that the terms of a settlement would generally result in a permissible rather than an unwarranted invasion of personal privacy. Such a record is, in my opinion, relevant to the performance of the official duties of the School Board and the employee.

In sum, if records do not fall within the scope of the grounds for denial appearing in the Freedom of Information Law, I believe that they must be made available, notwithstanding a promise of or agreement with respect to confidentiality.

It is noted that pending charges against a tenured teacher may be withheld [see Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)] and that confidentiality could be asserted in a situation in which charges have been dismissed in conjunction with what might be characterized as an "acquittal". While section 3020-a of the Education Law, which provides guidance concerning disciplinary action initiated against a tenured teacher, indicates that some records may be expunged, I do not believe that the cited provision would permit expungement of a stipulation of settlement or a contract prepared as a result of a settlement. Specifically, in a tenure proceeding initiated under section 3020-a of the Education Law, the last sentence of subdivision (4) entitled "Post hearing procedures", states that: "[I]f the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record". In my view, the substitution of an agreement in lieu of a report of the hearing panel would not constitute an "acquittal". As such, I do not believe that the expungement provisions described in section 3020-a(4) of the Education Law would be applicable to the situation at issue.

Moreover, in discussing the expungement provisions, in Matter of Appeal of Gideon Hirsch (Decision No. 9583, January 4, 1978) the Commissioner of Education wrote that:

> "It is clear from the language of this subdivision that charges must be expunged from an employee's record only where the employee has been acquitted after a hearing has been held concerning such charges. The language of the subdivision does not, in my opinion, require or imply that where charges

> have been brought against an employee and subsequently withdrawn, such charges and all references to them be expunged from the employee's record".

In view of the foregoing, even though charges may have been withdrawn by means of a settlement, such an act would not constitute an acquittal. On the contrary, if charges were withdrawn in conjunction with an agreement to settle the matter, in my opinion, the provisions in section 3020-a that confer confidentiality by means of expungement are not applicable.

Also of significance is section 87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

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

Under the circumstances, the settlement and the contract could likely be characterized as "intra-agency" materials. Nevertheless, I believe that those records are reflective of a "final agency determination" and would be accessible on that basis [see Farrell, Geneva Printing, Sinicropi, supra,].

I hope that the foregoing information will be useful to you. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles L. Hunt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5911

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

January 19, 1990

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.

Dear Ms. Braham:

I have received your letter of January 8, as well as the correspondence attached to it.

According to the materials, you directed requests to Ms. Lola Locker, Special Assistant to the President of Queen College, for a "list of all cases heard by the Academic Senate and its Committee, from its inception to the present time," for a copy of "the first chronological case heard by the Academic Senate...", and for a "list of the records...relating to the Academic Senate, i.e., a list of any cases heard by the Academic Senate, etc." Although Ms. Locker apparently indicated in May that some records concerning the Academic Senate are maintained by the College, she wrote in response to your request that "The Academic Senate and its Committees do not keep a list of cases heard "and that "There are not copies of the first case heard by the Academic Senate and its Committees." Based upon her May letter, you contend that Ms. Locker "refuses" to send the records sought to you.

In this regard, unless I have misunderstood the situation, Ms. Locker has not "refused" to disclose records falling within the scope of your request. Rather, she indicated that there are no "lists" containing the information sought and that there are no copies of the first case heard by the Academic Senate. Under the circumstances, it appears that the College does not maintain the records that you requested. If that is so, the Freedom of Information Law, in my view, would not be applicable.

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. In the context of your request, if, for example, the College maintains no list of the cases in question, I do not believe that it would be obliged to create such a record on your behalf.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert Freeman
Executive Director

RJF:saw
cc: Lola Locker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5912

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

January 19, 1990

Mr. Thomas J. O'Dell
#82-A-2257
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.

Dear Mr. O'Dell:

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

According to the correspondence, having been convicted in a jury trial in 1982 in Dutchess County, you requested records under the Freedom of Information Law from the District Attorney. Neither your request nor your appeal were answered. You have asked for assistance in this matter.

In this regard, I offer the following comments.

First, the records of an office of a district attorney in my view are subject to rights granted by the Freedom of Information Law, for the Freedom of Information Law pertains to records of an "agency," a term defined in section 86(3) of the Law to mean:

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

Based upon the language quoted above, 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 tht one of the first decisions rendered under the Freedom of Information Law indicated that certain records of a disrict 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., Barrett v. Morgenthau, ___ NY 2d ___, NYLJ, Nov. 20, 1989' Moore v. Santucci, 543 NYS 2d 103, ___AD 2d___ (1989); New York Public Interest Research Group, Inc. v. Grenberg, 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, 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 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, 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, although the courts and court records are not subject to the Freedom of Information Law, court records are often available pursuant to other provisions of law. It is possible that some of the records in which you are interested are maintained by the court in which your trial occurred. If that is so, it may be worthwhile to seek those records from the clerk of the court.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: William V. Grady, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5913

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

January 22, 1990

Dr. Angela 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 Dr. Elefante:

I have received your letter of January 12, as well as the materials attached to it.

Once again, your inquiry concerns the status of the Oneida County Industrial Development Corporation (OCIDC) under the Freedom of Information Law. The materials that you enclosed include the certificate of incorporation for OCIDC and related documents. Based upon a review of those documents, I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains 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 is applicable to governmental entities that perform a governmental function.

Second, in our earlier correspondence, it was suggested that if OCIDC is a "local development corporation," arguably its records would be subject to the Freedom of Information Law. Although local development corporations are not-for-profit corporations, section 1411(a) of the Not-for-Profit Corporation Law specifies that such corporations perform "an essential governmental function." Based upon that language and judicial decisions cited in our earlier correspondence, it has been contended that local development corporations are required to comply with the Freedom of Information Law.

Having reviewed the incorporation papers that you forwarded, I have found nothing that indicates that OCIDC is a local development corporation. Further, those records in my view indicate that OCIDC is not an "agency" subject to the Freedom of Information Law. If that is so, the Freedom of Information Law would not serve as a vehicle under which you could request records from OCIDC.

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:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5914

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

January 22, 1990

Mr. Percy Moore
78-A-1182
Green Haven Correctional Facility
Drawer B
Stormville, NY 12581

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

Dear Mr. Moore:

I have received your letter of January 12 in which you requested assistance.

You wrote that you are the petitioner in Moore v. Santucci, 543 NYS 2d 103, ___ AD 2d ___ (1989), a case in which the Appellate Division found that certain records should be made available under the Freedom of Information Law. Since the records access officer designated by the District Attorney has failed to disclose the records found to be available, you have requested assistance in gaining access to the records. You added that you wish to bring an action pursuant to the provisions added by Chapter 705 of the Laws of 1989, and you requested information concerning the procedure for bringing such an action.

In this regard, I offer the following comments.

First, it is questionable in my view whether Chapter 705 would apply to the situation. The amendment to the Freedom of Information Law that is part of that Chapter, a new 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."

Similar language was enacted as a new section 240.65 of the Penal Law.

In my opinion, the new provisions would apply in situations in which a request for records has been made, and in which a government official denies the existence of the records, thereby concealing the records, or in which a government official destroys the records in order to prevent disclosure. It does not appear not that either of those circumstances would be applicable in the situation described. Further, I believe that a proceeding brought under the provisions of Chapter 705 would be initiated by means of a complaint made to a district attorney. In this instance, the records are maintained by an office of a district attorney.

Second, rather than seeking to use the provisions of section 705, it is suggested that you seek an order from the court to enforce the decision. It is also recommended that you discuss the matter with your attorney or perhaps with a representative of Prisoners' Legal Services or other legal assistance organization.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5915

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

January 22, 1990

Mr. Joseph A. Fiore
[redacted]

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

Dear Mr. Fiore:

I have received your letter of January 12, as well as the correspondence attached to it.

According to the materials, you have directed requests under the Freedom of Information Law to the Low Level Radioactive Waste Siting Commission (the Commission) and the Department of Environmental Conservation (DEC). With respect to the former, you were not informed of your right to appeal what you characterized as a denial. In response to that request, you were told that the materials sought "have not been compiled...". In the case of the other request, you were informed that you would be notified when the records requested will be available. As of the date of your letter to this office, the records had neither been disclosed or withheld.

In this regard, I offer the following comments.

First, with respect to the request to the Commission, as I understand the matter, the information sought apparently does not exist in the form of a record. Here I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Freedom of Information Law states in part that an agency generally need not create or prepare a record in response to a request. If my interpretation of the matter is accurate, that the records sought do not exist, your request was not denied. Stated differently, in my view, an agency can neither grant nor deny access when records sought do not exist; it can withhold only those records that it maintains.

When a request for existing records is denied, the regulations promulgated under the Freedom of Information Law by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law require 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" [21 NYCRR section 1401.7(b)].

Second, it is noted that the Freedom of Information Law and the Committee's regulations 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, 2d 87 AD 2d 388, appeal dismissed

Under the circumstances, since you have heard nothing from the DEC since the receipt of your request was acknowledged on November 13, it appears that the request has been constructively denied and that you may appeal on that basis. I believe that the person designated to determine appeals at the DEC is Counsel to the Department, Mr. Marc Gerstman.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan C. Baranski
Dr. Paul J. Merges

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5916

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

January 23, 1990

Mr. Walter Hang
[redacted]

The staff of the Committee 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. Hang:

I have received your letter of January 12, which pertains to the response by the Department of Environmental Conservation to your request for the Industrial Chemical Survey (ICS). Although the Department has apparently offered to print out the information, you requested that the contents of the database be reproduced on a magnetic tape. Since the Department denied your request for the data in the form in which you seek it, you questioned the propriety of the response.

In this regard, based upon a review of the denial and discussion with officials at the Department, it is my understanding that the database, as it is maintained by the Department, cannot be reproduced on the kind of storage device that you seek to use. While the determination on appeal indicated that the Department has no obligation under the Freedom of Information Law to create records, nor is it obliged to "develop a program to access this data", I am not sure that the issue necessarily involves the creation of records. Under the circumstances, the issue appears to involve the ability of the Department to transfer the information from its database to the information storage medium that you use. If my understanding of the matter is accurate, that kind of transfer cannot be accomplished without an expenditure of a substantial amount of time and effort. I do not believe that the Department is required to undertake such an effort to comply with the Freedom of Information Law. On the

other hand, if the data could be extracted or reproduced on the storage medium of your preference without engaging in the numerous steps that are required in this instance, I believe that the Department would be required to reproduce the data in the format that you suggested. Again, that does not appear to be feasible in this case.

On a more favorable note, I believe that you will soon receive, on a disk, the contents of the Department's Inactive Hazardous Waste Disposal Sites Registry.

I hope that I 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-5917

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

January 23, 1990

Ms. Carol LaGrasse
[redacted]

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

Dear Ms. LaGrasse:

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

You have requested an opinion concerning rights of access to records maintained by the Department of Environmental Conservation. Specifically, in a letter addressed to Commissioner Jorling, you sought a map that "has somehow delineated the land that the State somehow designated for acquisition on a long-range basis, or which the State considers desirable for acquisition on a long-range basis, or which the State is considering acquiring." In a response to the request by W. A. Ives, Chief of Preserve Protection and Management, it was stated that the Department "has had a long standing policy of not releasing to the public any information relating to potential acquisitions." Mr. Ives wrote that the policy is based upon a contention "that the release of information would lead to widespread speculation and consequent price increases in parcels identified for future acquisition by the Department."

You also asked whether you are entitled to "written policy guidelines" for land acquisition, the names of any such guidelines and the name of the map, and whether you may know that any such records exist.

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. In my view, two of the grounds for denial are likely relevant to your inquiry.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." That provision has been successfully asserted to withhold records pertaining to real estate transactions prior to their consummation. In Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982), the Court of Appeals upheld an agency's denial of access to appraisals sought prior to the consummation of the transactions to which those records related. In that situation, premature disclosure would have enabled the public to know appraised values of the property, thereby potentially precluding the agency from obtaining an optimal price for the properties. In this instance, the disclosure of records identifying properties that the Department seeks to acquire would likely encourage speculation. Similarly, if the location of the properties becomes known, others may offer or perhaps purchase the properties, defeating the Department's capacity to do so. If disclosure would impair the Department's ability to acquire the properties at prices beneficial to the public, based upon Murray, supra, I believe that the map in question could properly be withheld pursuant to section 87(2)(c) of the Freedom of Information Law.

The other ground for denial of likely significance, particularly with respect to "written policy guidelines," 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 could appropriately be asserted [i.e., section 87(2)(c)]. 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.

Policy guidelines developed by the Department concerning the acquisition of real property could be characterized as intra-agency materials. However, I believe that they would be available on the ground that they constitute "final agency policy" pursuant to section 87(2)(g)(iii), except to the extent that disclosure would impair present or imminent contract awards, thereby permitting the Department to withhold the records pursuant to section 87(2)(c). However, unequivocal advice cannot be offered regarding the guidelines, for I am unaware of their contents or whether such records exist.

Lastly, with regard to inquiries concerning the names of records or verification of their existence, I point out that the Freedom of Information Law does not require that agencies respond to questions. The Law pertains to existing records and requires that agencies respond requests for existing records by granting or denying access to such records. In addition, section 89(3) of the Freedom of Information Law states in part that, upon request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." Ordinarily a request for portions of records that identifies the names of the records should in my view be honored. I believe that the names or titles of records would constitute factual information that would generally be available under 87(2)(g)(i). However, as suggested earlier, other grounds for denial may be relevant.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: W.G. Ives

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5918

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

January 24, 1990

Mr. Charles L. Hunt
[redacted]

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

Dear Mr. Hunt:

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

Your initial area of inquiry involves rights of access to a settlement agreement between the Iroquois Central School District and one of its employees. As you may be aware, I expressed my views on the issue in a letter addressed to the District Superintendent, Mr. Lawrence Pereira, a copy of which was sent to you. If you have not received a copy of the letter, please so inform me.

The second area of inquiry involves the sufficiency of the District's rules and regulations adopted under the Freedom of Information law. Having reviewed the rules and regulations, a copy of which is attached to your letter, I offer the following comments.

First, the rules and regulations were adopted in 1974. I point out initially that the original Freedom of Information Law became effective on September 1 of that year. That statute, however, was repealed and replaced with the current Freedom of Information Law, which became effective on January 1, 1978.

Second, section A of the District's rules states in part that "The Superintendent shall develop an index of all documents according to law that are available for public inspection." While that provision might have been substantially consistent with the original version of the Freedom of Information Law, it is inconsistent with the current Law. Relevant to the issue is section 87(3)(c) of the Freedom of Information Law, which 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."

While a "subject matter list" need not identify every record maintained by the District, I believe that it must make reference, by subject matter, to the kinds of records maintained by the District, whether or not the records are accessible to the public.

Third, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural aspects of the Law and the subject matter list. In turn, section 87(1) of the Law requires the governing body of a public corporation, i.e., a board of education in a school district, to adopt regulations consistent with the Law and the Committee's regulations.

From my perspective, the School District's regulations are inadequate in several respects. For example, the Committee's regulations require that the Board of Education designate a "records access officer," a person who has the duty of coordinating and agency's response to requests for records. Similarly, the Board is required to designate a person of body to determine appeals following denials of access to records.

Rather than cataloging the areas in which there may be deficiencies, enclosed are copies of the Committee's regulations and model regulations designed to enable agencies to easily adopt appropriate procedures.

In an effort to enhance compliance with the Freedom of Information Law, copies of this letter, the regulations and the model regulations 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:saw

cc: Lawrence Pereira, Superintendent,
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5919

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

January 24, 1990

Mr. Frederick W. McMillian
#89-B-0901
Attica Correctional Facility
Attica, New York 14011-0149

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

Dear Mr. McMillian:

I have received your letter of January 12, which reached this office on January 19.

You have asked whether you can use the Freedom of Information Law to request records pertaining to yourself from the Division for Youth. In this regard, I offer the following comments.

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

Second, the initial ground for denial appearing in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." Relevant under the circumstances is section 372 of the Social Services Law which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of section 372 states in relevant part that such records:

> "shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination or by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court, or by a judge of the family court when such records are required for the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice."

For purposes of construing section 372, I have been informed by representatives of the Division for Youth that references to the "department" have been construed to mean the Division for Youth. As such, I believe that records that identify persons committed to a facility of the Division for Youth are confidential and cannot be disclosed, except under the conditions described above.

In short, I believe that you may obtain records concerning yourself from the Division for Youth only pursuant to a court order. Further, the Freedom of Information Law would not, in my view, serve to grant rights of access to the records in question.

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-5920

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

January 24, 1990

Mr. Michael B. Gallagher
Gannett Westchester Newspapers
One Gannett Drive
Corporate Park II
White Plains, NY 10604

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

Dear Mr. Gallagher:

I have received your letter of January 18 in which you requested an advisory opinion concerning access to a report prepared for the Village of Briarcliff Manor.

According to your letter, the Village spent approximately $17,000 for the preparation of a report concerning a former police sergeant, Ronald Langer. You added that the report was prepared for the Village by the brother of the Village Attorney. For about two weeks, the investigator "compiled statements, names, incidents, etc., in connection with Langer's actions while on duty, [redacted] village a[redacted]. You wrote that the Village used the report as evidence for the initiation of a disciplinary proceeding, but that on the night of the scheduled hearing, Langer resigned. Langer is no longer employed by the Village, and no criminal charges have been filed as a result of the report. Further, you specified that the person who conducted the investigation and prepared the report was not hired as a consultant.

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. I point out 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 in my view indicates that a single record or report might contain both accessible and deniable information. I believe that the phrase also imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Second, several of the grounds for denial may relate to rights of access to the report. However, the capacity of the Village to assert those grounds is, in my view, limited.

The first basis for withholding records under 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 that has been construed to exempt records from disclosure, under certain circumstances, is section 50-a of the Civil Rights Law. In brief, that statute states that personnel records concerning police officers that are used to "evaluate performance toward continued employment or promotion" are confidential. The subject of the report is no longer a police officer; as such, I do not believe that section 50-a could be asserted as a basis for denial. Further, judicial interpretations of section 50-a indicate that the purpose of that statute is to shield from disclosure sensitive personnel records that could be used in litigation [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26 (1989)], and that those records are subject to rights conferred by the Freedom of Information Law when the records have a remote potential for being used in litigation, as in the case of personnel records sought by a newspaper [see Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986)]. In short, although section 50-a of the Civil Rights Law might have been applicable if Langer remained an employee of the Police Department, due to his resignation and the facts that you presented, section 50-a of the Civil Rights Law is likely irrelevant to rights of access.

Also 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."

It is questionable whether the report could be characterized as having been compiled for law enforcement purposes, for it might have been prepared solely for internal disciplinary purposes. Even if the report was compiled for law enforcement purposes, the authority to withhold under section 87(2)(e) is limited to the circumstances described in subparagraphs (i) through (iv) of that provision. Since the investigation has ended and there is apparently no possibility of either a departmental or criminal proceeding, the only aspect of section 87(2)(e) that might be asserted would involve the provision dealing with the identification of a confidential source. Therefore, if the report was compiled for law enforcement purposes and portions of the report would, if disclosed, identify confidential sources, I believe that those portions of the report could be withheld.

Since you indicated that the report was not prepared by a consultant, a ground for denial that may be asserted to withhold reports prepared by consultants for agencies would not, in my opinion, be applicable. Section 87(2)(g) pertains to inter-agency and intra-agency materials, and it has been held that reports prepared by consultants should be considered as "intra-agency" materials [see Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)]. If the report in question could not be so characterized, I do not believe that section 87(2)(g) would serve as a basis for denial. Even if it could be considered as a consultant's report, section 87(2)(g)(i) would require that portions of the report consisting of statistical or factual information must be disclosed, unless other grounds for denial could be properly asserted.

The remaining ground for denial of relevance 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)(a) of the Freedom of Information Law permits an agency to delete identifying details to protect against unwarranted invasions of personal privacy prior to disclosing records. To the extent that the report identifies witnesses or members of the public who made statements, for example, it is likely that those identifying details could be withheld. However, the extent to which the report could be withheld to protect Langer's privacy would in my opinion be dependent upon the specific content of the report.

The report was prepared concerning a person who at the time of its preparation was a public employee. Further, it pertains to the activities of that employee while he was on duty.

Although subjective judgments must often of necessity be made when questions concerning privacy arise, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

It has been advised that if charges are filed in a disciplinary matter against a public employee and are later dismissed based upon a finding that the charges could not be substantiated, those charges and records relating to them may be withheld as an unwarranted invasion of personal privacy. In this instance, however, there was no such finding; the subject of potential disciplinary action resigned. Further, in situations in which charges have been initiated, but in which there was no final determination resulting in a finding of misconduct, but rather a settlement agreement reached between an employee and an agency, it has been found that the termination of such proceedings could not be equated with a dismissal of charges or an "acquittal" [see e.g., Geneva Printing Co. v. Village of Lyons, supra; Buffalo Evening News v. Board of Education of the Hamburg Central School District, Sup. Ct., Erie Cty., June 12, 1987; Matter of Appeal of Gideon Hirsch, Decision of the Commissioner of Education No. 9583, January 4, 1978]. As such, I do not believe that a blanket denial of the report based upon considerations of privacy would be appropriate.

The report clearly pertains to the manner in which duties were carried out by a person serving as a public employee. As such, the report, insofar as it pertains to that person, is likely relevant to the performance of his official duties, thereby diminishing the authority of the Village to withhold.

Lastly, it is emphasized that I am unfamiliar with the specific content of the report. I have no knowledge concerning its detail, whether it includes conjecture, unsubstantiated allegations, factual descriptions of events or occurrences, hearsay and the like. Those factors and perhaps others are in my view relevant in determining the extent to which disclosure might constitute an unwarranted invasion of personal privacy of Langer's privacy. However, it is reiterated that a denial of the report in its entirety would likely be inappropriate; only those portions that would if disclosed constitute an unwarranted invasion of personal privacy or which if disclosed would identify confidential sources could in my opinion be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5921

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

January 25, 1990

Mr. Roger Gunther
#89-C-227
Wende Correctional Facility
Box 1187
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. Gunther:

I have received your recent letter, which reached this office on January 22.

You asked how you can "obtain a complete copy of [your] inmate file" and whether there is any way to find out whether the F.B.I. has a file pertaining to you.

In this regard, I offer the following comments.

First, as required by section 87(1) of the Freedom of Information Law, the Department of Correctional Services has promulgated regulations involving the procedural implementation of the Law. The regulations indicate that a request for records kept at a correctional facility should be directed to the facility superintendent. A request for records kept at the Department's central offices in Albany may be made to the Deputy Commissioner for Administration.

Second, it is emphasized 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 and identify the records in which you are interested.

Third, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Although the Law provides substantial rights of access, it is unlikely in my opinion that you would have the right to obtain all records pertaining to yourself. Some records might relate to law enforcement investigations; others might include evaluations or opinions that could be withheld under section 87(2)(g) of the Law. Further, I point out that, to the extent that records are available and copies are requested, the Freedom of Information Law generally permits an agency to charge up to twenty-five cents per photocopy.

Lastly, the preceding comments pertain to the New York Freedom of Information Law, which applies to records maintained by entities of state and local government in New York. The F.B.I. is not subject to the Freedom of Information Law, but rather falls within the scope of the federal Freedom of Information Act (5 U.S.C. section 552). Like the New York Freedom of Information Law, the federal Act requires that an applicant reasonably describe records that are requested. I do not believe that a request made to the F.B.I. for records pertaining to you, without more, would be sufficient. Any such request should likely include names, dates, descriptions of events, identification numbers and similar data that would enable officials to locate records.

Enclosed for your review are copies of the Freedom of Information Law and the regulations promulgated by the Department of Correctional Services to which reference was made earlier.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5922

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

January 25, 1990

Mr. Mark Fleisher
Coordinator
Chemung County Records and
Information Department
205 Lake Street
P.O. Box 588
Elmira, NY 14902-0588

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

Dear Mr. Fleisher:

I have received your letter of January 17 in which you raised questions concerning fees that may be assessed under the Freedom of Information Law.

According to your letter, the Sheriff informed you that several law enforcement agencies and the State Department of Motor Vehicles charge fees in excess of twenty-five cents per photocopy. The Sheriff also sought guidance concerning the fee that can be imposed for "photographic prints".

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)]. I point out that the Sheehan decision dealt specifically with fees for accident reports. Consequently, unless an act of the State Legislature authorizes an agency to charge fees inconsistent with the Freedom of Information Law, no more than twenty-five cents per photocopy can be charged.

It is noted, too, that the amendment was not directed at fees charged for accident reports, but rather fees charged for copies of records in general. From my perspective, although the twenty-five cent limitation may pertain to police accident reports, once again, the intent behind the amendment was to establish a uniform maximum charge with respect to fees generally and not with respect to accident reports specifically.

Some of the confusion regarding the issue might be attributed to section 202 of the Vehicle and Traffic Law, which was recently amended. Section 202(3) authorizes a copying fee of $8.00 for accident reports obtained from the Department of Motor Vehicles and one dollar per page for copies of other records. Section 202 also authorizes the Department to collect certain fees for searching for records. However, since those provisions of the Vehicle and Traffic Law pertain to particular records in possession of the Department of Motor Vehicles only, in my opinion, other agencies, such as municipal police or sheriff's departments, cannot unilaterally adopt policy or regulations authorizing fees in excess of twenty-five cents per photocopy without specific statutory authority to do so.

Lastly, section 87(1)(b)(iii) provides that the fee for records that cannot be photocopied, as in the case of duplication of photographs, should be based upon the actual cost of reproduction. As such, the Department's cost of reproducing a photograph may be passed on to an applicant.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5923

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

January 25, 1990

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 January 19, which involves rights of access to records under the Freedom of Information Law.

According to your letter, four members of the Ticonderoga Town Board signed a letter alleging "illegal actions" on the part of another Town official and sent it to the District Attorney. They were later informed by letter that the State Police had been asked to investigate the matter based upon the contents of their letter. As a result of the investigation, you wrote that the official was indicted, pleaded guilty and was sentenced.

You have asked whether the letter initially sent to the District Attorney and the District Attorney's reply are available under the Freedom of Information Law from the Office of the District Attorney.

In this regard, I offer the following comments.

First, the records of an office of a district attorney in my view are subject to rights granted by the Freedom of Information Law, for the Freedom of Information Law pertains to records of an "agency," a term defined in section 86(3) of the Law to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function

> for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based upon the language quoted above, 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., Barrett v. Morgenthau, ___ NY 2d ___, NYLJ, Nov. 20, 1989' Moore v. Santucci, 543 NYS 2d 103, ___AD 2d___ (1989); New York Public Interest Research Group, Inc. v. Grenberg, 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, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 unaware of the content of the initial letter sent to the District Attorney, it appears likely that the letter could be withheld.

As indicated earlier, an office of a district attorney is an "agency", as is a town. Consequently, a communication between town officials and a district attorney would constitute "inter-agency material" subject to section 87(2)(g) of the Freedom of Information Law, which is one of the grounds for denial. 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. Assuming that the letter consists of allegations concerning the conduct of a particular official, I believe that it could be withheld pursuant to section 87(2)(g).

Also of possible 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". Again, since I am unfamiliar with the content of the letter, I cannot provide specific guidance. However, there may be privacy considerations relating to the subject of the letter, as well as the persons who sent it.

Another possible ground for denial is section 87(2)(e). That provision states that an agency may withhold records that:

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

At this juncture, it is unlikely in my view that disclosure would interfere with an investigation or deprive a person of a right to a fair trial. However, the letter might identify a confidential source or contain confidential information relating to a criminal investigation. As such, section 87(2)(e)(iii) might be relevant to rights of access.

Lastly, although the preceding comments pertained to rights of access to the initial letter, I believe that similar considerations would apply to any letter of reply that might have been sent by the District Attorney to Town Board members.

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- 5924

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

January 29, 1990

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 January 22 addressed to the Chair of the Committee and its members. As indicated above, the staff is authorized to respond to inquiries on behalf of the Committee on Open Government.

You wrote that you "have asked the Readers Digest Association, Inc. for copies of all of its records relating to the 'Croton Housing Network, Inc.', in the matter of $20,000 donated by Readers Digest to the non-profit/not-for-profit entity 'Croton Housing Network, Inc.'."

You have requested an "opinion, adjudication & ruling" concerning whether such records are available under the Freedom of Information Law. In this regard, I offer the following comments.

First, although the Committee on Open Government and its staff may offer opinions concerning rights of access to records, neither the Committee nor its staff is empowered to render what might be characterized as an "adjudication" or a "ruling".

Second, as specified in previous correspondence, the Freedom of Information Law is applicable to records of an "agency", 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 upon the foregoing, rights conferred by the Freedom of Information Law pertain generally to records maintained by entities of state and local government in New York.

I do not believe that the Readers Digest Association, Inc. or the Croton Housing Network, Inc. could be characterized as agencies, for they are not governmental entities. If that is so, the Freedom of Information Law would not be applicable to those entities or with respect to the records sought.

I hope that the foregoing serves to enhance your understanding of the scope 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

OML-AO-1709
FOIL-AO-5925

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

January 29, 1990

Ms. Susan D. Rathbun
Executive Director
PRIDE of Ticonderoga
146 Montcalm Street
Ticonderoga, New York 12883

The staff of the Committee on 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. Rathbun:

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

Your inquiry concerns the status of PRIDE of Ticonderoga, Inc. with respect to the Freedom of Information Law and the Open Meetings Law. You wrote that PRIDE, which has been incorporated as a not-for-profit corporation, "is engaged in providing relief to the poor, the distressed and the underprivileged; in promoting the public good; and in improving housing and economic conditions for persons of less than average means." To achieve its goals, "PRIDE works in cooperation and coordination with governmental agencies, community organizations, business and industrial groups, and volunteer citizens."

In this regard, I offer the following comments.

Both the Freedom of Information Law and the Open Meetings Law apply to governmental entities. Specifically, the Freedom of Information Law pertains to agencies records, and section 86(3) of that statute defines that 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 PRIDE. As such, although you may choose to disclose records, you are not required to do so by the Freedom of Information Law.

I point out that the organization may have relationships with agencies that are subject to the Freedom of Information Law. Records pertaining to PRIDE 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 of PRIDE 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

OML-AO-1710
FOIL-AO-5926

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

January 29, 1990

Ms. Gilda B. Namer
School District Clerk
Ticonderoga Central School District
351 Amherst Avenue
Ticonderoga, New York 12883

The staff of the Committee on 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. Namer:

I have received your letter of January 22.

In your capacity as District Clerk for the Ticonderoga Central School District, you asked whether "it [is] appropriate for a Board of Education to go into 'executive session' for the purposes of determing the Superintendent's goals for the school year." In conjunction with that question, "once the goals for the Superintendent are determined," you questioned whether they must be made public.

In this regard, I offer the following comments.

With respect to your first area of inquiry, I point out that 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 a closed or executive session may properly be held. Further, section 105(1) of the Law specifies and limits the subjects that may appropriately be discussed during an executive session.

From my perspective, only one of the grounds for entry into executive session is relevant to the issue, and the nature of the Board's discussion would determine the extent to which an executive session could validly be held. Specifically, section 105(1)(f) of the Open Meetings Law permits a public body to conduct an executive session to discuss:

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

In my opinion, to the extent that the discussion involves the position of superintendent, the duties inherent in that position, and the goals sought to be accomplished by any person who might serve as superintendent, there would be no basis for entry into an executive session. That kind of discussion would not focus upon the particular person who holds the position of superintendent, but rather upon the nature of that position and the goals to be achieved by the incumbent of that position.

On the other hand, if, for example, the discussion includes a review of the performance of the Superintendent, and the discussion of goals involves the correction of deficiencies or areas in which the Superintendent should improve his performance, such a discussion could, in my view, be conducted in an executive session. That kind of discussion would focus upon a "particular person" in conjunction with consideration of how well or poorly that person has carried out his duties.

With respect to disclosure of goals that the Board determines that the Superintendent must achieve, it is assumed that those goals would be reduced to writing. Based upon that assumption, I direct your attention to the Freedom of Information Law.

Like the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 two of the grounds for denial would be relevant to a determination of rights of access to a statement of goals to be carried out by the Superintendent. However, neither would in my opinion serve to justify a denial of access to such a record.

Of relevance 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." Although subjective judgments must often of necessity be made when questions concerning privacy arise, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are

relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 ADF 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. ct., Suffolk Cty., NYLJ, Oct. 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (9186)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

A statement of goals would in my view clearly be relevant to the performance of the duties carried out by a person serving in the position of superintendent. As such, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

The other ground for denial of significance is section 87(2)(g), which enables an agency to withhold records that:

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

A statement of goals could be characterized as "intra-agency" material. However, I believe that it would consist of instructions to staff that affect the public accessible under section 87(2)(g)(ii) or perhaps final agency policy concerning the establishment of goals to be carried out by an employee serving in a particular position that would be available under section 87(2)(g)(iii).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1711
FOIL AO-5927

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

January 29, 1990

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 January 22, as well as the correspondence attached to it.

The materials involve a request for records of the Village of Pulaski, and you wrote that you contacted the Village and was informed that the Village Clerk is the records access officer. In response to a request directed to the Clerk, the Mayor wrote that the records are available for inspection during business hours and that you should make an appointment to inspect and/or copy the records. The records that you requested include:

> "Minutes that reflect the appointment of John K. Wade as provisional Chief of Police of the Village of Pulaski, N.Y.-subsequent provisional appointments as chief, if any. Village Board Minutes that reflect the reason for the departure of the former Chief of Police William Bates. Roster of Village Police Department showing data of appointment-rank held-date of completion of Police Basic School-date of appointment from Civil Service Eligible List."

You have raised questions concerning the propriety of the Mayor's response, whether the records access officer or other official must search for the records and inform you of the number of pages to be copied for the purpose of determining the fee that would be assessed, whether the Village must make the records available by mail and whether the records should be disclosed.

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 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, while an agency may offer to permit an applicant to search for and review its records in person, I believe that an agency is generally required to search for and retrieve the records sought.

Second, there is nothing in the Freedom of Information Law or the Committee's regulations that specifically deals with requests made by mail. However, due to the size of the state, the inability of some people to physically travel to locations where records are kept, and the intent of the Law, I believe that it is implicit that agencies must accept and respond to requests made by mail. However, in addition to the fee for photocopying, an agency could in my view also charge for the cost of postage.

Lastly, with respect to rights of access to the information sought, it is noted initially that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that, unless contrary direction is specified, an agency is not required to create or prepare a record in order to satisfy a request. In addition, the same provision 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 records. While the Village might maintain records containing the information sought and have the capacity to locate those records, I am unaware of whether those conditions are present.

Two aspects of your request involve minutes of meetings of the Village Board of Trustees. In both instances, I believe that the subject matter could have been considered during executive sessions [see Open Meetings Law, section 105(1)(f)]. Although the Board might have taken action in public to make an appointment or accept a resignation, action might nonetheless have occurred during executive sessions. In either case, it appears that minutes should have been prepared pursuant to section 106 of the Open Meetings Law. That section 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."

In my opinion, minutes indicating the appointment of an individual to a particular position would clearly be available under the Freedom of Information Law. Similarly, minutes reflective of the acceptance of a resignation or perhaps the termination of a person's employment would also be accessible. I know of no requirement, however, that minutes must include the reasons for an employee's "departure" from service. Further, if the reasons for one's departure appear in minutes, I believe that those portions of the minutes would be available or perhaps deniable, depending upon their contents. For example, if the reason involved a medical condition, it is likely that disclosure of the reason would constitute "an unwarranted invasion of personal privacy" and could be withheld on that basis [see Freedom of Information Law, section 87(2)(b)].

The remaining records sought would in my opinion be available under the Freedom of Information Law if they exist and can be located. It is noted that one of the few instances in the Freedom of Information Law in which a records must be prepared involves payroll information. 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". If no "roster" exists containing the information sought, the payroll record described above would identify all

Village employees, including police officers, by name and title. To the extent that records exist indicating dates of completion of training or appointments from eligible lists, such records should in my opinion be disclosed, for none of the grounds for denial appearing in the Freedom of Information Law could be asserted to withhold those records. Nevertheless, it is reiterated that I am unaware of whether the Village maintains the records in the manner in which you requested 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Daniel A. Briggs, Mayor
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1712
FOIL-AO- 5928

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

January 30, 1990

Mr. Joseph Maraio
[redacted]

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

Dear Mr. Maraio:

I have received your letter of January 18, as well as the materials attached to it.

According to the correspondence, on December 7, you submitted a request to Paula Zorros, Executive Assistant at Community School Board #18, for a copy of the Board's minutes of a meeting held on October 3 pertaining to a vote on a proposed resolution to withdraw charges initiated against you pursuant to section 3020-a of the Education Law earlier in the year. Having received no response to the request, you appealed to the Chancellor of the Board of Education on December 26. As of the date of your letter to this office, you had received no response to either the request or the appeal.

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)].

Second, the Open Meetings Law provides guidance concerning the preparation of minutes of meetings, their contents and the time within which they must be prepared and made available. With respect to minutes of executive sessions, subdivision (2) of section 106 of the Open Meetings Law states that:

> "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."

Further, subdivision (3) provides 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."

Based upon the foregoing, if a vote was taken to withdraw the charges during an executive session, I believe that minutes reflective of that action should have been prepared within one week of the executive session during which the vote was taken. In addition, the minutes, insofar as they include the information that you requested, would be available to the extent required 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.

Under the circumstances, it appears that the information sought could likely be withheld from the public on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)]. Nevertheless, as the subject of the information, I believe that it should be disclosed to you. It is noted that, unless a different ground for denial applies, the Law states that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him".

In an effort to enhance compliance with law, copies of this opinion will be sent to Ms. Zorros and Chancellor Fernandez.

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: Hon. Joseph Fernandez, Chancellor
Paula Zorros, Executive Assistant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5929

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

January 30, 1990

Mr. Michael J. Dowden
Brookville Taxpayers Association, Inc.
[redacted]

The staff of the Committee 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. Dowden:

As you are aware, I have received your letter January 8, as well as a variety of correspondence related to it.

Your inquiry concerns a request for copies of records maintained by the Village of Brookville. Although copies of some of the records were made available, the Village denied your request for a copy of a map of a proposed sewer pipe project. In response to your appeal, the Village Attorney, Robert D. Kops, denied the appeal, because "The map as filed is preliminary in nature and may well constitute an inter-agency communication..." He added that the "preliminary map is 24" by 36" in size" and that the Village has "no equipment to produce same." Nevertheless, Mr. Kops wrote that "you may review and examine the preliminary map and make any notes from same."

In this regard, I offer the following comments.

First, in my view, Mr. Kops' response contains an inconsistency. If a record is made available for inspection, I believe that an agency is obliged to make a copy upon payment of the appropriate fee [see Freedom of Information Law, section 89(3)]. Under the circumstances, since you were offered the opportunity to inspect the map an take notes concerning its contents, the Village is, in my view, required to prepare a copy if you are willing to pay the requisite fee for copying.

Second, while the Village may not have the equipment to reproduce a map in its entirety on a single sheet, you expressed a willingness to make separate photocopies on a conventional photocopier and thereafter piece together the copies in order to prepare the equivalent of a 24 by 36 inch sheet. If that is so, again, I believe that the Village must prepare photocopies in accordance with the foregoing.

Third, assuming that the map was prepared by the Village, it could be characterized as intra-agency material as Mr. Kops suggested. However, the provision in the Freedom of Information Law pertaining to intra-agency materials indicates that the contents of those materials determine the extent to which they must be disclosed. 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 I am unfamiliar with the map, I would conjecture that some of its features involve information that is factual in nature and therefore available for inspection and copying pursuant to section 87(2)(g)(i).

In an effort to assist you, copies of this opinion will be sent to the Village Attorney and the Village Clerk.

Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Robert D. Kops, Village Attorney
Jean G. Pailet, Clerk/Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5930

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

January 31, 1990

Ms. Rosemary Konatich
[redacted]

Dear Ms. Konatich:

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

According to the correspondence, on August 22, on an application form apparently prepared by the Town of North Hempstead, a request was made for data, memoranda and reports "regarding gas migration on or near Seaview Industrial Park." In response to the request, Robert J. Vrana, Executive Director of the Town of North Hempstead Solid Waste Management Authority, wrote that the records sought did not exist in the agency's files. He added that "All sampling results were (and have been) transmitted to the Town verbally in the interest of expediting the identification of any potential problem." Nevertheless, in a letter addressed to the regional director of the Department of Environmental Conservation, you wrote that a member of your organization, the Citizens Advisory Committee on the Port Washington Landfill, reviewed records produced following a different request and "was astonished to come across the enclosed data and related material from the Seaview Industrial Park gas monitoring program." You added that "Not only does written data exist, but transmission memos from SCS consultants to Bill D'Antonio of Public Works to Bert Cunningham, Assistant to the Supervisor, clearly indicate that Town officials were well aware that such data had been collected." You also wrote that "The newly discovered data documents the presence of high levels of gas in and around many buildings in the industrial park dating back to early 1989."

Based upon the foregoing, you asked that the Committee on Open Government "conduct an investigation" concerning the matter.

In this regard, the Committee has neither the authority nor the resources to conduct what might be characterized as an investigation. Nevertheless, 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 on the foregoing, if the Town maintained any of the documentation that you sought at the time the request was made, those documents would, in my opinion, have constituted "records" subjected to rights of access conferred 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.

From my perspective, if the records sought had been maintained by the Town when your request was made, I believe that they would have been accessible under the Law in great measure, if not in their entirety. Although one of the grounds for denial would likely have been relevant, that provision, due to its structure, often requires significant 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.

Records prepared by Town officials could be characterized as "intra-agency materials." Similarly, it has been held that records prepared by consultants retained by agencies are considered "intra-agency materials" [see Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)]. However, to the extent that such records consist of "statistical or factual tabulations or data," I believe that they would be available under section 87(2)(g)(i), and should have been disclosed if they were maintained by the Town at the time of your request.

Lastly, for future reference, I point out that a new provision of the Freedom of Information Law became effective on November 1. The amendment to the Law 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."

Similar language was enacted as a new section 240.65 of the Penal Law.

In my opinion, the new provisions would apply in situations in which a request for records has been made, and in which a government official denies the existence of the records, thereby concealing the records, or in which a government official destroys records in order to prevent disclosure of requested 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:saw

cc: Robert J. Vrana, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5931

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

January 31, 1990

Mr. Andre Cates
#86-B-1614
35-31 Gaines Basin Road
Albion, New York 14411

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

Dear Mr. Cates:

I have received your letter of January 22.

In your capacity as an inmate, you have raised questions concerning your ability to obtain records concerning your de- [redacted] his arrest. The records in which you are interested include a medical examiner's report, an arrest report, a "911 printout" and the name and address of the arresting agency.

In this regard, I offer the following comments.

First, I do not believe that your status as an inmate affects your rights under the Freedom of Information Law. If records are accessible under the Freedom of Information Law, I believe that they should be made equally available to any person, without regard to one's status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976); and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Second, I believe that autopsy or medical examiner's reports are generally confidential with respect to the public. However, if you are the next of kin of the deceased, such a report would likely be disclosable to you.

Third, with respect to the arrest report and 911 printout, I am unfamiliar with the content of those records and cannot, therefore, offer specific guidance. However, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. The following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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.

The final aspect of the materials in which you are interested involves the name and address of the arresting agency. A record or portion of a record containing that information would in my view be available, for none of the grounds for denial would serve to permit a denial of that information.

To request records from the New York City Police Department, it is suggested that you write to:

Sgt. John G. Sultana, Records Access Officer
New York City Police Department
1 Police Plaza, Room 10
New York, New York 10038

To seek the medical examiner's report, a request may be directed to:

Office of the Chief Medical Examiner
Director of Public Affairs
520 First Avenue
New York, New York 10016

Again, it is suggested that such a request include reference to your relationship to the deceased.

Enclosed is a copy of the Freedom of Information Law for your review.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw
Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5932

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

January 31, 1990

Mrs. Margery F. Conlon
City Clerk
City of Binghamton
38 Hawley Street
Binghamton, NY 13901

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

Dear Mrs. Conlon:

I have received your letter of January 23 in which you raised a series of questions concerning the Freedom of Information Law.

Your initial area of inquiry concerns a situation in which a citizen apparently requested 64 "FOI forms" used to apply for records. You asked whether you are obliged to provide that many forms. In addition, you questioned whether requests are "required to be put on FOI forms" and, in the case of a request for a large number of records, whether an agency may charge for postage. Finally, when a citizen requests records and you gather or reproduce them in response to the request, but the citizen "refuses to accept same", you asked whether such action constitutes "harassment".

In this regard, I offer the following comments.

First, although section 89(3) of the Freedom of Information Law permits an agency to require that a request be made in writing, there is nothing in the 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.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use a form 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, nothing in the Freedom of Information Law or the Committee's regulations specifically deals with requests made by mail. However, due to the size of the state, the inability of some people to physically travel to locations where records are kept, and the intent of the Law, I believe that it is implicit that agencies must accept and respond to requests made by mail. However, in addition to the fee for photocopying, an agency could in my view also charge for the cost of postage.

Tbird, with respect to the request for 64 FOI forms, assuming that the request involves the duplication or reproduction of those forms, I point out that section 87(1)(b)(iii) of the Freedom of Information Law generally enables an agency to charge up to twenty-five cents per photocopy when records are duplicated. At that cost, it is likely that a citizen could obtain a single form and reproduce it more cheaply elsewhere. Also relevant in my view is tbe practice or policy established by your office. If the forms are ordinarily made available free of charge to the public, the authority to assess a fee for multiple copies would, in my opinion, be questionable.

Lastly, if copies have been made in response to a request, but the citizen has refused to accept them, it is suggested that copies sought by means of ensuing requests not be made available until the appropriate fees have been paid. With regard to the matter of harassment, I am unaware of any judicial decisions rendered under the Freedom of Information Law that deal with the issue. I would conjecture that any determinations on the subject would involve the review of facts on a case by case 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5933

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

February 1, 1990

Mr. Michael James
85-A-1212 D-1-29
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. James:

I have received your letter of January 10, which reached this office today.

You have raised a variety of issues relating to your incarceration. However, only one appears to involve the jurisdiction of this office. For future reference, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law; this office has neither the authority nor the expertise to advise with respect to the numerous other issues raised in your letter.

As I understand the matter as it relates to access to records, the inmate records clerk at your facility has refused to permit you "to review records, final opinions made in the adjudication of [your] parole". Without greater familiarity with your request or the content of the records sought, I cannot offer specific guidance. Nevertheless, I offer the following general comments.

First, 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 superintendent or his designee.

Second, 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 and identify the records.

Third, if a request for records is denied, an applicant may appeal the denial in accordance with section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

For your information, the person designated by the Department of Correctional Services to determine appeals 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.

To the extent that you are seeking a final determination made in conjunction with an adjudication, I believe that such a record would likely be available under section 87(2)(g)(iii) of the Freedom of Information Law, which generally requires that final agency determinations be disclosed.

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-3934

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

February 1, 1990

Mr. John J. LaGumina
Hitsman, Hoffman & O'Reilly
570 Taxter Road
Elmsford, NY 10523

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

Dear Mr. LaGumina:

I have received your letter of January 22, as well as a variety of correspondence related to it.

You have requested from the Department of Audit and Control "a list of physicians used by the Retirement System". The request was denied in response to your initial request and the ensuing appeal. Since you specified in correspondence with the agency that the request was not made "for any commercial or fund raising purpose", it is your view that the denials were "groundless". The denial of the request was based upon section 89(2)(b)(iii) of the Freedom of Information Law, and the determination of your appeal indicates that the "purpose for which the list is sought [has not been] stated...".

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

By way of background, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute " an unwarranted invasion of personal privacy". Further, section 89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "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)].

The provision quoted above represents what might be viewed as an internal conflict in the Law. As a general matter, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records [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)]. However, due to the language of section 89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought. In that decision, it was stated that:

> "The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents' denials of petitioner's request

> for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgment for that of the respondents" (id.).

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses.

Although your request indicated that you do not intend to use the list for commercial or fund-raising purposes, you did not specify the intended use of the list. Based upon the case law cited earlier, it is suggested that you resubmit the request, indicating the intended use of the list and offering to certify that the list will not be used for commercial or fund-raising purposes.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul V. Morgan
Herbert M. Friedman
Karl LaPointe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5935

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

February 1, 1990

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.

Dear Ms. Braham:

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

You have asked that I "intervene" on your behalf with respect to a request for records directed to Lola Locker, Special Assistant to the President of Queens College.

By way of background, enclosed with your letter is a copy of correspondence addressed to you on May 4, 1988, by Ms. Locker. She advised that:

> "Queens College has records relating to Admissions, Bursar, Vice Presidents Offices, Deans of the Faculty Offices, Dean of Students, President's Office, Provost's Office, all academic offices, Advisement, Academic Senate and its Committees, Alumni, Career Development, Business Office, College Relations, External Relations, Computer Center, Financial Aid, Health Services, Library, Registrar, Special Events, Personnel, Capital Construction and general correspondence."

The other enclosure is a recent request made to Ms. Locker for records maintained by Queens College to which she referred in her letter of May 4, 1988, "pertaining to the Academic Senate." You also asked that any fee for copies of the records be waived due to your status as a poor person.

In this regard, I offer the following comments.

First, it is noted that 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 "intervene" by compelling an agency to grant or deny access to records.

Second, 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. From my perspective, it is unlikely that your request meets the requirement of reasonably describing the records in which you are interested. While I am unfamiliar with the nature or volume of records maintained by Queens College concerning the Academic Senate, it is possible that the records involve a significant period of years and a variety of topical areas. The Academic Senate likely has conducted meetings, made recommendations, prepared reports, reviewed curricula, dealt with employment issues and has engaged a variety of activities that have been memorialized in records. In short, due to the absence of any detail contained in your request, it may be so broad that it does not reasonably describe the records that you seek.

Third, as indicated in previous correspondence, although you might have been characterized as a poor person in conjunction with your status as a litigant, nothing in the Freedom of Information Law pertains specifically to the waiver of fees that may be imposed under that statute.

I hope that I have been of assistance and that the foregoing comments serve to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Lola Locker, Special Assistant to the President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5936

162 WASHINGTON AVENUE, ALBANY, NEW YORK 122
(518) 474-2518, 27

February 1, 1990

Mr. Thomas Linz
#79-A-2875 S.H.U. B-1-36
Box 51
Comstock, New York 12821-0051

Dear Mr. Linz:

I have received your letter of January 26 in which you requested materials concerning access to records and assistance regarding a problem that you have encountered.

As I understand the matter, based upon a recent federal court decision, you are seeking permission "to marry, visit, and correspond with [your] fiancee" in accordance with "Directive # 4201." You indicated that you have made inquiries concerning the matter, apparently witbout receiving responses, from the State Division of Probation and the New York City Department of Probation.

In this regard, I offer the following comments.

First, if you are seeking permission to have contact with your fiancee, I do not believe that the Freedom of Information Law is relevant. The Freedom of Information Law pertains to requests for agency records; it does not deal with requests for permission to engage in the kinds of activities that you described.

Second, if you are seeking records concerning the matter, a request should be directed to an agency's designated records access officer. The records access officer has the duty of co-ordinating an agency's response to requests for records sought under the Freedom of Information Law.

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 and identify 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. Assuming that you are interested in obtaining a copy of the directive to which you referred, it is likely that such a record must be disclosed on the ground that it constitutes either an instruction to staff that affects the public accessible under 87(2)(g)(ii) of the Freedom of Information Law or as final agency policy accessible under section 87(2)(g)(iii) of the Law. However, without knowledge of the nature of records in which you may be interested, clear guidance concerning rights of access cannot be offered.

To request records from the agencies that you identified, it is suggested that you write to the records access officer of the New York City Department of Probation at 115 Leonard Street, New York, New York 10013, and to Mr. Jack Barry, the records access officer at the New York State Division of Probation and Correctional Alternatives, 60 South Pearl Street, Albany, New York 12207.

Enclosed for your review 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 assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Directive

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5937

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

February 2, 1990

Mr. Anthony Lewis
80-A-3742
H.U. 22 - Bed #12
Box 1245
Beacon, NY 12508-0901

Dear Mr. Lewis:

I have received your letter of January 29.

You have requested "some information on finding the names of some of the district attorneys in the Legal Aid Society Prisoners' Rights project...and the one in the court house in Poughkeepsie...". You also asked for the address of "the News Company (Eye Witness News) or any other."

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 maintain records generally, and we have no list of employees of offices of district attorneys or a legal aid society. Further, there are many television news programs that are known as "Eyewitness News". As such, I am unable to provide the information you seek concerning news companies.

Second, for future reference, 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 office of a district attorney is in my opinion clearly an "agency", for it is a governmental entity performing a governmental function. I do not believe, however, that a private or non-profit entity, such as a legal aid society, would be an agency, for it would not be a governmental entity.

Third, if you are seeking names of persons employed by an office of a district attorney, 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..."

A request for the kind of record described above could be made to the records access officer of the agency that maintains the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests for records.

Lastly, 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 and identify 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-5938

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

February 5, 1990

Mr. Charles Leahy
[redacted]

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

Dear Mr. Leahy:

I have received your package of correspondence which reached this office on January 29.

As I understand the situation, you have attempted without success to obtain medical records that were used in making a determination [redacted] as a New York City police officer. You have requested assistance in gaining access to records and asked whether the Committee on Open Government can "compel" the Police Department to disclose the records to you.

In this regard, I offer the following comments.

First, the Committee 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, I am unfamiliar with the facts that precipitated your inquiry or the contents of the records in which you are interested. Nevertheless, 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 you referred to opinions used in making a determination, it appears that one of the grounds for denial may be particularly relevant to rights of access. Section 87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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 the Police Department or other entities of City government would in my view fall within the scope of section 87(2)(g). Factual information, such as laboratory test results, for example, would in my view be available; opinions might, however, be withheld under the cited provision.

Third, other provisions of law may be relevant. As you indicated in one of the items of correspondence, section 18 of the Public Health Law generally requires that medical records be disclosed to a patient by a treating physician or hospital. It is unclear on the basis of your correspondence whether that provision would apply with respect to the records in which you are interested.

Also of possible relevance is section 50-a of the Civil Rights Law. In brief, section 50-a provides that personnel records pertaining to police officers that are "used to evaluate performance toward continued employment or promotion," are confidential "without the express written consent of such police officer...except as may be mandated by lawful court order." While I know of no judicial decisions dealing with the right of a po-

lice officer to review personnel records subject to section 50-a, it might be contended that if a police officer has the right to waive confidentiality, he must have the right to inspect personnel records pertaining to himself.

It is noted that your latest letter addressed to the Police Department was sent to the "Freedom of Information Section, Room 152-A." While that address may be appropriate, I would like to inform you that the Department has designated Sgt. John A. Sultana as its 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. Sgt. Sultana's office is located at room 110c at 1 Police Plaza, and it might be worthwhile to write to him or contact him at 374-6902.

Lastly, since your correspondence suggests that you have been seeking records for months, 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)].

It is noted, too, that the regulations adopted by the Office of the Mayor and which are applicable to the Police Department are consistent with those promulgated by the Committee.

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-5939

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

February 5, 1990

Ms. Diana Leicht
[redacted]

The staff of the Committee 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. Leicht:

I have received your letter of January 24, as well as the correspondence attached to it.

According to the materials, you requested "daily operating reports" prepared for the Town of Newburgh and kept at its water filtration plant. In response to the request, you were informed by the Town Clerk that:

> "The Town has contracted with Metcalf & Eddy Services, Inc., an independent contractor, for professional services for tbe operation and maintenance of the Chadwick Lake Filtration Plant. Metcalf & Eddy is responsible for the preparation and submission of daily reports to the appropriate agencies. It is not subject to Freedom of Information requests."

You added that it ia your understanding that the response to your request was based on recommendations made by David Rider, the Town Attorney. Having contacted the Town Clerk in order to obtain additional information, it was confirmed that the response was based on advice given by Mr. Rider. She added that there may be a reluctance to disclose the reports due to litigation that you have initiated against the Town in small claims court.

You have sought an advisory opinion concerning the propriety of the denial. In this regard, I offer the following comments.

First, as I understand the facts, the Town of Newburgh maintains a water filtration plant that is operated on its behalf by a contractor. As such, a function that would ordinarily be carried out by the Town and its employees is being performed for the Town by the contractor. If my analysis is accurate, I believe that the documentation in which you are interested is prepared by the contractor for the Town, and that, therefore, it is subject to rights of access conferred by the Freedom of Information Law.

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."

Under the circumstances, even though the materials you seek might not be maintained at the Town Hall by Town employees, they apparently consist of information that has been kept, held, filed or produced for an agency, the Town. If that is so, I believe that they are "records" that fall within the scope of the Freedom of Information Law.

Second, while the records in question might not be in her physical custody, I believe that they are in the legal custody of the Town Clerk. Section 30(1) of the Town Law states in relevant part that the town clerk "shall have the custody of all the records, books and papers of the Town." Moreover, as the Town's "Freedom of Information Officer," I believe that the Town Clerk is authorized to obtain and review records in her legal custody in order to determine rights of access to the records sought.

Third, with respect to rights of access, 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 the records appear to have been prepared for the Town, one of the grounds for denial is, in my view, particularly significant. That provision, however, due to its structure, often requires disclosure. Specifically, section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

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

Although the records sought could likely be characterized as intra-agency materials, those aspects of the records in which you are interested would consist of "statistical or factual tabulations or data" that should in my opinion be disclosed pursuant to section 87(2)(g)(i) of the Freedom of Information Law.

Lastly, I do not believe that your rights under the Freedom of Information Law as a member of the public are altered by your status as a litigant or potential litigant. As stated by the Court of Appeals, the state's higheat court: "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, which is a disclosure device that may be used by litigants. Perhaps the most commonly used discovery mechanism is Article 31 of the Civil Practice Law and Rules (CPLR). 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 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public rights 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 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.'" [id. at 80].

Based upon the foregoing, the pendency of litigation would not affect your rights as a member of the public under the Freedom of Information Law, notwithstanding your status as a litigant.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the Town Clerk and Town Attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Doris M. Greene, Town Clerk
David Rider, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5940

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

February 5, 1990

Mr. Steve Coffman
Finger Lakes Times
218 Genesee Street
P.O. Box 393
Geneva, New York 14456

The staff of the Committee 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. Coffman:

As you are aware, I have received several items of correspondence concerning a denial of a request for records maintained by the City of Geneva.

According to the materials, Donald Hadley, Managing Editor of the Finger Lakes Times, requested "the lakefront soil test results" from the City of Geneva on January 25. The City's records access officer denied the request, stating that "these are preliminary drafts and not in final form, they are inter or intra-agency memorandums that are not disclosable under the Freedom of Information Law." The denial of the request was appealed to the City Manager, who upheld the denial on the same grounds offered in the response to the initial request. He added that "the draft reports we have received form our Engineers have only been presented in draft form for our City Staff to review. The purpose of the review is to determine the accuracy of the information and any corrections which need to be made."

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 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."

In view of the language quoted above, I believe that drafts, even though they may be preliminary, constitute "records" 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. 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 in 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, as indicated in the responses to your requests, the only ground for denial of apparent 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. 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 correction 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 AD 2d 176, 181, mot for lv to app den 48 NY 2d 706). Respondents erroneously clain 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)].

It is unclear whether the records sought were prepared by City employees or consultants retained by the City. In either case, I believe that the result would be the same in terms of rights of access. The Court of Appeals has determined that records or reports prepared for an agency by consultants may be characterized as "intra-agency" materials that fall within the scope of section 87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)]. However, due to the language of that provision and in a manner consistent with decisions cited previously, the Court in Xerox 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, in similar situations, in order to assist agencies in avoiding public reliance upon records that must be disclosed but which are preliminary and subject to review, it has been suggested that such records be marked or stamped "draft" or "preliminary" when they are disclosed. By so doing, an agency may comply with the requirements of the Freedom of Information Law while concurrently informing the public that the records are not final and are subject to change.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to City 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: Phyllis Anastasi, Records Access Officer
Steven R. Aynes, City Manager
Frederick W. Warder, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5941

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

February 6, 1990

Mr. Dannie Martin
#85-A-5787
P.O. Box 51
Comstock, New York 12821-0051

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

Dear Mr. Martin:

I have received your letter of January 31 in which you raised a question concerning access to records.

According to your letter, you requested records "pertaining to a cooperation agreement between Herman Scott, the District Attorney's office and the Police Department." Both the request and your appeal were denied. You have asked whether the District Attorney has the authority to withhold records under the Freedom of Information Law "where those records pertain to the subject matter of a prosecution witness' testimony at a defendant's trial."

In this regard, I offer the following comments.

First, the records of an office of a district attorney in my view are subject to rights granted by the Freedom of Information Law, for the Freedom of Information Law pertains to records of an "agency," a term defined in section 86(3) of the Law to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function

> for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based upon the language quoted above, 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 dfistrict 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., Barrett v. Morgenthau, ___ NY 2d ___, NYLJ, Nov. 20, 1989' Moore v. Santucci, 543 NYS 2d 103, ___AD 2d___ (1989); New York Public Interest Research Group, Inc. v. Grenberg, 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, 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 am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 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.

Records prepared by employees of the Police Department or the office of a district attorney, or records transmitted between those agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

I hope 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-5942

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

February 6, 1990

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.

Dear Ms. Braham:

I have received your letter of January 29, in which you asked that I "intercede" on your behalf with respect to several requests for records for which you have received no reply.

The first involves a request for a subject matter list from the State University of New York Health Science Center in Brooklyn. The request was apparently made on October 28, 1988. In a response to the request prepared by Patricia Penman, the records access officer, it was stated that "The subject matter listing that you requested is currently under development." Ms. Penman added that "a copy of that document will be sent to you when it is finalized."

In this regard, the record that you requested represents one of the few instances in which the Freedom of Information Law requires that an agency prepare and maintain a record. Specifically, section 87(3) states in relevant part that:

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

It is noted that provisions concerning the maintenance of a subject matter list have existed since the Freedom of Information Law was enacted in 1974.

In an effort to enhance compliance with the Freedom of Information Law and to intercede on your behalf, a copy of this communication will be forwarded to Ms. Penman.

Two of the requests were directed to the records access officer of the Equal Employment Opportunity Commission and that agency's district director, both of whom are located at 90 Church Street in New York City. The remaining request was made to the Counsel to the Commission in Washington.

In my view, none of the three requests described in the preceding paragraph fall within the scope of the New York Freedom of Information Law. That statute is applicable to agency records, and 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 is generally applicable to records maintained by entities of state and local government in New York; it does not apply to records of federal agencies.

Although the requests were made to the Commission's records access officer and district director in New York City, the Equal Employment Opportunity Commission is a federal agency. Its New York City address is that of a regional office and is listed in the Manhattan telephone directory under "United States Government Offices." The Commission's main office is located in Washington, DC. Since the Equal Employment Opportunity Commission is a federal agency, its records are not in my opinion subject to the New York Freedom of Information Law. Therefore, your inquiry, insofar as it pertains to requests made to either the regional or the main offices of the Commission, involves a matter beyond the jurisdiction of this office.

I regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Patricia Penman, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5943

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

February 6, 1990

Ms. Patricia Carroll
[redacted]

The staff of the Committee on 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. Carroll:

I have received your letter of January 25, as well as a variety of materials related to it.

By way of background, early in 1987, it was reported that an investigation has been initiated concerning the alleged misappropriation of funds by two employees of the Bayport-Blue Point School District. The District's auditors, Horwitz and Horwitz, were directed to perform a "re-audit" of the School District's finances, and its findings were forwarded to the Suffolk County District Attorney, the Superintendent, Dr. George Reilly, and the Board of Education. Upon completion of the review by the auditors, the President of the Board of Education, Mary Weber, issued a statement on January 13, 1987, in wbich she indicated that:

> "At the request of the District Attorney, this information shall remain confidential to allow law enforcement officials to study it and to determine an appropriate course of action. For this reason we continue to be reserved in our discussion of the issue. It is our intention to share information with the public at the earliest appropriate time."

The two employees under investigation were indicted on May 28, 1987. Based upon news articles that you forwarded, although it is clear that one of the employees pleaded guilty, it appears that both did so, for the articles state that both appeared in court and were given five years probation and ordered to make restitution.

You wrote that residents of the District have been seeking information concerning the events described above for two years without success. Most recently, you requested records pertaining to the audit conducted by Horwitz and Horwitz. In response, you were informed that the documentation:

> "constitutes intra-agency documents produced for litigation, the release of which can constitute an invasion of privacy. They are privileged and the school district is unable to release them to you."

You appealed the denial on January 6. However, as of the date of your letter to this office, no determination of the appeal had been rendered.

You requested an advisory opinion 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 upon a presumption of access. Stated differently, all records 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 grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report, for example, might contain both accessible and deniable information. That phrase in my view imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Upon completion of such a review, I believe that an agency may delete those portions of records that fall within the grounds for denial, and that it must disclose the remainder.

In my opinion, four of the grounds for denial may be relevant to a determination of rights of access to the records sought. However, the extent to which those grounds could appropriately be asserted is questionable.

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 section 3101(d) of the Civil Practice Law and Rules, which involves material prepared for or in anticipation of litigation. If records are prepared solely for litigation, I believe that they are exempted from disclosure. However, it has been held that when records are prepared for multiple purposes, one of which includes possible eventual use in litigation, such records are not exempted from disclosure under section 3101(d), but rather are subject to rights conferred by the Freedom of Information Law [see Westchester-Rockland Newspapers v. Mosczydlowski, 51 AD 2d 234 (1977)]. The materials attached to your letter suggest that the records in which you are interested, such as the "re-audit" prepared by the District's auditors, were indeed prepared for multiple purposes. If my analysis is accurate, I do not believe that the records could be characterized as "privileged" or that they would be exempted from disclosure by statute.

As indicated earlier, the denial was based in part upon a contention that disclosure would constitute "an invasion of privacy." While that may be so, 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" (emphasis added). In some instances, depending upon the nature of personally identifiable information and the effect of its release, disclosure might constitute a "permissible" invasion of privacy. In short, not every disclosure of a record containing personally identifiable information would constitute an unwarranted invasion of personal privacy. Further, section 89(2)(a) of the Freedom of Information Law permits an agency to delete identifying details to protect against an unwarranted invasion of personal privacy prior to disclosing records.

In my view, the extent to which the records sought could be withheld due to considerations of privacy would be dependent upon their specific contents. However, insofar as they pertain to individuals, the records appear to relate to the activities of those individuals when they served as public employees.

Although subjective judgments must often of necessity be made when questions concerning privacy arise, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general

rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372, NYS 2d 905 (1975); Gannett Co,. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct. Nassau Cty., NYLJ, Nov. 22, 1977].

It has been advised that if charges are filed in a disciplinary matter against a public employee and are later dismissed, based upon a finding that the charges could not be substantiated, the charges and records relating to them may be withheld as an unwarranted invasion of personal privacy. In this instance, however, there was no disciplinary proceeding. Rather, there were apparently judicial proceedings that resulted in either a plea or finding of guilt. Further, the individuals involved left the employ of the District before any internal or other discipline related proceedings were initiated by the District.

Without knowledge of the contents of records sought, I cannot advise with certainty as to the extent to which disclosure would result in an unwarranted invasion of personal privacy. Nevertheless, it appears that the capacity to withhold based upon privacy considerations is diminished, for the records appear to be relevant to the performance of duties of persons serving as public employees, and because two former employees have been convicted through public judicial proceedings. As such, their identities and various details regarding their activities have been disclosed. Moreover, as indicated earlier, identifying details could be deleted from records that are otherwise available, including, perhaps, identifying details concerning District employees who were not the subjects of the review.

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

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

> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The materials attached to your letter indicate that the auditors' report was made available to the District Attorney. However, it is unclear whether the report could be characterized as having been "compiled for law enforcement purposes." A finding of discrepancies in an agency s finances or purchasing practices might routinely involve the engagement of an auditor to determine the reason for such problems, and that may have been so in this case. Further, financial records concerning purchases and expenditures by the District are prepared and kept in the ordinary course of business, and I do not believe that those records could be viewed as having been compiled for law enforcement purposes. If the records in question could not be so characterized, section 87(2)(e) would not serve as a basis for denial.

Even if some of the records were compiled for law enforcement purposes, it is questionable whether disclosure would, at this juncture, result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e). Under the circumstances, disclosure would not interfere with an investigation, for the investigation has ended. Similarly, since the result of the investigation has been made public (i.e., convictions), disclosure would not deprive a person or persons of the right to a fair trial. To the extent that the records would, if disclosed, identify confidential sources or similar information, those portions might justifiably be withheld under section 87(2)(e)(iii). Section 87(2)(e)(iv) appears to inapplicable, for the records prepared by the District's auditors could not likely be characterized as "criminal" investigative techniques or procedures. In sum, the authority to assert section 87(2)(e) appears to be minimal.

The remaining ground for denial of relevance is section 87(2)(g). Although that provision constitutes a basis for withholding records, 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, 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.

If the material prepared by the auditors constitutes an "external audit," it would be available under section 87(2)(g)(iv), except to the extent that a different ground for denial could appropriately be asserted (i.e., section 87(2)(b) con- cerning privacy). It is noted that section 87(2)(g)(iv) was added to the Freedom of Information Law as an amendment, and that I am unaware of any judicial decisions involving its scope. However, even if it could be contended that the materials prepared for the District by its auditors do not constitute an "external audit," such a finding would not necessarily result in the capacity to withhold those materials. It has been held by the State's highest court that records prepared for an agency by a consultant constitute intra-agency materials that fall within the scope of section 87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)]. However, due to the language of that provision, the Court in Xerox 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 materials subject to production, they should be redacted and made available to the appellant." (id. at 133).

Therefore, if the materials prepared by the auditors do not constitute an external audit, I believe that they would nonetheless consist of intra-agency materials. Those materials, insofar as they consist of statistical or factual information, would be available under section 87(2)(g)(i), again, except to the extent that a different ground for denial could be asserted.

Lastly, since your appeal of January 6 had not been answered, I point out that section 89(4)(a) of the Freedom of Information Law provides direction concerning an agency's responsibilities in relation to appeals. 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 sum, while some aspects of the records sought might properly be withheld in accordance with the previous discussion, I do not believe that a blanket denial of your request is appropriate. Further, as suggested earlier, District officials must in my opinion review the records that you have requested in order to determine which portions, if any, may properly be withheld.

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

Robert J. Freeman
Executive Director

RJF:saw
cc: Board of Education
George Reilly, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5944

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

February 7, 1990

Mr. Andy Leahy
Staff Writer
Syracuse New Times
1415 West Genesee Street
Syracuse, New York 13204-2156

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

Dear Mr. Leahy:

I have received your recent note, which appears on an appeal made following a denial of access to records by the City of Syracuse.

According to the appeal, you requested "the completed segments of Water Systems Engineer Philip Johnston's study of water usage at some 80 unmetered public facilities served by Syracuse's water system." The request was denied on the ground that "No document in final form exists which satisfies your request..." You contended, however, that "The completed data as requested exist -- if not in documentary form, then certainly as a computer records somewhere in the City's Engineering Department."

You have requested my views on the matter. In addition, since the City's Board of Estimate apparently no longer exists, you asked who should decide appeals.

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, if no records falling within the scope of your request exist, the City would not be obliged to prepare

records in response to the request. Nevertheless, the fact that documents do not exist "in final form" does not necessarily result in a conclusion that the Freedom of Information Law is inapplicable or that preliminary documentation has not been prepared.

Second, it is emphasized that 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 upon the language quoted above, if information is maintained in some physical form, even though it may be incomplete, not final or preliminary, it would in my opinion constitute a "record" subject to rights of access conferred by the Law.

Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held ten years ago that "Information is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically in a computer, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape. On the other hand, if information sought can be retrieved from a computer or other storage medium only hy means of new programming or the alteration of existing programs, those steps would, in my opinion, by the equivalent of creating a new record. As stated earlier, since section 89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available.

Third, as it pertains 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.

Assuming that the data that you requested exists in printed form or can be retrieved from a computer, it is likely that section 87(2)(g) would be 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. It appears that the information sought would consist of "intra-agency material." However, it likely consists of "statistical or factual tabulations or data" that would be available under section 87(2)(g)(i) of the Law.

Lastly, with regard to your question concerning appeals, by way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires tbe Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Law (21 NYCRR Part 1401). In turn, section 87(1) of the Law states in part that the governing body of a public

corporation, i.e., a city council, "shall promulgate uniform rules and regulations for all agencies in such public corporation" pursuant to the regulations adopted by the Committee and consistent with the Freedom of Information Law. Section 1401.7(a) of the Committee's regulations provides 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."

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: Bob Visser, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1718
FOIL-AO-5945

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

February 8, 1990

Professor Michael A. Foster
English/Journalism Department
Illinois Central College
East Peoria, Illinois 61635

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

Dear Professor Foster:

I have received your letter of February 5 and appreciate your kind words.

You wrote that you are involved in a research project involving an examination of "how quasi-public agencies -- bodies or agencies which get a substantial portion of their funding from public funds but whose leaders are not elected" are treated under freedom of information and open meetings statutes.

In this regard, I offer the following comments.

The New York Freedom of Information Law is applicable to agency records, and section 86(3) of the Law defines that 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 Law generally includes "governmental entities" that perform a "governmental function" within its scope.

Similarly, the Open Meetings Law pertains to meetings of public bodies. "Public body" is defined in section 102(2) of that statute to include:

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

The application of the two laws and the definitions cited earlier are in some instances dependent upon the language of other statutes. Industrial development agencies, for example, are public benefit corporations; their records and meetings of their boards of directors are clearly subject to both the Freedom of Information Law and the Open Meetings Law. Other entities might have relationships with government, contractual or otherwise, but are fully independent of government, as in the case of most not-for-profit corporations. It has generally been advised that not-for-profit corporations, despite their reliance of public funding, are not subject to open government laws.

However, there have been exceptions. In New York State, outside of cities, most firefighting and emergency services are carried out by volunteer fire or ambulance companies. Those entities are usually created as not-for-profit corporations. Despite their corporate status, due to their performance of what traditionally has been considered a governmental function and their statutory relationship with municipalities, it has been held judicially that they are "agencies" subject to the Freedom of Information Law (see attached Westchester News and S.W. Pitts). Further, in view of those decisions, although there are no cases involving their status under the Open Meetings Law, it has been advised that their meetings are subject to the Open Meetings Law.

Likewise, it has been advised that the Open Meetings Law is applicable to meetings of boards of "local development corporations." Those entities are created under the Not-for-Profit Corporation Law. However, the applicable statute specifies that local development corporations perform "an essential governmental function." While my opinions might have reached a bit, it

has been suggested they are also subject to the Freedom of Information Law. Moreover, the opinions have often served as the catalyst for significant disclosures. Enclosed are copies of advisory opinions on the subject.

It has also been advised that community action agencies, due to the federal enabling legislation that authorizes their creation, are subject to the Open Meetings Law (see attached opinion).

In short, except in the case of volunteer fire companies, there is little in the way of judicial determinations on the subject. Absent case law, our opinions have focused on other statutes that provide clues concerning the nature and status of quasi-public agencies.

Lastly, I do not believe that the issue has been highly significant in New York. The Freedom of Information Law is quite expansive in scope. 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."

Further, the Court of Appeals, the state's highest court, has found the definition to be as far-reaching as its specific language suggests. Irrespective of the physical form in which information exists, its origin or use, it constitutes a "record" subject to rights of access. Due to the nexus between government and the kinds of entities that are the subject of your inquiry, the Freedom of Information Law has been used successfully when requests have been made to agencies that maintain records pertaining to the entities in question.

In addition, from a technical perspective, I wonder how one defines what a "quasi-governmental" entity might be. While an entity involved in economic development for or on behalf of government should be accountable, should sunshine laws extent to chambers of commerce that are involved in similar activities? Is government funding the appropriate link? If so, how far would

it go? Would it include a profit-making corporation that engages in a program or partnership with government or that received grant money from government? In that case, would a firm have to separate its records concerning its quasi-governmental functions from its other activities? Would it have to designate an access officer? In the event of a denial of access, would the same judicial vehicles apply that are used when a suit is brought against government?

In short, I think that it would be difficult to determine how far sunshine laws might extend to the kinds of groups that you described. Again, determinations or opinions offered in New York have been based upon the language of the Freedom of Information Law and the Open Meetings Law, coupled with other factors, particularly statutes dealing with specific kinds of entities.

I would be interested to know where your research leads you and what your findings might be with respect to other jurisdictions.

I hope that 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
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5946

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

February 9, 1990

Mr. Frederick Goldfeder
Associate Attorney
Office of Legal Affairs
NYS Department of Transportation
Albany, New York 12232

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

Dear Mr. Goldfeder:

I have received your letter of January 19, which reached this office on February 6.

Attached to your letter is a summary of John Doe Agency v. John Doe Corp., which was decided by the United States Supreme Court on December 11, 1989. You have asked whether the decision "should be routinely followed in connection with FOIL requests" directed to the Department of Transportation.

By way of background, the Court in John Doe involved an interpretation of the federal Freedom of Information Act. Exemption 7(A) of the Act enables federal agencies, under specified circumstances, to withhold "records compiled for law enforcement purposes." In brief, it was held that the exemption may properly be asserted to withhold records that were not originally created for law enforcement purposes but which were later gathered for law enforcement purposes. Section 87(2)(e) of the New York Freedom of Information Law also permits agencies subject to that statute to withhold records "compiled for law enforcement purposes" in certain circumstances.

In this regard, I offer the following comments.

First, although the federal Freedom of Information Act is similar in structure to its New York counterpart, those statutes are separate and distinct. In my view, there is no requirement that agencies or courts, in their construction of the State statute, must adhere to precedent appearing in interpretations of the federal Act.

Second, the Court of Appeals has held on several occasions that the exceptions to rights of access appearing in section 87(2) "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" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In my opinion, the Court in John Doe construed an exemption in the federal Act broadly, as is indicated in the dissenting opinions in that case. While the Court of Appeals has not directly considered the issue, if it interprets the Freedom of Information Law in a manner consistent with decisions rendered to date, section 87(2)(e) would be construed narrowly in order to foster access.

Third, I am aware of one decision rendered under the New York Freedom of Information Law that dealt with the issue determined by the Supreme Court. That decision, in my view, illustrates why section 87(2)(e) should be construed narrowly, and why a broad construction of that provision would give rise to an anomalous result. Specifically, in King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees. Those minutes, which were prepared by the petitioner, were requested from the District Attorney. In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he

> "must note in the first instance that the records sought were not compiled for law enforcement purposes (F.O.L. 87[2]e). Minutes of Village Board meetings serve a different function...These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material."

Often records prepared in tbe ordinary course of business, which might already have been disclosed under the Freedom of Information Law, become relevant to or used in a law enforcement investigation. In my view, when that occurs, the records would not be transformed into records compiled for law enforcement purposes. If they would have been available prior to their use in a law enforcement context, I believe that they would remain available, notwithstanding their use in that context for a purpose inconsistent with the reason for which they were prepared.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO-99
FOIL-AO-5947

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

February 15, 1990

Mr. Stanley Dlugolicki, Jr.
466 East 10th Street
Apt. 5-F
New York, NY 10009

Dear Mr. Dlugolicki:

I have received your letter of February 10 in which you requested copies of "subject matter lists", and "systems of records" pertaining to certain law enforcement agencies, as well as rules and regulations promulgated by those agencies.

In this regard, I offer the following comments.

First, although section 87(3)(c) of the Freedom of Information Law requires that each agency maintain a "subject matter list", there is no requirement that agencies forward those records to the Committee on Open Government. Since this office does not maintain those records, it is suggested that you request them directly from the agencies. It is noted that each agency should have designated a "records access officer", a person having the duty of coordinating an agency's response to requests. As such, I suggest that your requests be directed to the records access officers at the agencies maintaining the records sought.

Second, and in a similar vein, this office does not maintain the rules and regulations promulgated by the agencies in question, and it is suggested that those records also be requested from the agencies that you identified. Further, I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. In some instances, an agency's regulations may be voluminous. Therefore, a request should include sufficient detail to enable agencies to locate and identify the records in which you are interested, i.e., by indicating the subject area of interest.

Third, enclosed are records describing systems of records of two of the agencies named in your request, the Division of State Police, and the Division of Criminal Justice Services, which operates the Office of Identification and Data Systems. Those records were submitted to the Committee on Open Government pursuant to the Personal Privacy Protection Law. The provisions of that statute apply only to state agencies [see attached, Personal Privacy Protection Law, definition of "agency", section 92(1)]. As such, the two entities of local government to which you referred are not required to report on their systems of records and it is unlikely in my view that they maintain records characterized as "systems of records".

I hope that I have been of assistance and that the foregoing serves to clarify your understanding of the Freedom of Information Law, the Personal Privacy Protection Law and the role of this office.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5948

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

February 15, 1990

Ms. Janet Axelrod
National Education Association
of New York
217 Lark Street
Albany, NY 12210

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

Dear Ms. Axelrod:

I have received your letter of February 5, in which you requested clarification of an advisory opinion rendered on September 21, 1989, at the request of Patricia L. Knapp, President of the Canisteo Teachers Association.

Ms. Knapp's inquiry involved records concerning services rendered to the School District by a particular law firm, and it was advised that those records, insofar as they contain information considered confidential under the attorney-client privilege, could be deleted. You referred specifically to my statement that:

> "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."

You have sought an explanation concerning "what information, if any, on a bill or a statement by a law firm to a school district, in addition to the 'amounts expended' would be recoverable under FOIL". For instance, you asked whether "generic headings", i.e., "negotiations" or "litigation", or additional information, such as the type of litigation or negotiation, and the names of the parties, should also be disclosed.

In this regard, I offer the following comments.

First, in the opinion addressed to Ms. Knapp, it was advised that time sheets, bills, statements and similar records submitted to a school district by a law firm are presumptively available under the Freedom of Information Law. It was added, however, that deletions from those records could be made in consideration of privacy and in recognition of the attorney-client privilege under appropriate circumstances. Specifically, it was suggested that those portions of the records in question that contain information subject to the attorney-client privilege would be specifically exempted from disclosure pursuant to section 87(2)(a) of the Freedom of Information Law when read in conjunction with section 4503 of the Civil Practice Law and Rules.

Second, I believe that the scope of the attorney-client privilege in the context of your inquiry is limited. 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) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been waived, and that records consist of legal advice or information relating to it provided by counsel to the client, 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; 39 AD 2d 806 (1988)].

In my view, a "generic description" of services rendered would not fall within the scope of the attorney-client privilege or any other basis for withholding appearing in the Freedom of Information Law, for those descriptions would indicate nothing specific or confidential about the services rendered. When a record identifies particular litigation or the parties to litigation, I do not believe that the privilege could be asserted, for that information is publicly available from a court or perhaps other sources. On the other hand, if, for example, a statement includes reference to an attorney's investigation or preparation of work product pertaining to a tenured teacher against whom charges have been initiated whose name has not been disclosed and where there is no final determination of the charge, the name of the teacher could in my view be withheld. Similarly, to the extent that the records in question describe services rendered in conjunction with litigation that may be taken against a person or entity, but which has not yet been initiated, those portions identifying the person or entity or or an indication of the details of such litigation could likely be withheld. Further, if such a record identifies a student, that portion of the record could in my opinion be withheld due to considerations of privacy, as well as provisions of the Family Educational Rights and Privacy Act.

In sum, my comment concerning the disclosure of "numbers indicating amounts expended" was intended to be illustrative. Other kinds of information, such as generic descriptions of services rendered or the names of parties to litigation that has been commenced would in my opinion be accessible under the Freedom of Information Law. Moreover, as suggested earlier, I believe that the authority to withhold is limited by the specific nature of the information contained in the records in question, and whether such information is indeed "confidential" and subject to the attorney-client privilege or some other basis for withholding based upon considerations of 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-5949

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

February 15, 1990

Ms. Mary E. Seamon
[redacted]

The staff of the Committee 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. Seamon:

I have received your letter of January 19, which reached this office on February 8.

According to your letter and the correspondence attached to it, a complaint was made against you as a licensed real estate broker and notary public, which was investigated by Mr. Edward K. Vernum of the Division of Licensing Services of the Department of State in Binghamton. Following the investigation, you were informed by the Department that there was no evidence to support the allegation made in the complaint. Thereafter, you directed requests for a copy of the complaint to Mr. Vernum and the Department's records access officer in Binghamton. As of the date of your letter to this office, you had not received a response to the request.

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

First, for future reference, the Department's records access officer is Mr. Samuel Messina, whose office is located in Albany. It is likely that the delay in response was due to the necessity of forwarding your request to Mr. Messina.

Second, having made inquiries on your behalf, I was informed that a response to your request was rendered on February 2, and that the request was denied based upon considerations of privacy.

Although the Freedom of Information Law provides broad rights of access to records, with respect to complaints made to an agency by a member of the public, it has generally been advised that those records may be withheld to the extent that disclosure would result in an unwarranted invasion of personal privacy pursuant to section 87(2)(b) and 89(2) of the Freedom of Information Law. I point out that section 89(2)(b) states that an "agency may delete identifying details when it make 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. Further, when 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 that person's privacy. In this instance, it appears that you are aware of the identity of the complainant. As such, I believe that the denial of your request was appropriate.

As indicated in the response to your request, you have the right to appeal the denial.

I hope that the foregoing enhances your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
cc: Samuel Messina

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5950

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

February 21, 1990

Mr. Alfredo Serrano
88-A-2887
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

Dear Mr. Serrano:

I have received your letter of February 13, which is characterized as an "appeal".

According to your letter, you filed a request under the federal Freedom of Information and Privacy Acts for records maintained by the "court clerk of Bronx County". Since the clerk informed you that you are not permitted to obtain the records sought, you "appealed" to the Committee on Open Government.

In this regard, it is noted initially that the Committee does not render determinations on appeal. When an agency denies access to records under the Freedom of Information Law, an appeal may be made pursuant to section 89(4)(a) of that statute, 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."

Further, it is emphasized that the Freedom of Information Law is applicable to agency records and that 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 courts and court records are not subject to the Freedom of Information Law.

Lastly, the statutes that you cited under which you made your request are provisions of federal law applicable to records maintained by federal agencies. Those statutes in my opinion have no application to rights of access to records maintained by a New York State court.

Under the circumstances, it is suggested that you confer with your attorney.

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-5951

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

February 21, 1990

Mr. David Corbin
[redacted]

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

Dear Mr. Corbin:

I have received your letter of January 29, as well as various related materials.

Your initial question involves your right under the Freedom of Information Law to obtain "the name and other personally identifying details" concerning a person who made a complaint against you to the New York City Police Department. By way of background, you wrote that you live in an apartment in a building owned by Bernice Greenberg and Herbert Stevens. On February 10, 1988, an emergency 911 phone call was made to the Police Department by a person who identified himself as the "owner" of the building. Further, the police operator addressed the caller as "sir." The complaint involved an allegation that someone broke into a second floor apartment and was in the apartment when the call was made. Information concerning the call was apparently obtained by means of a transcript of the call made available by the Department. The transcript, according to information that you supplied, includes the entirety of the conversation between the complainant and the Department, except for the complainant's name, which was deleted.

Following the call, [redacted] incident. That information was obtained in a complaint report made available to you in part. The report specifies that the

"ownership" of the apartment is in "dispute." Deleted from the report are the name, physical description, address and business phone number of the complainant. It also appears that no arrest was made, and that you were not charged. Further, the report indicates that the case is "closed."

Following the incident, the owners of the property initiated "holdover proceedings" in the Housing Part of Civil Court. In a decision rendered concerning the proceedings, the court appears to have referred to the incident, stating that "Petitioner contended [redacted] entered into and remained in apartment 2R by force and/or unlawful means..." (Bernice Greenberg and Herbert Stevens v. David Corbin, Civil Court, Housing Part 18, November 14, 1988).

In this regard, I offer the following comments.

As you suggested in your letter, there may be three grounds for denial of potential significance. If the facts as you relate them are accurate, and if certain assumptions can be made, I believe that those portions of the records sought that name the complainant should, under the circumstances, be disclosed to you.

In my view, each of the three grounds of possible relevance are based upon the effects of disclosure and the potential for harm that could arise when records, particularly those containing personally identifying details, are disclosed. Those provisions state that an agency may withhold records or portions thereof that:

> "(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article...
>
> (e) are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings:
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

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

(f) if disclosed would endanger the life or safety of any person..."

Depending upon attendant facts, disclosure of the identity of a complainant might constitute an unwarranted invasion of personal privacy, interfere with an investigation or identify a confidential source, or endanger a person's life or safety. However, if it can be assumed that the caller, the complainant, was one of the owners of the property, Mr. Stevens, a person who is known to you, I do not believe that disclosure would constitute an unwarranted invasion of personal privacy or identify a person who could be characterized as a confidential informant. Further, since the complaint report indicates that the case is closed, disclosure would not interfere with any law enforcement investigation. Similarly, if the identity of the owner is known to you and you have ongoing contact with him, and if that person is indeed the complainant, it is unlikely in my view that it could be demonstrated that disclosure would endanger his life or safety. Further, if it can be assumed that the reference in Greenberg and Stevens v. Corbin to the petitioner's contention that you entered the premises unlawfully indicates that the petitioner was the complainant, that person was identified by means of a public judicial proceeding. In short, since it appears that the complainant, identified in the transcript of the 911 call as the owner of the property, is known to you, I do not believe that the grounds for denial described earlier could justifiably be asserted to withhold his name.

It is noted, too, that it has been held that "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 investigation purposes or following arrest'" [Johnson Newspaper Corporation v. Call, 115 AD 2d 335 (1985)]. In a different context, it was recently found that, while statements made by witnesses and co-defendants in the course of preparing a criminal case for trial may generally be withheld under the Freedom of Information Law, "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" [Moore v. Santucci, 543, NYS 2d 103, 107 (1989); ___ AD 2d ___]. Again, the owner, who appears to have been the complainant, was identified as a party and in the facts described in the decision cited earlier rendered by Civil Court.

Your second area of inquiry involves a request for Police Department records, "such as tapes or complaint reports, which they maintain of emergencies reported by [you] at 631 Park Avenue over a five month period." Although the request was denied, you were advised that a search could be made by "individual dates." You wrote that it is your belief that the Department, "without resorting to extraordinary search means, can search their SPRINT data base for a list of all such emergencies." If the Department has such a capability, you asked whether it would be obliged to produce the records to the extent that the records are accessible under the Freedom of Information Law.

In my view, the issue is whether the request "reasonably described" the records sought as required by section 89(3) of the Freedom of Information Law. In brief, it has been held that a request reasonably describes the records when the agency can locate records based upon the terms of a request. Further, to deny a request on the basis that it is overbroad, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought." [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986); also Johnson Newspaper Corp. v. Stainkamp, 94 AD 2d 825, 826, modified on the other grounds 61 NY 2d 958 (1984)].

It is noted that Konigsberg, supra, involved a request by an inmate for records kept on him and his identification number. The Department of Correctional Services, the agency in possession of records, was able to locate some 2,300 pages of documents on the basis of the terms of the request. In holding that that Department could not reject the request due to its breadth, it was 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 non-identifiability 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).

As such, 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 or retrieval 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.

If the Department can locate the records only by date, the request would not, in my opinion, have reasonably described the records. On the other hand, if, based upon the Department's computer programs, it can retrieve the records based upon an address, I believe that it would be required to do so and disclose the records to the extent required by the Freedom of Information Law.

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-5952

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

February 22, 1990

Ms. Arlene Popkin
Senior Counsel
Criminal Division
The Legal Aid Society of
Westchester County
One North Broadway - Ninth Floor
White Plains, NY 10601-2352

The staff of the Committee on 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. Popkin:

As you are aware, I have received your correspondence. Please accept my apologies for the delay in response.

You have raised a series of issues concerning requests for records directed to the Division of State Police.

The first involves the creation of records. In this regard, as you are likely aware, the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Freedom of Information Law states in part that an agency generally need not create or prepare a record in response to a request.

In a letter of January 20 addressed to you, Colonel Carl R. Baker, Deputy Superintendent, wrote that:

> "certain data which you have requested is not information which is generated in printout format. Accordingly, our efforts to provide you with the information you request has mandated special programming to obtain the specific data desired.

> "This 'special programming' is not required by any topically related statutory provisions and all future responses will be limited to those records which are already maintained and generated in the course of normal business."

Relative to Colonel Baker's comments, it has been advised that, to the extent that information sought is accessible under the Freedom of Information Law and may be retrieved based upon existing computer programs, an agency would be obliged to disclose. On the other hand, if the accessible information that you are seeking can be retrieved from a computer or other storage medium only by means of new programming or altering existing programs, those steps would, in my opinion, be the equivalent of creating a new record. Since section 89(3) of the Freedom of Information Law does not require an agency to create or prepare a record in response to a request, I do not believe that the Division would be required by the Law to reprogram or develop new programs to retrieve information that would otherwise be available.

Nevertheless, Colonel Baker indicated that special programs had been developed to accommodate previous requests that you made. Assuming that those programs continue to exist and can be used to retrieve the data in which you are interested, no new programming would be needed to extract the data. If my assumption is accurate, the retrieval of the data would not involve the creation of a record, and the Division would in my view be obliged to disclose the data to the extent required by the Freedom of Information Law, even if the data is not "generated in the course of normal business".

Further, as an alternative to engaging in programming, it might be feasible to seek a printout or equivalent "hard copy" record. While the Division might withhold portions of the record, i.e., by making deletions, to the extent permitted by section 87(2) of the Freedom of Information Law, the remainder would be available.

Second, you raised a question concerning the adequacy of the Division's "list" of records, a copy of which you enclosed. It is assumed that the list in question was prepared pursuant to 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."

While a "subject matter list" is not required to consist of an index that identifies each and every record maintained by an agency, I believe that it is required to indicate, by category, the kinds of records kept by an agency. Further, the regulations promulgated by the Committee on Open Government provide 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)].

Having reviewed the Division's list, the descriptions of its records are, in my opinion, broad and somewhat vague. Further, it is unlikely that the broad classifications include reference to all records maintained by the Division. For instance, there are no references in the list to records involving litigation in which the Department is involved, memoranda concerning legislation, inter-agency letters or memoranda, affirmative action, etc.

Third, you wrote that "troopers are instructed to and do keep one copy of each V & T ticket they issue at least until they are informed of the outcome". In this regard, Deputy Chief Inspector Stanley E. Hook wrote that:

> "The Uniform Traffic Ticket supplied by the Department of Motor Vehicles does indeed have five (5) copies; the original of which is the simplified traffic information. It is delivered to each appropriate court and remains with the respective court. Therefore, no 'accusatory instrument' is maintained by the Division of State Police for which a UTT has been issued. In all other cases, non-vehicle and traffic misdemeanors and felonies, accusatory instruments prepared by our personnel are also court documents. We do not maintain a copy of the accusatory instrument. If individual Troopers or Investigators keep copies of accusatory instruments for other than our few warrant cases, they do so without our knowledge or demand."

However, he added that:

> "Regarding other parts of the UTT, one copy is kept by each issuing Member, not be the Division of State Police, until the disposition of that case is verified."

It is assumed that an "issuing Member" is a trooper or other person employed by the Division. In my opinion, although the Division does not apparently maintain those records centrally or as a group for purposes of filing, its employees prepare and

maintain those documents as part of and in the performance of their official duties. Whether the documents are kept in the physical custody of the Division at its headquarters or at its regional facilities, or whether the documents are kept by its employees, the documents in my opinion consist of "records" that fall within the scope of the Freedom of Information Law. It is emphasized that section 86(4) of the Freedom of Information 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."

Due to the expansive language quoted above, which has been construed 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)], I believe that the documents kept by troopers in conjunction with the performance of their duties for an agency constitute "records" subject to rights of access conferred by the Law.

Another area of inquiry involves a response by Inspector Hook that apparently involved a request for names and dates of assignment of supervisors to Troop T in which he indicated that no such record exists. Nevertheless, you wrote that you "know that the Division, in any given week or month, has a list of which troopers, sergeants, lieutenants, etc., are assigned to which troops and where they are posted. Yet they tell [you] that no such document exists from any past time period" (emphasis yours). For reasons offered earlier, if indeed not such records exist, I do not believe that the Freedom of Information Law would be applicable, for the Division would not be required to create records on your behalf.

It may be possible that officials at the headquarters of the Division do not maintain the records in question, such as duty rosters or records indicating assignments of staff. However, those records might be kept at the locations of assignments. Further, records of attendance might indicate the locations of the assignment of personnel. It is noted that attendance records pertaining to police officers have been found to be available [see Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986)]. Further, duty rosters or similar

records sought after troopers and other staff have completed their assignments would, in my opinion, generally be available. However, if, for example, individuals served in undercover assignments, or other unusual duty, portions of such records might be withheld pursuant to section 87(2)(f), which enables an agency to deny access to records to the extent that disclosure would endanger one's life or safety.

With regard to a denial of the existence of a record, I point out that section 89(3) of the Freedom of Information Law states in part that, upon request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". It is suggested that such a certification might be requested. In addition, while I am not inferring that it would be applicable, a recent amendment to the Freedom of Information Law, 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."

Lastly, in response to a request for descriptions of the duties of the Division's executive staff, certain deletions were made on the ground that disclosure "would endanger the life and safety of others" (response of Lieutenant Colonel Gary C. Dunne, August 9, 1989). Deletions were made from descriptions of the duties carried out by the Deputy Superintendents for Field Command, Administration and Employee Relations. While I have no knowledge of the nature of information that has been deleted, it is particularly difficult to envision how disclosure of information regarding the duties of those in charge of administration and employee relations would endanger life or safety.

While I do not seek to encourage litigation, I point out that the burden of proof in a proceeding brought under the Freedom of Information Law is on the agency that withholds records [see Freedom of Information Law, section 89(4)(b)]. As stated by the Court of Appeals:

> "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" [Capital Newspapers, supra, 566; see also Farbman & Sons v. New York City Health and Hospitals Corp., 62 NYS 2d 75, 80 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Colonel Carl R. Baker, Deputy Superintendent
Lieutenant Colonel Gary C. Dunne, Assistant Deputy Superintendent
Stanley E. Hook, Deputy Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5953

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

February 23, 1990

Mr. Robert Neuwirth
[redacted]

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

Dear Mr. Neuwirth:

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

You have requested an advisory opinion concerning the response to a request directed to the New York City Police Department.

The first aspect of your request involved "the time consuming process of arrest and arraignment". As such, you sought information indicating "the average time an officer is off the street after making an arrest", as well as a detailed breakdown reflective of the time used in filling out forms, fingerprinting and waiting in the complaint room at the District Attorney's office.

The second aspect of the request concerns crime on 42nd Street, and you sought records indicating "the actual numbers of police officers patrolling the block between Seventh and Eight Avenues, per shift, over the past five years", and the current complement of officers on the street". In addition, you requested "copies of any memos, letters, correspondence or other documents for the past five years, regarding policing Times Square or contact between the police department and any other governmental agencies...regarding the Times Square area".

In the initial response to the request by the Department's Records Access Officer, you were informed that "the Freedom of Information Law simply requires an agency to access its data files for particular records or documents maintained in those files" (emphasis added by the Records Access Officer), and that the Law "does not require an agency to respond to interrogatives". You were also informed that the requests "fails to identify a particular record or document...".

Further, the response indicates that the Department "does not maintain statistics concerning the number of police officers covering a particular block per shift over a five year period". It was also found that the "Roll Call-Daily" could be withheld because such records are "intra-agency materials which are not: final agency policy or determinations".

Your request for memoranda and other correspondence involving the policing of Times Square does not, according to the response, "specify the particular record you seek". Moreover, it was stated that records falling within the scope of your request could be withheld under sections 87(2)(b), (e)(iv) and (g) of the Freedom of Information Law.

One page of statistics concerning complaints, by crime, was made available.

The response to your appeal generally reiterated the points made by the Records Access Officer. However, the appeals officer wrote that roll call records could also be withheld under section 87(2)(e)(i) and (iv), stating that: "The records were compiled for law enforcement purposes, and, if revealed, would interfere with law enforcement investigations and would reveal criminal investigative techniques which are not routine". She added that: "Disclosure of this information carries the risk of alerting criminal elements to the numbers and deployment of police personnel in a given area".

I agree with some aspects of the responses to your request. However, I disagree with and question others. In this regard, I offer the following comments.

First, the title of tbe Freedom of Information Law may be somewhat misleading, for that statute is a vehicle under which records may be requested. It does not necessarily require an agency to disclose "information", nor does it require agencies to answer questions.

Second, in a related vein, 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. Therefore, to the extent that the informa-

tion sought does not exist in the form of a record or records, I do not believe that the Department would be obliged to prepare records on your behalf in order to respond to a request for information.

Third, by way of background, the Freedom of Information Law as originally enacted required that an applicant seek "identifiable" records. That standard resulted in a variety of difficulties, for applicants often could not identify a particular record or records of interest. Section 89(3) of the current version of the Law, which has been in effect since 1978, requires that an applicant "reasonably describe" the records sought. Judicial decisions indicate that an applicant meets the responsibility of reasonably describing records when a request contains sufficient detail to enable agency officials to locate and identify the records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986); Johnson Newspapers Corp. v. Stainkamp, 94 Ad 2d 825, 61 NY 2d 958 (1984)]. As such, while I do not believe that you must identify records in which you are interested with particularity, a request should include enough information to permit Department officials to locate the records you are seeking. That portion of your request involving memos and other correspondence concerning the policing of Times Square may be so broad that the standard of reasonably describing the records would not have been met.

Fourth, the Freedom of Information Law pertains 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."

Further, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is noted, too, that the introductory language of section 87(2) refers to the capacity to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase

quoted in the preceding sentence indicates that a single record or report may contain both available and deniable information. I believe that it also requires an agency to review records sougbt that can be located to determine which portions, if any, may justifiably be withheld.

"Roll Call" records were found by the Department to be deniable under sections 87(2)(g) and (e). It is questionable in my view whether either would justify a denial.

Section 87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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 tbe public, final agency policy or determinations or external audits must be made available, unless another 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.

If a "roll call" record is intended to mean a record identifying police officers and perhaps others who are present or who report for duty at a certain time or date, its contents in my opinion would consist of factual information that must be disclosed pursuant to section 87(2)(g)(i) of the Freedom of Information Law, unless a different ground for denial could appropriately be asserted. As such, if my understanding of roll call records is accurate, section 87(2)(g) would not serve as a basis for denial.

Section 87(2)(e) permits an agency to withhold records that:

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

If a roll call record is essentially a record of attendance, it might be contended that such a record was prepared in the ordinary course of business, rather than "compiled for law enforcement purposes". Should that be so, section 87(2)(e) would be inapplicable as a basis for denial. Even if such a record could be characterized as having been compiled for law enforcement purposes, the authority to withhold under section 87(2)(e) is limited to situations in which the harm described in subparagraphs (i) through (iv) would arise as a result of disclosure.

It is possible that disclosure of current or perhaps recent roll call records would interfere with law enforcement investigations or endanger the safety of personnel and, therefore, be deniable under sections 87(2)(e)(i) or (2)(f). The latter proviaion permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person". However, it is difficult to envision how those harmful effects would arise with respect to disclosure of roll call records prepared months or years ago.

The appeals officer also relied upon section 87(2)(e)(iv) to withhold roll call records, stating that those records would, if disclosed, "reveal criminal investigative techniques and procedures which are not routine". If roll call records are prepared every day on every shift in every precinct, they would, in my view, represent records routinely compiled. Further, if, for

example, those records include attendance information, as well as information concerning assignments or duties that are not routine, those latter portions of the records might justifiably be withheld. The remainder, however, might be available.

Again, if the roll call records are analogous to records of attendance and indicate those employees who were present or absent on given dates, I believe that the judicial interpretation of the Freedom of Information Law suggests that those records must be disclosed. In a case that reached the Court of Appeals, the State's highest court, it was found that the days and dates of sick leave claimed by a particular police officer must be disclosed. In that case, 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).

Lastly, although your request for memoranda and similar materials between the Department and other agencies concerning the policing of Times Square might not have reasonably described the records sought, the Department also cited three of the grounds for denial to withhold those records, sections 87(2)(b), (g) and (e)(iv). Aside from the issue of reasonably describing the records and assuming that some records could be found, a blanket denial of those records would likely be inconsistent with tbe 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". However, section 89(2)(a) indicates that an agency may delete identifying details prior to disclosing records to protect against an unwarranted invasion of personal privacy. Therefore, identifying details may be withheld from a record prior to disclosure of the remainder of a record. Further, the records in question would involve communications between government officials presumably acting in the performance of their official duties. As such, it is questionable whether there would be significant privacy considerations concerning records identifying those officials.

With respect to section 87(2)(g), as suggested earlier, the contents of inter-agency or intra-agency materials determine the extent to which those materials may be withheld. While those materials might not be reflective of final agency policies or determinations, they might nonetheless contain statistical or factual information, for example, that would be accessible under section 87(2)(g)(i).

The final basis for denial offered with regard to that category of your request, section 87(2)(e)(iv), pertains to records compiled for law enforcement purposes which if disclosed would reveal non-routine criminal investigative techniques or procedures. While I am unfamiliar with the records that fall within the scope of the request, section 87(2)(e)(iv) in my view represents a narrow basis for withholding. As the language of that provision suggests, some criminal investigative techniques and procedures are indeed "routine", and in those instances, I do not believe that the provision in question would apply.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. John G. Sultana, Records Access Officers
Eileen D. Millett, Assistant Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 5954

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

February 23, 1990

Mr. John A. Horn
[redacted]

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

Dear Mr. Horn:

I have received your letter of February 3 in which you described a problem involving access to records of the assessor of the Town of Mt. Pleasant.

According to your letter, the Town officials "will only give access to 5 cards per person per day, and refuse to make photocopies of any card except for the owner in person, or an agent who has a notarized letter of authorization."

You have asked whether the practice described above "is in violation of state guidelines." 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, with respect to the records in which you are interested, I do not believe that any ground for denial appearing in the Freedom of Information Law could appropriately be asserted to withhold the records. Further, long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107

NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969)]. Even though an assessment roll or property cards might identify the owners of real property, indicate the assessed value of the property, specify whether or not real property taxes have been paid or provide details concerning real property, those records have long been accessible for public inspection and review.

Moreover, with regard to the cards in which you are interested, 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].

Third, the introductory language of section 87(2) of the Freedom of Information Law indicates that accessible records are available for inspection and copying. In addition, section 89(3) requires that an agency prepare photocopies of accessible records upon payment of the appropriate fee, which generally cannot exceed twenty-five cents per photocopy. As such, when records are accessible under the Freedom of Information Law, an agency is obliged to copy those records when the requisite fees are paid.

Lastly, when a record is accessible under the Law, it should be made available to any person, and I do not believe that the capacity to inspect or copy such a record can be conditioned upon the consent of the subject of the record or the owner of real property, for example.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the Town 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:saw

cc: R. O'Connor, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5955

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

February 23, 1990

Mr. Frederick W. McMillian
89-B-0901
Attica Correctional Facility
Attica, New York

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

Dear Mr. McMillian:

I have received your letter of February 5.

In accordance with regulations promulgated by the Department of Correctional Services, you wrote that you requested medical records from the Director of Health Services in Albany. In response to the request, you were advised to seek the records from the health unit at your facility. Having done so, you were informed that you would be charged five cents per photocopy plus $5.50 for personnel costs, and that mental health records are under the control of a different agency, the Office of Mental Health.

You indicated that you are "confused" as a result of the information given to you. In addition, you asked how an individual inmate's records are organized.

In this regard, I offer the following comments.

First, by way of backgroud, the Freedom of Information Law pertains to agency records, including those mantained 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 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 tht the Freedom of Information Law would permit a denial.

However, on January 1, 1987, a new statute, statute 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 regard 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 rthat cannot be photocopies, unless otherwise provided by a statute other than the Freedom of Information Law. Section 18(2)(e) of the Public Health Law state 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 any 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

Second, 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 requests 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 "staellite 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, New York 12229. I point out that under section 33.16 there are certain limitations on rights of access.

Lastly, I am unaware of the methods in which inmate records are organized. It is suggested that you discuss the matter, with the inmate records coordinator at your facility.

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-5956

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

February 26, 1990

Ms. Marion Provost
[redacted]

Dear Ms. Provost:

I have received your recent letter in which you appealed a denial of a request directed to the President of the Clifton-Fine Central School District Board of Education.

Please be advised that the Committee on Open Government is not authorized to render a determination concerning the appeal. The Committee is charged with the duty of advising with respect to the Freedom of Information Law; however, it does not maintain records generally, nor is it empowered to compel an agency to grant or deny access to records.

The provisions concerning the right to appeal are found in section 89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought. In addition, esch agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

As such, while an agency must send copies of appeals to this office, an appeal is determined by the head or governing body of an agency, or a person designated to carry out that function.

Further, having reviewed your request, it appears that you misunderstand the Freedom of Information Law. The title of the Freedom of Information Law may be somewhat misleading, for that statute is not a vehicle that gives the public a right to seek information by asking questions or cross-examining public officials; rather, it is a vehicle under which the public may seek records. Further, 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 records in response to a request.

In your request, you raised questions; you did not request existing records. I am unaware of whether records exist that would contain the information sought in the questions raised in your request. Nevertheless, if you believe that it would be worthwhile to do so, it is suggested that you submit a new request for existing records.

Enclosed is a brochure that describes the Freedom of Information Law and contains a sample letter of request that may be useful to you.

I hope that I have been of assistance and that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Teresa Pommerville, President, Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5957

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

February 26, 1990

Mr. Ed Davis
89-A-2418 C210
900 Kings Highway
Warwick, NY 10990

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

Dear Mr. Davis:

I have received your recent letter and the correspondence attached to it, which reached this office on February 12.

Although it is unclear which records you want, one aspect of your inquiry deals with the vote on Article 13-E of the Public Health Law. Having located Article 13-E, it appears that you are interested in obtaining the record indicating how members of the State Legislature voted on a bill to regulate smoking in certain public areas. That bill was passed by both houses and was approved by the Governor as Chapter 244 of the Laws of 1989.

If my assumption is accurate, I point out that section 88(3) of the Freedom of Information Law, which pertains to the State Legislature, states in relevant part that:

> "Each house shall maintain and make available for public inspection and copying: (a) a record of votes of each member in every session and every committee and subcommittee in which the member votes..."

As such, both the Senate and the Assembly must maintain records concerning each bill indicating how each member cast his or her vote on a bill. It is suggested that you write to the records access officers at the Senate and the Assembly to seek the record of votes concerning the bill that became Chapter 244 of the Laws of 1989.

The second issue involves a request, a copy of which you attached, that is undated and which does not indicate to whom the request was made. Based upon a review of the request, I offer the following comments.

First, each agency subject to the Freedom of Information Law should have designated a "records access officer", a person who has the duty of coordinating an agency's response to requests for records. A request should generally be directed to the records access officer.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. As such, a request should contain sufficient detail to enable agency officials to locate and identify the records. It is questionable in my view whether your request would have reasonably described the records in which you are interested.

In a related vein, you requested "all knowledge" concerning your case. In this regard, the Freedom of Information Law pertains to existing records, and 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.

Lastly, I am unaware of the nature or content of the records sought. However, the Freedom of Information Law contains several grounds for withholding records [see attached Freedom of Information Law, section 87(2)]. The nature and content of records, as well as the effects of their disclosure, would determine the extent to which they must be disclosed under the Freedom of Information Law. I point out, too, that rights conferred by the Freedom of Information Law likely differ from rights accorded in discovery statutes applicable to disclosure in conjunction with judicial proceedings.

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-5958

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

February 27, 1990

Mr. Raphael Ben Levi
#83-A-5867
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. Ben Levi:

I have received your letter of February 5, as well as the materials attached to it.

According to the correspondence, requests were directed in March of 1989 for records relating to your indictment to the Office of the New York County District Attorney and the New York City Police Department. The receipt of your requests was acknowledged by the Police Department on April 17 and by the Office of the District Attorney on May 18. Neither acknowledgement provided an approximate date when the records would be granted or denied. Due to the failure of those agencies to further respond, you appealed on October 2 on the ground that your requests had been constructively denied.

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

First, section 89(3) of the Freedom of Information Law provides guidance concerning the time within which agencies must respond to requests. Specifically, that provision states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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..."

Further, the "Uniform Rules and Regulations Pertaining to Administration of the Freedom of Information Law" promulgated by the Mayor of New York City 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, specify the time limits for responding to requests following the acknowledgement of the receipt of a request.

In view of the regulations cited above, which are applicable to the Police Department, and the delay in granting or denying access to records by the Office of the District Attorney, it appears that your appeals to those agencies were appropriate.

Second, the provisions concerning the right to appeal are found in section 89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

> chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain on writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I point out that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, while I am unfamiliar with the records sought or the effects of their disclosure, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the record access officers at the Office of the District Attorney and the New York City Police Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Daniel K. Healy, Assistant District Attorney
Sgt. John G. Sultana

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5959

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

February 27, 1990

Mr. Edward A. Davis
89-A-2418 - C210
Mt. McGregor Prison
PO Box 2071
Wilton, New York 12866

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

Dear Mr. Davis:

I have received your letter of February 11.

You asked initially how you may learn the identity and address of the telephone company tbat serves your facility and how you may ascertain charges.

In this regard, first, it is assumed that the the Department of Correctional Services and its facilities are billed for the use of telephones at its facilities. If that is so, bills indicating the name and address of a phone company providing the amount charged, presumably on a monthly basis, would be maintained by tbe Department or an individual facility. In my view, telephone bills, to the extent that they indicate the name and address of the phone company and a figure reflective of the amount paid, would be available, for I do not believe that any of the grounds for denial appearing in section 87(2) of the Freedom of Information Law could properly be asserted to withhold those kinds of information found in records.

Second, the regulations promulgated by the Department of Correctional Services under the Freedom of Informstion Law state that a request for records kept at a facility may be made to the facility superintendent. For records kept at the Department's central office in Albany, a request may be made to the Deputy Commissioner for Administration.

Your remaining area of inquiry is based upon your contention that the use of a telephone credit card at a correctional facility "is a crime." You asked when the "legislative action" concerning the issue was enacted and which state legislators voted for or against the legislation.

I know little about the subject matter of your question. Further, although I attempted to locate a statute that deals with the issue, I was unable to locate any such provision. If, alone or with legal assistance, you can locate an act of the State Legislature dealing with the issue, I point out that records indicating the sponsorship of the legislation and the individual votes of members of the Senate and Assembly would be available under section 88 of 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-5960

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

February 28, 1990

Mr. Tomas Muniz
88-B-1927
Box AG
Fallsburg, New York

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

Dear Mr. Muniz:

I have received your letter of February 12.

You wrote that, shortly before your trial, your attorney was arrested. You indicated that you are interested in obtaining information concerning the incident, as well as the attorney's arrest record, the disposition of the matter, and anything that may have "transpired with the Bar Association" relating to the incident.

In this regard, I offer the following comments.

First, section 468 of the Judiciary Law requires that the Chief Administrator of the Courts maintain an official register of attorneys admitted to practice in New York. While I am not completely familiar with the register, it might indicate whether an attorney who had been admitted to practice is no longer permitted to do so. I believe that the register includes the year of admission and the Department of admission. To determine whether the attorney remains admitted to practice, it is suggested that you request such information from Mr. Samuel Younger, Office of Court Administration, 270 Broadway, New York, New York 10007. Records concerning attorney discipline are maintained by the Appellate Division in which an attorney was admitted.

Second, it may be difficult to obtain records concerning the incident and its outcome without information in addition to that described in your letter. I point out that, when requesting records, section 89(3) of the Freedom of Information Law requires

that an applicant "reasonably describe" the records sought. As such, a request must include sufficient detail to enable agency officials to locate the records.

Third, assuming that you are able to reasonably describe the records in which you are interested, those records would likely be maintained by the New York City Police Department, the office of the district attorney in the county in which the arrest was made, or the court in which proceedings were conducted relative to the arrest.

It is noted that the Freedom of Information Law pertains to records of an agency, and that 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 upon the foregoing, police departments and offices of district attorneys are "agencies" subject to the requirements of the Freedom of Information Law. Although the courts and court records fall outside the scope of the Freedom of Information Law, other statutes often grant rights of access to court records.

A request made under the Freedom of Information Law should 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. For your information, the records access officer for the New York City Police Department in Sgt. John G. Sultana, 1 Police Plaza, Room 110C, New York, New York 10038. If you seek court records, it is suggested that a request be directed to the clerk of the appropriate court.

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. As a general

matter, the record of an arrest should in my view be disclosed by the arresting agency. Further, if an individual is convicted, court records used in the proceeding are generally accessible from the court.

It is noted that, in a situation in which charges against an accused are later dismissed in favor of that person, section 160.50 of the Criminal Procedure law generally requires that records concerning the incident be sealed. In such a case, the records would be exempted from public disclosure.

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-5961

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

March 1, 1990

Mr. John J. LaGumina
Hitsman, Hoffman & O'Reilly
570 Taxter Road
Elmsford, New York 10523

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

Dear Mr. LaGumina:

I have received your letter of February 13 in which you referred to an advisory opinion rendered on February 1 concerning your request for a list of physicians used by the New York State Employees Retirement System. The request was denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy pursuant to section 89(2)(b)(iii) of the Freedom of Information Law.

That provision, as you are aware, states that an unwarranted invasion of personal privacy includes "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." You wrote that, based upon your research, "commercial or fund-raising purposes would be found where lists...are used to solicit potential clients." However, you requested my opinion concerning the manner in which a commercial or fund-raising purpose may be defined.

In this regard, there is no definition in the Freedom of Information Law concerning what constitutes a "commercial or fund-raising purpose," and I do not believe that I could offer what might be characterized as a definition of that phrase. While I agree that a commercial purpose would include a use involving the solicitation of potential clients, I do not believe that solicitation of clients is the only standard for determining whether a request is made for a commercial purpose.

For example, Fisher and Fisher v. Davison (Supreme Court, New York County, NYLJ, October 6, 1988) involved a voluminous request made by a law firm that conceded that it was acting on behalf of a landlords' organization. One aspect of the requst dealt with "names and addresses of the tenants to whom the Department's Window Falls Prevention Office has written letters." In upholding the agency's denial, which was based upon section 89(b)(iii), it was found that:

> "Petitioner's allegation that it does not intend to use the names and addresses it seeka 'for commercial purposes' cannot withstand scrutiny. The landlords' group involved is openly seeking this information for its own benefit - and that benefit is, by definition, commercial - however principled and high-minded its clients are in petitioner's eyes" (id.).

In Fisher and Fisher, there was apparently no intent to engage in commercial solicitation. Rather, the decision appears to indicate that a list of names and addresses may be withheld if it would be used for some commercial benefit or advantage.

In an early decision, Person-Polinsky Associates, Inc. v. Nyquist, [377 NYS 2d 897 (1975), petitioner ran a review course for candidates for the State Certified Public Accountant examination and sought a list of applicants for the examination. In relying upon the predecessor language of section 89(2)(b)(iii), which was the same as the provision at issue, it was found that "the commercial character of petitioner's business brings it within the statutory exemption..." (id., 899). The court also noted: "That the petitioner's purpose is educational and helpful is beside the point" (id.).

Based upon the decisions cited above and others, a commercial purpose would in my view likely involve a use resulting in the potential for profit, a commercial benefit, particularly vis a vis others in an industry or trade, or a private advantage in conjunction with business activity.

The phrase, "fund-raising" was considered recently by the Court of Appeals in Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Department [73 NY 2d 92 (1989)]. The agency in that case did not claim that the request, which was submitted by a not-for-profit corporation, was made for any commercial use. Rather, it was contended that the solicitation of membership dues constitutes a fund-raising activity. In upholding the agency's denial, the decision stated as follows:

"We reject petitioner's argument - relying on [Matter of New York Teachers Pension Assn. v. Teachers' Retirement System, 71 AD 2d 250, 256, 422 NYS 2d 389; and New York Veteran Police Assn. v. New York City Police Dept., 92 AD 2d 772, 459 NYS 2d 770, supra] - that seeking membership dues to promote the aims of a nonprofit organization is different from directly soliciting contributions. It is the purpose of the solicitation which matters, not what it is called, the manner or form in which it is presented to the solicitees, or the incidental benefits available to those who make payment - as, for example, in the case before us, the receipt of the organization's bi-monthly newspaper or free legal advice in firearms licensing cases. If, as is unquestionably true here, dues received are intended to support the general activities of the organization and to further its over-all objectives, the solicitation activity is fund-raising.

"Our construction of the term 'fund-raising' is not in any sense inimical to the policies of the FOIL. It does not deny disclosure of official information helpful to the public in making 'intelligent, informed choices with respect to both the direction and scope of governmental activities (see Public Officers Law, section 84).' (Matter of Fink v. Lefkowitz, supra, 47 NY 2d at 571, 419 NYS 2d 467, 393 NE 2d 463.) It is not even suggested that disclosure of the names and addresses of the permittees would promote this objective. Indeed, it is precisely because no governmental purpose is served by public disclosure of certain personal information about private citizens that the privacy exemption of section 87(2)(b) fits comfortably within the FOIL's statutory scheme. Thus, the rights of individuals to be free from unwanted commercial contacts or nonprofit fund-raising efforts - specifically recognized by the Legislature in the exemption at issue here - can be given precedence without undercutting FOIL's purpose" (id. 96, 97).

Fund-raising, in the context of the decision cited above, includes dues solicitation by a not-for-profit organization. However, fund-raising might also involve a variety of other activities that are more directly associated with that term.

While the foregoing does not define or seek to define "commercial or fund-raising purposes," perhaps it will serve to provide guidance concerning the scope of that phrase.

You also sought advice concerning "the procedure for offering to 'certify' that the list will not be used for commercial or fund raising purposes..." I am unaware of any decisions that specify the procedure in question. However, based upon the case law cited in the earlier opinion, it appears that an agency in receipt of a request for a list of names and addresses is entitled to know, with some degree of certainty, what the purpose and intended use of such a list might be, coupled with assurances that it will not be used for commercial or fund-raising purposes. A certification, perhaps prepared in the form of an affidavit, containing the ingredients noted above, might be appropriate.

Since there is no precedent of which I an aware that deals specifically with the issue, it is suggested that you contact the records access officer at the Department of Audit and Control to discuss the elements of a certification that would enable the Department to render an appropriate determination concerning your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Karl LaPoint
Paul V. Morgan
Herbert M. Friedman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5962

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

March 2, 1990

Mr. William C. Hitt
[redacted]

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

Dear Mr. Hitt:

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

In brief, the correspondence indicates that your request for a copy of the employment application of the person designated as Chief of Police of the Town of Cortland was denied. In responding to your request, the Deputy Town Clerk wrote that, on the advice of the Town Attorney, "the item requested is not public information since it pertains to personnel."

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 in-

> telligent, 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).

Fourth, 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 an application, I do not believe that they could necessarily be cited to withhold an application concerning a person who has been hired in its 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 an application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met the qualifications

needed to serve in particular positions. However, I do not believe that those portions of an application indicating an employee's home address, social security number or other personal details unrelated to the position must be disclosed. That kind of personal information would, in my view, constitute an unwarranted invasion of personal privacy if disclosed. Similarly, indications of previous employment, with the exception of previous public employment, could, in my view, be withheld. Since previous public employment would have been a matter of public record while an individual was so employed, I do not believe that those aspects of an application could be withheld.

In an effort to share these views with Town officials, copies of this opinion will be sent to the Deputy 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
Executive Director

RJF:jm

cc: Catherine M. Hoffman, Deputy Town Clerk
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5963

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

March 2, 1990

Mr. John J. Sheehan
J.J. Sheehan Adjusters, Inc.
P.O. Box 604
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. Sheehan:

I have received your letter of February 14, as well as the correspondence attached to it.

Your inquiry concerns a request for records maintained by the City of Ithaca. In response to the request, you were informed that you would be required to pay twenty-five cents per photocopy, plus a fifty percent administrative charge and postage. Further, the Assistant City Attorney, Mr. John J. Kelleher, wrote that "Under Ithaca's Municipal Code, providing of copies is discretionary".

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

First, the Freedom of Information Law is a statute that was enacted by the State Legislature. In my view, a provision of municipal code, a policy adopted by a agency, a local law or a regulation cannot be inconsistent with a statute.

Second, providing copies of records accessible under the Freedom of Information Law is not discretionary. Section 87(2) of the Law requires that accessible records be made available for inspection and copying. In addition, section 89(3) of the Law states in part that: "Upon payment of, or offer to pay the fee

prescribed therefor, the entity shall provide a copy of such record...". As such, I do not believe that an agency, under its municipal code or otherwise, can refuse to prepare a copy of an accessible record when an applicant for the record pays the appropriate fee.

Third, unless there is a statute, an act of the State Legislature, that permits an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy when it reproduces records up to nine by fourteen inches [see Freedom of Information Law, section 87(1)(b)(iii)]. Moreover, in view of the legislative history of the Freedom of Information Law and its judicial interpretation, it is clear in my opinion that the only fee that an agency can charge is a fee for copying, unless a statute other than the Freedom of Information Law specifically authorizes the assessment of a different or additional fee.

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, as the petitioner

in the case, you are aware that it has been confirmed judicially 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 [Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. In that case, the provisions of a municipal ordinance were found to be invalid to the extent that they were inconsistent with the Freedom of Information Law.

It is noted, too, that the regulations promulgated by the Committee on Open Government, which have the force of law, preclude the assessment of search or administrative fees, unless such fees are prescribed by statute (21 NYCRR 1401.8).

In sum, while the City may charge twenty-five cents per photocopy, as well as postage if you are unable or unwilling to personally retrieve the records, I do not believe that the City has the discretion to prepare copies, or that it can charge an administrative fee when providing access to records.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: John J. Kelleher, Assistant City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5964

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

March 2, 1990

Mr. Norman Goldman
[redacted]

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

Dear Mr. Goldman:

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

Your inquiry pertains to a situation during which you observed an exchange between a member of the Town Board and the Deputy Town Clerk while you were at the Town Hall. The exchange involved the submission by the Board member of a paper suggesting proposed changes in minutes of a meeting. Having sought a copy of that paper, you were denied access on the ground that the record constituted an "inter office memo".

In view of the intent of the Freedom of Information Law, you requested an advisory opinion concerning the propriety of the denial. In this regard, I offer the following comments.

I agree with your contention that the statement of legislative intent appearing in section 84 of the Freedom of Information Law is broad, and I concur with judicial decisions indicating that the Law should be interpreted to provide maximum access to records and that exceptions to rights of access should be construed narrowly. I also agree that the record in question could have been disclosed, even if an exception could appropriately have been asserted.

Nevertheless, based upon the specific language of the Law, it appears that the denial was likely justifiable.

The provision to which the denial of your request alluded, 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.

Under the circumstances, the record sought would in my view clearly constitute "intra-agency" material. Further, the proposed changes in the minutes represented recommendations offered by a Board member. Those recommendations could be accepted, rejected or modified by the Town Board as a whole. As you may be aware, section 63 of the Town Law states in part that: "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all of the members of the town board". Again, when tbe record was submitted, it consisted of recommendations to alter the minutes. If that was so, I believe that it could have been withheld under section 87(2)(g) of the Freedom of Information Law. This is not to suggest tbat the Town was required to withhold the record, but rather that it was permitted to do so.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Mildred Peck, Town Clerk
Barbara Beach, Member of the Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5965

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

March 2, 1990

Mr. Kenneth R. Weigert
[redacted]

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

Dear Mr. Weigert:

I have received your recent letter in which you requested a "ruling" concerning rights of access to records.

Attached to your letter is a copy of an appeal directed to Mr. D. Hurlbutt of the Victor Central School District. According to the appeal, various records sought were denied on the grounds that the District "does not maintain records on some items and the other information had previously been furnished." You wrote, however, that "neither is true."

Your request involved "salary information for all secretarial services," "the qualifications and background of the Clerk of the Works," "the agenda or schedule of the AASA Convention held in Orlando, Feb. - Mar. '89 and the dates of the Convention," "the names of all architect firms considered for the Victor School job with the corresponding percentage rates each requested for their remuneration," and a "schedule showing exact dates of any vacation days, sick days, etc., taken for the school year '88-'89" by two named employees of the District.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. It cannot render what may be characterized as a "ruling," nor is it empowered to compel an agency to grant or deny access to records.

Further, I have no personal knowledge of the records maintained hy the District or the extent to which the records in quesiton might have been disclosed to you. As such, the ensuing remarks should not be construed as an indication of my belief in your veracity or that of School District officials. Rather, they are restricted to my views concerning the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information law is appalicable 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, hut 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, all records maintained by the District are subject to rights of access, irrespective of their origin or function.

Second, the Freedom of Information Law generally pertains to existing records. Section 89(3) of the Law states in part that an agency is not required to create or prepare records in response to a request, unless specific direction is provided to the contrary. For the purposes of the ensuing analysis, it will be assumed that records are maintained by the District.

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

With regard to salary information, one of the few instances in which an agency is required to maintain a record involves payroll information. Specifically, section 87(3) of the Law states in relevant part that:

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

While there may be no separate list involving salaries of secretarial personnel, the District must nonetheless maintain a list identifying all employees in accordance with section 87(3)(b). From that list, you should be able to learn the salaries of secretarial personnel.

The provision in the Freedom of Information Law of most significance concerning the qualifications of an employee 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 em- ployees 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].

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 an application, or resume, I do not believe thst they could necessarily be cited to withhold such a record concerning a person who has been hired in its 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 an application or resume would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met the qualifications needed to serve in particular positions. However, I do not believe that those portions of an application or resume indicating an employee's home address, social security number or other personal details unrelated to the position must be disclosed. That kind of personal information would, in my view, constitute an unwarranted invasion of personal privacy if disclosed. Similarly, indications of previous employment, with the exception of previous public employment, could, in my view, be withheld. Since previous public employment would have been a matter of public record while an individual was so employed, I do not believe that those aspects of an application could be withheld.

An agenda or schedule concerning a convention would, in my opinion, clearly be available, for none of the grounds for denial could appropriately be asserted to withhold such records.

With regard to the records concerning architectural firms, I must admit that I am unfamiliar with the meaning of the phrase "percentage rates" to which you alluded. It appears, however, that you are referring to records submitted to the District in conjunction with architectural services furnished or to be furnished to the District. If that is so, I believe that one of thee grounds for denial may be relevant. Section 87(2)(c) of the Freedom of Information law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards..." If a contract has been awarded, for example, disclosure would not impair the process of selecting a firm furnishing goods or services. On the other hand, if disclosure would "impair" the District's ability to engage in an optimal contractual agreement that has not been consummated, the records could in my view be withheld.

Lastly, I believe that attendance records pertaining to public employees are generally under the Freedomm of Information Law. Further, following a denial of a request for the days and dates of sick leave claimed by a particular employee, a police officer, it was held judicially that such records must be disclosed.

In terms of the analysis of the issue, 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 puhlic;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including hut not limited to audits performed hy the comptroller and the federal government..."

It is noted that the language quoted ahove 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, dates of absence would consist of "statistical or factual" information accessible under section 87(2)(g)(i).

Also of relevance is section 87(2)(b), which, as indicated earlier, permits an agency to withhold records or portions thereof when disclosure would result in an unwarranted invasion of personal privacy. Nevertheless, in decision referenced earlier, 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 witb 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 choicea 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).

Based on the foregoing, I belive that records indicating dates or amounts of leave time would 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 sent to Mr. Hurlbutt.

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: D. Hurlbutt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5966

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

March 5, 1990

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 20 addressed to the members of the Committee on Open Government. As indicated above, the staff of the Committee is authorized to render advisory opinions on its behalf.

You have requested an advisory opinion concerning "the correctness of seeking and receiving" certain records requested from the Village of Croton-on-Hudson. Attached to your letter is a copy of a request directed to the Village's records access officer. In the request you referred to an article published in the Croton Gazette, the Village's official newspaper, which provided notice of a public hearing and stated that:

> "The Village of Croton on Hudaon Trustees is considering Local Law Introductory No. 1 of 1990 to rezone numerous parcels of land to PRE Zones 1, 2 and 3 as defined by Local Law No. 6 of 1988. The parcels and the proposed zoning are on file in the Village Office."

Based upon the foregoing, you requested the following:

> "1. The list of parcels including tax map designation, present zoning, and present use to be considered at the Public Hearing, March 19, 1990.

2. The resolution of the Croton Village Board to hold such meeting.

3. The agenda, resolutions, and minutes of the meeting of the Board of Trustees of January 8, 1990, whereby said Board declared itself lead agency for the SEQR review of this action 'since they are the only involved agency and legislative body responsible for amending the zoning map.'"

In this regard, I offer the following comments.

With respect to the first aspect of your request, as indicated in previous correspondence, it is emphasized that the Freedom of Information Law pertains to existing records, and that an agency is not required to create records in order to satisfy a request [see Freedom of Information Law, section 89(3)]. Assuming that there is a "list" containing the information sought, I believe that it must be disclosed, for none of the grounds for denial appearing in section 87(2) of the Law could appropriately be asserted to withhold such records.

With regard to items 2 and 3 of the request, again, assuming that the records sought exist, they should, in my view, be disclosed for the same reason as that stated above.

Lastly, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy. Assuming that the records sought exist and that the requisite fees are paid, I believe that the Village must make the records sought available to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Records Access Officer, Village of Croton-on-Hudson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1726
FOIL-AO-5967

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

March 5, 1990

Ms. Wilma Ryan
Town Clerk
324 Champlain Avenue
Ticonderoga, NY 12883

The staff of the Committee on 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. Ryan:

I have received your letter of February 22, as well as a variety of correspondence, all of which has been precipitated by requests for information by Mr. Hal Otley.

Based upon the materials, Mr. Otley has made dozens of requests within the past few months. In some instances, he has clearly requested records; in others, he has requested information by asking questions or has sought information that does not exist in the form of a records or records. Further, issues have arisen concerning the payment of fees for copies. Despite your efforts to comply with law, you wrote that you are "at a loss as to how to satisfy the man", and you have asked for suggestions concerning the matter.

In this regard, I offer the following comments.

First, having reviewed Mr. Otley's requests and your responses to them, I believe that you have dealt with the requests appropriately.

Second, as you are aware, 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. Similarly, it is noted that the title of the Freedom of Information Law may be somewhat misleading, for that statute is not a vehicle that provides the public with a right to cross-examine public officials or that requires agency officials to answer questions or respond to questions that seek to elicit "information".

Third, section 89(3) of the Freedom of Information Law also states that an applicant is required "reasonably describe" the records sought. Therefore, although an applicant is not required to identify records, a request must contain sufficient detail to enable agency officials to locate and identify the records. Further, the nature of an agency's filing or record-keeping system often is relevant in determining whether a request reasonably describes the records sought. For example, if a certain class of records is kept chronologically, a request for a record within the class by means of a name might not reasonably describe the record requested, for the records within the class are kept and retrievable by date rather than by name.

Fourth, with regard to the time within which agencies must respond to requests, section 89(3) of the Freedom of Information Law requires that agencies respond to a request within five business days of the receipt of a request. If more than five business days is needed to locate or review records, the agency must acknowledge the receipt of the request and provide "a statement of the approximate date when such request will be granted or denied...". The Committee on Open Government, by means of regulations promulgated in 1978 pursuant to section 89(1)(b)(iii) of the Public Officers Law, sought to insure timeliness of response by requiring agencies to grant or deny access to records within ten business days of the acknowledgement of the receipt of a request [21 NYCRR section 1401.5(d)]. However, a recent decision invalidated that portion of the regulations on the ground that the statute does not include a time limitation in which agencies must determine to grant or deny access to records following the acknowledgement that a request has been received [Lecker v. New York City Board of Education, App. Div., First Dept., NYLJ, January 16, 1990, ___ AD 2d ___]. As such, the requirement in the Committee's regulations that agencies grant or deny access to records within ten business days after acknowledging the receipt of a request is apparently no longer binding. While agencies may not be restricted to the ten business day limitation, I believe that records must nonetheless by granted or denied within a reasonable time after the receipt of a request is acknowledged in accordance with section 89(3) of the Law.

Lastly, with respect to fees, as you are aware, an agency generally cannot charge for inspection records but may charge up to twenty-five cents per photocopy for duplicating records [section 87(1)(b)(iii)] and case law indicates that an agency may require that payment for photocopies be made in advance of reproducing records (see Santucci v. McGuire, Sup. Ct., New York County, Nov. 4, 1982). Further, if an individual has not paid for photocopies of records prepared in response to a request, it has been suggested that no additional copies be made until appropriate payments have been made.

The other issue that you raised involves notice of meetings held by Town committees. In response to an inquiry on the subject, you informed a citizen that "if [you] receive notice in time all meeting will be published in the paper", and that notice is posted in a conspicuous location prior to such meetings. You asked that I confirm that notice is being given as required by law.

In this regard, section 63 of the Town Law states in part that "the supervisor may, from time to time, appoint one or more committees, consisting of members of the board, to aid and assist the board in the performance of its duties". Therefore, I believe that the Supervisor is clearly authorized to designate the committees described in your letter.

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."

Based upon the foregoing, I believe that a committee consisting of two Town Board members by the Supervisor constitutes a "public body" that falls within the requirements of the Open Meetings Law.

Section 104 of the Open Meetings Law requires that notice be given prior to meetings of public bodies, including committees. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable,

> to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Based upon your letter, it appears that you provide notice in a manner consistent with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5968

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

March 5, 1990

Mr. Marvin Datz
[redacted]

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

Dear Mr. Datz:

I have received your letter of February 20 in which you allege that the New York City Police Department has "systematically violated" the Freedom of Information Law.

You wrote that the Department "has failed to advise respecting the Records Access Officer and Appeals Records Access Officer", and has failed to "provide a list of the records, files and materials available for inspection". You also alluded to "a policy of concealment" concerning a "red traffic light" program and a "quota" system. As such, you requested my "intervention" and a "finding of violation" by the New York City Police Department.

In this regard, I offer the following comments.

First, it is emphasized that neither the Committee on Open Government nor its staff can render what may be characterized as a "finding of violation". The Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, and only a court can find that an agency has violated the Law.

Second, I am unfamiliar with the "red traffic light" program or the "quota" system to which you referred. Therefore, I cannot provide guidance concerning those issues.

Third, the Department has designated a records access officer and an appeals officer. Those persons are, respectively, Sgt. John G. Sultana and Eileen D. Millett, Assistant Deputy Commissioner for Civil Matters.

Third, it appears that you misunderstand the requirements of the Freedom of Information Law concerning the list of records to which you referred. The Freedom of Information Law does not require that agencies prepare a list of records available for inspection. Rather, section 87(3)(c) of the Freedom of Information Law states that:

> "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, I believe that each agency is required to maintain a list, by category, in reasonable detail, of the kinds of records it maintains, whether or not the records described in the list are available under the Freedom of Information Law.

I hope that the foregoing serves to clarify the Freedom of Information Law and the role of this office.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Lee Brown, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5969

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

March 6, 1990

Mr. Angelo Fiorio
[redacted]

Dear Mr. Fiorio:

I have received your recent letter in which you requested medical, social services and similar reports, including those derived from insurance records, from this office.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office does not maintain records generally. Further, it has no authority to compel an entity of government to grant or deny access to records. In short, I cannot provide the records in which you are interested, because this office does not maintain them.

It is also noted that the Freedom of Information Law pertains to records of an "agency", a term defined in section 86(3) of the Law to mean:

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

Based upon the language quoted above, the Freedom of Information Law generally applies to records maintained by entities of state and local government in New York. It would not apply to records maintained by an insurance company, a private hospital or a physician, for example. If you believe that the records in which you are interested are maintained by an agency required to comply with the Freedom of Information Law, 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 for records. Therefore, if, for instance, you believe that a county department of social services maintains records pertaining to you, a request should be made to the records access officer at that agency.

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 and identify records in which you are interested. I do not believe that a request for records pertaining to yourself, without additional description, would meet the requirement of reasonably describing the records.

Lastly, there may be other laws that could be used to obtain records pertaining to yourself. Section 18 of the Public Health Law generally requires that health care providers, such as hospitals and physicians, provide access to medical records to the subjects of those records. Enclosed is a brochure published by the New York State Department of Health that briefly describes your right to your medical records. Similarly, patient or client records maintained by a mental health facility are generally available to the subject of those records under section 33.16 of the Mental Hygiene Law.

I regret that I cannot be of greater assistance. Nevertheless, I hope that the foregoing serves to enhance your understanding of your capacity to obtain records.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5920

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

March 6, 1990

Mr. Mike Schmucker
[redacted]

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

Dear Mr. Schmucker:

I have received your letter of February 16, as well as the material attached to it.

You have questioned the "legality" of a resolution recently adopted by the Board of Education of the East Islip School District. The resolution states that:

> "WHEREAS, on a regular basis, the Superintendent of Schools provides each member of the Board of Education and certain administrative staff with a written memoranda which contains materials of a confidential and sensitive nature; and
> WHEREAS, the memoranda is prepared solely for use by the Board of Education and certain administrative staff and should not be disseminated to the public; and
> WHEREAS, the distribution of the memoranda to the public could subject the East Islip Union Free School District to potential liability
> NOW, IN CONSIDERATION OF THE ABOVE, BE IT RESOLVED that no board member, officer, administrator or agency shall distribute the above memoranda prepared by the the Superintendent or divulge its contents to the public. The failure of any board member, officer, administrator or agency to comply with this resolution shall be punishable as prescribed by law."

Your inquiry is raised in terms of the propriety of the resolution relative to the Open Meetings Law. In my view, however, the issue pertains to the Freedom of Information Law. In this regard, I offer the following comments.

First, the Open Meetings Law generally deals with meetings of public bodies and the extent to which meetings must be conducted open to the public and, conversely, with the extent to which meetings may be closed. The issue that you raised deals with the disclosure of records. Therefore, in my opinion, the focal point in terms of the propriety of the resolution is the Freedom of Information Law, not the Open Meetings Law.

Second, 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" 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."

As such, the written memoranda and any other materials that are the subject of the resolution clearly, in my opinion, constitute "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. Further, 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 memorandum might contain both available information and deniable or perhaps confidential information. I believe that the phrase requires that an agency review requested records to determine which portions, if any, may justifiably be withheld and that remaining portions be disclosed.

Only those portions of records that may properly be denied in accordance with the grounds for denial appearing in section 87(2) of the Freedom of Information Law can be withheld. Only a statute enacted by Congress or the State Legislature can serve to diminish rights conferred by the Freedom of Information Law, and I do not believe that a resolution adopted by a board of education can restrict rights of access granted by the Freedom of Information Law, an enactment of the State Legislature.

Fourth, since the resolution refers to "confidential" material, it is emphasized that the term "confidential" in my opinion has a precise meaning. To be confidential, a statute must grant authority to maintain secrecy or to prohibit public disclosure of records. When records are confidential, section 87(2)(a) of the Freedom of Information Law, the first ground for denial, applies. That provision pertains to records that are "specifically exempted from disclosure by state or federal statute".

In the context of a school board's duties, it is unlikely that records will be "confidential" or exempted from disclosure by statute. The one area that comes to mind where a requirement of confidentiality may arise involves records pertaining to students. The Family Educational Rights and Privacy Act (20 U.S.C. section 1232g) generally requires that education records identifiable to students must be kept confidential, except with respect to the parents of the students. If the memoranda in question identify students in conjunction with their educational programs, special needs, discipline, awards and similar matters, it is likely that the federal Act referenced above would preclude the Board from publicly disclosing those aspects of the materials. Again, in those instances, records that are identifiable to students would be "confidential" and "specifically exempted from disclosure" by a federal statute.

When records are exempted from disclosure by statute, an agency cannot disclose. In all other instances, the Freedom of Information Law is permissive. In other words, even though an agency may withhold records or portions thereof, it is not required to do so. As indicated by the Court of Appeals, the State's highest court, while an agency is permitted to restrict access to those records falling within the grounds for denial, "the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records..." [see Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)]. Therefore, although records might not be confidential, i.e., exempted from disclosure by statute, they may nonetheless be deniable. Where they are deniable, an agency may choose to withhold or disclose the records.

In short, with the exception of references to students, it is unlikely in my opinion that the records in question could be characterized as "confidential" or that there is a legal duty to prohibit public access to those records.

Fifth, as inferred earlier, the specific contents of the memoranda determine the extent to which they may be withheld. Other than the provision discussed earlier [section 87(2)(a)], there may be several grounds for denial of possible relevance.

Memoranda transmitted among school district officials could be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law. Although that provision is one of the grounds for denial, due to its structure, it often requires disclosure of portions of 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, 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 point out that it has been held that factual information that might be "intertwined" with advice or opinions must be disclosed under section 87(2)(g)(i), unless there is a different basis for denial [see Ingram v. Axelrod, 90 AD 2d 568 (1982)].

Also of potential 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". That provision might apply, for example, to permit the deletion of names of candidates for employment or the name of a teacher involved in an unresolved disciplinary proceeding.

Another ground for denial of possible significance is section 87(2)(c), which permits an agency to withhold records when disclosure would "impair present or imminent contract awards or collective bargaining negotiations". The memoranda might include information concerning strategy used in collective bargaining negotiations which if disclosed would impair the negotiations.

In sum, insofar as the resolution places a blanket of confidentiality on the records in question, I believe that it is inappropriate and inconsistent with the Freedom of Information Law. While portions of the records might justifiably be withheld under the Freedom of Information Law, other aspects of the records might be accessible, and it is reiterated that the contents of the records determine the extent to which they are accessible or deniable.

Lastly, the resolution includes a sentence pertaining to a failure to comply with its provisions and the possibility that disclosures may be "punishable as prescribed by law". As indicated earlier, when a statute prohibits disclosure (as in the case of the Family Educational Rights and Privacy Act), certain records cannot be made available. In such a circumstance, there may be legal sanctions imposed. However, where there is no statutory prohibition, but rather, as in the case of the Freedom of Information Law, discretionary authority to withhold records, I question what legal punishment could be imposed if records are 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: Board of Education, East Islip School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5971

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

March 7, 1990

Mr. Larry Randall
89-A-4772 B-3-4
Southport Correctional Facility
Pine City, NY 14871

Dear Mr. Randall:

I have received your recent letter in which you requested assistance in obtaining records indicating "how the District Attorney instructed the Grand Jury".

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which is applicable 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."

Baaed on the foregoing, the courts and court records fall outside the coverage of the Freedom of Information Law. If the record sought is maintained by a court, the Freedom of Information Law would be inapplicable.

Further, section 190.25(4)(a) of the Criminal Procedure Law states in part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

In short, the Freedom of Information Law appears to be inapplicable to the records in which you are interested. As a defendant, however, you may have other rights of access to records or means of obtaining records. Since I lack expertise concerning Criminal Procedure Law or the rights of defendants, it is suggested that you discuss the matter with your attorney.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1592

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

March 7, 1990

[redacted]
#86-A-3579
P.O. 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 [redacted]:

I have received your letter of February 14, which reached this office on February 22.

According to your letter, you requested a variety of records from the Office of the Ulster County District Attorney pertaining to your case, "which was already decided and closed." The records sought involve or relate to laboratory tests conducted in conjunction with your arrest and the ensuing proceeding. You added, "since the evidence...was used against [you] at trial," that "it should not be exempted from disclosure, especially after being introduced at trial."

In response to the request, the District Attorney wrote that:

> "The disclosure that you request under the Freedom of Information Law is exempt as it constitutes records which pertain to investigations being actively pursued by this office. For that reason your request is refused."

You have requested assistance in the matter.

In this regard, I am somewhat confused by the facts that you presented and the District Attorney's response, for you wrote that the case is closed, but the District Attorney wrote that the

records sought relate to ongoing investigations. Since I have no personal knowledge of the facts, I am unaware of the accuracy of those statements. Nevertheless, I offer the following general 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 records 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, I do not believe that the Freedom of Information Law would be applicable.

Second, your request indicates that your case involved rape and sodomy. Although I am unaware of the age of the victim, I point out that section 50-b of the Civil Rights Law provides specific direction concerning records identifying victims of sex offenses who were under the age of eighteen at the time of the alleged commission of such offense. Specifically, that provision 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 documenta, 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 officers 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 subdivision 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; the counsel or guardian of such person; the public officers and employees charged with the duty of investigating, prosecuting, keeping

> records relating to the offense, or any other act when done pursuant to the lawful discharge of their duties; and any necessary witnesses for either party..."

If section 50-b is applicable, it appears that records identifiable to such a victim would be specifically exempted from public disclosure under section 87(2)(a) of the Freedom of Information Law. However, various records would apparently be available under section 50-b(2)(a) to a person charged with such an offense.

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. Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 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.

Records prepared by employees of a police department or the office of a district attorney, or records transmitted between those agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Lastly, in a recent decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "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" [see Moore v. Santucci, 543 NYS 2d 103, 107, ---AD 2d--- (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5923

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

March 9, 1990

Mr. Wilford Lalonde
[redacted]

Dear Mr. Lalonde:

I have received your recent correspondence, which reached this office yesterday. In your cover letter addressed to me, you appealed a denial of access to information sought on November 20 from the Clifton-Fine School District Board of Education. The information sought relates to the process by which a contract between the Board and its Superintendent was approved.

In this regard, I offer the following comments.

First, it is emphasized that the Committee on Open Government is not authorized to render determinations following appeals made under the Freedom of Information Law. The major function of the Committee involves providing advice with respect to the Freedom of Information and Open Meetings Laws.

The provision in the Freedom of Information Law pertaining to the right to appeal a denial of access to records, 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. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Based upon the foregoing, although agencies are required to transmit copies of appeals and the ensuing determinations to the Committee on Open Government, an appeal should be made to the head or governing body of an agency, or the person or body designated to determine appeals.

Second, having reviewed your request, you sought information by raising a series of questions. For future reference, it is noted that the title of the Freedom of Information Law may be somewhat misleading. That statute is not a vehicle that requires agency officials to provide information by preparing responses to questions. Rather, the Freedom of Information Law pertains to existing records and requires agencies to respond to requests for records. I point out that section 89(3) of the Freedom of Information Law states in part that an agency is not required to create or prepare a record or order to satisfy a request for information, unless the Law provides specific direction to the contrary.

Third, in one area of your request you expressed the belief that "every board member should be shown on the minutes of every motion voted on with the way the member voted," and you asked why "this is not being done." In response to that question, in a letter addressed to the Superintendent by the District's attorney, the attorney wrote that: "It appears that the Board's practice is to note the names of members who vote against a motion. Thus, it can be determined who voted for a motion by reviewing the names of members at the meeting." While that statement may be accurate in most instances, it might not be so in others in my opinion. If a member who is present abstains from voting, the abstention might result in the failure to approve an action. For instance, in the case of a seven member board, a record indicating three negative votes might suggest that there were four positive votes, in which case a motion would carry. However, if there were three negative votes and one abstention, I do not believe that the motion would carry, for an affirmative vote of a majority of the total membership, four in that instance, would be needed to carry a motion (see General Construction Law, section 41).

Moreover, the Freedom of Information Law, since its enactment in 1974, has contained what may be characterized as an "open vote" requirement. One of the few instances in which the Law requires the preparation of a record is section 87(3). In the context of the issue that you raised, that provision 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..."

As such, the Freedom of Information Law requires that a record be prepared indicating the manner in which each member cast his or her vote on an issue. Ordinarily, the record of votes appears in minutes of a meeting.

I hope that I have been of assistance and that the foregoing serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Board of Education
Arthur F. Grisham

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5974

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

March 9, 1990

Ms. Nancy Richman
New York Newsday
Long Island, New York 11747

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

Dear Ms. Richman:

I have received your letter of February 27, as well as the materials attached to it.

You have sought an advisory opinion concerning a request made under the Freedom of Information Law by New York Newsday reporter Joe Calderone for an audit prepared by the New York State Urban Development Corporation ("UDC"). Specifically, the request involved "a copy of an audit of 'project-related expenditures' of the Apollo Theatre project conducted by the Urban Development Corporation sometime prior to June 19, 1986."

The audit was denied in its entirety by UDC's records access officer on the basis of section 87(2)(g) of the Freedom of Informtion Law. Following Mr. Calderone's appeal, the denial was sustained. Notwithstanding the determination of the appeal, you requested a reconsideration of the denial, suggesting that the record in question constitutes an "external audit" required to be disclosed pursuant to section 87(2)(g)(iv) and that UDC must segregate any "non-exempt" materials within the audit and make those portions available. In response to that request, certain redactions were made, and portions of the audit consisting of statistical or factual tabulations or data were disclosed.

Nevertheless, it is your view that the extensive deletions made prior to disclosure may not have been "completely warranted." Further, you questioned the propriety of withholding "audit findings," which were deleted from the report in their entirety.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is emphasized that the introductory language of section 87(2) 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 include both accessible and exempt information. Further, in my view, that phrase imposes an obligation upon an agency to review a record sought in its entirety to determine which portions, if any, may justifiably be withheld.

Second, the focal point of the issue is section 87(2)(g). 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.

Since the audit report wss prepared for the UDC by its internal audit staff, I believe that it could be characterized as "intrs-agency material" and that it is not an "external audit." Nevertheless, the fact that a record constitutes intra-agency material is not alone determinative of whether it may be withheld. Rather, the contents of intra-agency materials determine the extent to which they must be disclosed or may be withheld. As stated by the Court of Appeals in a discussion of intra-agency reports:

> "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..." [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Another decision of possible relevance involved a situation in which opinions and factual materials were "intertwined." 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 dfata 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 AD 2df 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 102m, 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)].

Based upon the foregoing, even though factual information contained within a record may be "intertwined" with opinions, the factual portions, if any, would in my view be available under section 87(2)(g)(i), unless a different ground for denial applies.

In addition, in Miracle Mile Associates v. Yudelson, it was found that section 87(2)(g):

> "...is intended to protect the deliberative process of government, but not purely factual deliberative material...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...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..." [68 AD 2d 176, 182-183; motion for leave to appeal denied, 48 NY 2d 706 (1979)].

Third, as indicated earlier, the portion of the report consisting of "audit findings" was withheld in its entirety.

Although I am unfamiliar with the content of that portion of the report, "findings," as that term is ordinarily used, would appear to indicate that, following an inquiry, an investigation, or perhaps an audit, certain conclusions have been reached. In my view, characterizing a writing as "findings" suggests that the writing is something other than conjecture or an expression of opinion or advice.

On the contrary, "findings," as I understand the common meaning of that term, generally would represent the end results of an inquiry that are factual or conclusory in nature or which are reflective of a determination based upon facts obtained in the course of an inquiry. If my view of the meaning of that term is accurate, the audit findings deleted from the report might consist of factual information that should be disclosed under section 87(2)(g)(i); alternatively, audit findings might consist of final agency determinations, which would be available under section 87(2)(g)(iii).

Lastly, in conjunction with the foregoing, it is emphasized that the Court of Appeals has held on several occasions that the exceptions to rights of access "are to be construed narrowly 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" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also Farbman & Sons v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]. Again, I am unfamiliar with the contents of the report that were withheld. However, it is possible that some of those portions that were withheld, particularly the section containing audit findings, 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

Robert J. Freeman
Executive Director

RJF:saw

cc: James D. O'Donnell, Records Access Officer
Valerie Caproni, General Counsel
Joe Calderone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5925

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

March 12, 1990

Ms. Grace Anker
[redacted]

The staff of the Committee on 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. Anker:

I have received your note of February 25, which appears on a copy of an appeal of a denial of access to records directed to Vincent D'Andrea of the Mt. Vernon Board of Education.

In brief, the appeal indicates that the records withheld involve "the criteria for the appoint[ment] of assistant principals in the elementary schools in this school district." The appeal is dated February 1 and you wrote that, as of the date of your letter, you had received no response.

In this regard, I offer the following comments.

First, an agency is required to respond to an appeal within a time limit specified in the Freedom of Information Law. 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 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."

Since your appeal was made on February 1, it appears that the time within which a determination should have been rendered has been exceeded. 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, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD 2d 388; appeal dismissed, 57 NY 2d 774 (1982)].

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.

Assuming that records exist containing the criteria for the appointment of assistant principals in the elementary schools, one of the grounds for denial would, in my opinion, be relevant. However, due to the structure of that provision, it often requires disclosure, and I believe that to be so in this instance. Specifically, section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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 containing the criteria in which you are interested could, in my view, be characterized as intra-agency materials. However, it also appears that they are reflective of instructions to staff that affect the public that would be available under section 87(2)(g)(ii) or the policy of the Board or the District that would be accessible under section 87(2)(g)(iii).

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to Mr. D'Andrea.

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: Vincent D'Andrea

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5926

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

March 12, 1990

Mr. Mark Fleischer, Coordinator
Chemung County Records and
Information Department
205 Lake Street
P.O. Box 588
Elmira, New York 14902-0588

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

Dear Mr. Fleischer:

I have received your letter of February 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, the Solid Waste District contracts with an engineering firm to design a solid waste facility, and the design plans are filed with the Department of Environmental Conservation. The director of the Solid Waste District has asked if the plans are subject to the Freedom of Information Law "if they are copyrighted" by the engineering firm that prepared them, or whether "they are protected under the trade secret exemption."

You have sought my views on the 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 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, design 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.

By way of background, it is noted that the law concerning copyrighted materials has undergone significant change, and 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 discusaed, 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 or design 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 statute." 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 he 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...Tbus, 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 the plans in question 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
Executive Director

RJF:saw

Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5977

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

March 12, 1990

Ms. Marie Cortissoz
Westchester-Rockland Newspapers
Corporate Park II
One Gannett Drive
White Plains, New York 10604

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

Dear Ms. Cortissoz:

I have received your letter of February 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

Your question concerns rights of access to "restaurant inspection citations" prepared by the Westchester County Health Department. You wrote that you are given records indicating "the dispositions of cases against restaurants after their cases have gone through the hearing process and been resolved or fined," but that you have not received "the initial citations."

In this regard, I offer the following comments.

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

In my opinion, although three of the grounds for denial might arguably be relevant to rights of access to the records in question, none would justify a denial of access.

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." It has consistently been advised, however, that the provision concerning the protection of privacy may be aaserted only with respect to

records identifying natural persons. Moreover, in a recent decision, it was found that "the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence" [American Society for the Prevention of Cruelty to Animals v.. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989]. It was also found that: "In interpreting the Federal Freedom of Information Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g. Cohen v. Environmental Protection Agency, 575, F. Supp 425, D.C.D.C. (1983)" (id.). In short, I do not believe that the privacy provisions of the Freedom of Information Law are applicable regarding the records in question.

Also of possible 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.

In my view, the issuance of a citation indicates that a health code violation has been found. I believe that such a finding would consist of "factual" information accessihle under section 87(2)(g)(i) or a final agency determination accessible under section 87(2)(g)(iii). Further, presumahly a citation is

transmitted by the Health Department to a restaurant. If that is so, such a record would not involve inter-agency or intra-agency material. If that is so, section 87(2)(g) would not apply as a basis for withholding. Again, however, even if section 87(2)(g) is applicable, I believe that a record indicating the issuance of a citation would be available pursuant to subparagraph (i) or (iii) of section 87(2)(g).

The remaining ground for denial of potential relevance 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.

The language quoted above is based upon potentially harmful effects of disclosure and is generally cited in the context of criminal law enforcement. From my perspective, the effects of disclosure described in section 87(2)(e) would rarely arise in relation to code enforcement pertaining to restaurants. In Young v. Town of Huntington, 388 NYS 2d 978 (1976), which was decided under the Freedom of Information Law as originally enacted, it was held that records compiled by a town building department fell outside the "law enforcement purposes" exception to rights of access. As such, it is questionable, in my view, whether the records sought could be characterized as records "compiled for law enforcement purposes." Even if they could be so characterized, it does not appear that any of the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e) would arise by means of disclosure.

Based upon the foregoing, the records in question are in my view available under the Freedom of Information Law, for I do not believe that any of the grounds for denial could sppropriately be asserted to withhold those records.

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

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Victor Sousa, Acting Commissioner
Claire Palermo, Public Information Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5928

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

March 13, 1990

Ms. Lilly Haliasos
[redacted]

The staff of the Committee 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. Haliasos:

As you are aware, I have received your letter of February 28 and the materials attached to it.

Your inquiry concerns rights of access to "budget worksheets" used by the Board of Education of the West Hempstead Union Free School District and other District officials in the process of developing its budget. In response to your request for the budget worksheets, you were informed that "these documents are inter-office materials and not subject to Freedom of Information Law disclosures. In addition, they are discarded after use and thus are not available."

Although we have spoken since your correspondence was sent and it appears that the records in question have been or will be disclosed, you requested an advisory opinion on the matter. My remarks will in many instances be repetitive of those offered in other opinions previously forwarded to you.

In this regard, I offer tbe following comments.

First, tbe 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 "worksheets," 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 are likely relevant.

One is section 87(2)(c), which provides that records may be withheld to the extent that disclosure " would impair present or imminent contract awards or collective bargaining negotiations." If the worksheets refer to proposed expenditures for 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 portions of the worksheets could be withheld. On the other hand, if references in the worksheets to proposed expenditures are unrelated to "present or imminent contract awards or collective bargaining negotiations," section 87(2)(c) would not, in my view, serve as a basis for denial.

The other ground for denial of relevance is section 87(2)(g). That is the provision to which the response to your request alluded, and I agree that the worksheets could be characterized as inter-office materials. Nevertheless, the contents of these materials determine the extent to which they must be disclosed or may be withheld. I emphasize that 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, 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, also called "budget worksheets", 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 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, for instance, the statistical or factual portions should in my opinion be disclosed, unless different grounds for denial apply.

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:saw

cc: Dr. Richard L. Varriale, Superintendent of Schools
Gregory Guercio, School District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5979

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

March 13, 1990

Ms. Kathleen G. Cory, CMC
Town Clerk
Town of Lewisboro
Office of the Town Clerk
Town House, Main Street
South Salem, New York 10590

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

Dear Ms. Cory:

I have received your letter of February 28 and appreciate your kind words.

You referred to my comments made at the Annual Meeting of the Association of Towns to the effect that "tape recordings should be held for four months, and reproduction costs can be passed along to anyone requesting a copy." You have asked that I confirm those comments, "along with any other opinions that are pertinent to the use of video and voice tapes."

It is assumed that your inquiry pertains to the use of tape recording or video equipment at meetings of public bodies. Based upon that assumption, 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 hy, 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 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, 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, I was informed that tape recordings of meetings must be retained for a period of four months after transcription and/or approval of minutes.

With regard to the use of tape recorders and video equipment at open meetings, it is noted by way of background that 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 tbe 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.

As indicated earlier, there are no decisions rendered in New York with which I am familiar concerning the use of video equipment at meetings of public bodies. However, I believe that the principles are the same as those described with respect to the use of tape recorders. If the equipment is large, if special lighting is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.

I hope that 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-5980

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

March 13, 1990

Mr. Herman D. Schramm
90-C-0093
Wende Correctional Facility
3622 Wende Road, 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. Schramm:

I have received your letter of February 27 in which you requested assistance.

You wrote that you "need to know the years that certain lawyers were employed by the state as assistant D.A.'s and what cases they handled..."

In this regard, I offer the following comments.

First, a request should be directed to the records access officers at the agency, such as the office of a district attorney, that you believe maintains the records in which you are interested. The records access officer is the person designated to coordinate an agency's response to requests for 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.

I believe that a record or records indicating the years of a person's employment with an agency must be disclosed, for none of the grounds for denial could, in my opinion, be asserted to withhold such records. It is noted that payroll lists identifying public employees by name, public office address, title and salary have long been available under the Freedom of Information

Law [see section 87(3)(b)], and that records indicating dates of attendance have been found to be accessible under the Freedom of Information Law [see Capital Newspapers v. Burns, 109 AD 2d 292, aff d 67 NY 2d 562 (1986)].

Third, with respect to the "cases handled" by an assistant district attorney, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that, as a general rule, an agency is not required to create a record in response to a request. As such, if, for example, there is no list of cases handled by a particular assistant district attorney, an office of a district attorney would not be required by the Freedom of Information Law to prepare such a list on your behalf. Section 89(3) also requires that an applicant must "reasonably describe" the records sought. As such, a request must include sufficient detail to enable agency officials to locate and identify the records. If, for instance, there is no series of files containing records involving cases handled by a particular employee, or if cases are kept by subject matter or chronologically, it may be all but impossible to locate cases handled by a particular assistant district attorney. In those examples, I do not believe that a request for all cases handled by an assistant district attorney would reasonably describe the records sought, for the records could not be located on the basis of that person s name.

Lastly, even if records can be located that identify cases handled by a certain assistant district attorney, it is likely in my opinion that some of those records could be withheld. One of the grounds 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." Several statutes may require confidentiality concerning records relating to cases. For example, when charges are dismissed in favor of an accused, section 160.50 of the Criminal Procedure Law generally requires that records relating to the charges be sealed. Some cases might have involved juvenile or youthful offenders, and records pertaining to those cases might be confidential by statute. In short, it is doubtful in my opinion that you could obtain records that indicate all cases that might have been handled by an assistant district attorney.

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-5981

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

March 14, 1990

[redacted]
79-A-2875-B-1-36
Box 51
Comstock, New York 12821-0051

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

Dear [redacted]:

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

As I understand the situation, you have attempted without success to obtain permission to correspond with your fiancee, who is on probation, and to obtain information needed to comply with rules or orders concerning your capacity to visit and marry her. In your efforts to gain access to the information, you submitted requests to the records access officer of the New York City Department of Probation for records pertaining to your fiancee's probation supervisor, to the probation supervisor asking for permission to visit and marry, and to the New York State Department of Probation for information.

In this regard, I offer the following comments.

First, the Freedom of Information Law is a statute that permits individuals to seek records. Further, section 89(3) of the Law states that an agency need not create a record in response to a request. The Freedom of Information Law is not, in my view, a vehicle used to seek permission to visit or marry a person on probation, nor is it a vehicle that requires agency officials to answer questions.

Second, your request to the New York City Department of Probation is quite broad. Here I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Your request involves records pertaining to a particular individual, and it is likely

that numerous records are kept relating to that individual. In my view, such a request is vague and does not likely reasonably describe the records. To comply with the standard in the Freedom of Information Law, a request should contain sufficient detail to enable agency officials to locate and identify the records sought.

Third, rather than requesting records about your fiancee's probation supervisor, it is suggested that you seek records reflective of rules, procedures, directives and the like concerning visitation and marriage. Such requests should be directed to the record access officers at the agencies that you believe maintain the records sought.

It is noted, too, that your request sent to the New York State Department of Probation was addressed to 115 Leonard Street in New York City. According to my directory, however, the address for the New York City office of the State Division of Probation and Correctional Alternatives is 250 Broadway, New York, New York 10007.

Lastly, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, I believe that a request may be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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."

As you requested, the materials attached to your letter will be returned to you.

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-5982

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

March 16, 1990

Ms. Marie Fuesy
Town Clerk
Town of Ossining
18 Croton Avenue
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, unless otherwise indicated.

Dear Ms. Fuesy:

I have received your letter of March 1 in which you requested my comments concerning a request made under the Freedom of Information Law.

Specifically, the Town of Ossining has received the following request:

> "Town Assessment Roll--all property owners with address of property, address and name of owner. It would be helpful if this information were provided in street address order on mailing labels."

You wrote that it is your understanding that the assessment roll consists of public information, and that it may be provided in the format in which it is maintained by the Town, "namely computer format". Nevertheless, you question whether the information sought should be provided on mailing labels and asked whether the Town is obliged to produce the labels.

In this regard, I offer the following comments.

First, I agree with your conclusion that the assessment roll must be disclosed. As you are likely aware, assessment records and related information are generally available and were found to be accessible long before the enactment of the Freedom of Information Law.

Further, in Szikszay v. Buelow [107 Misc. 2d 886, 436 NYS 2d 558 (1981)[, the applicant sought assessment information as well as tax maps. The assessment information existed in computer tape format. The court referred to section 87(2)(b), as well as section 89(2)(b)(iii) (id. at 558) of the Freedom of Information Law, which states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes". Notwithstanding those provisions, the court granted access to the computer tapes and held that:

> "In view of the history of public access to assessment records and the continual availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.L.R.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted'" (id.).

The Court also found that:

> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner's purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy. It is therefore improper for respondent to deny petitioner's request for copies of the County assessment rolls in computer tape format" (id.).

I point out, too, that the same conclusion was reached by another court in an unreported decision (Real Estate Data v. Nassau County and Abe Seldin, Chairman, Board of Assessors, Sup. Ct., Nassau Cty., September 18, 1981).

In view of the foregoing, I believe that assessment information that is now stored on a computer tape or in some other format is accessible.

Second, although the contents of the assessment roll maintained in computer tape format would be available, I believe that the request, insofar as it pertains to mailing labels, represents a separate issue. According to information that you and other officials have provided, the Town, based upon its existing computer programs, does not have the capacity to generate mailing labels containing the information sought.

I point out that section 89(3) of the Freedom of Information Law states in part that an agency need not create a record on behalf of an applicant in order to satisfy a request.

As a general matter, it has been advised that if, based upon existing computer programs, an agency can retrieve or reproduce available information stored in a computer, it would be required to do so. On the other hand, if information stored in a computer cannot be retrieved or generated without engaging in reprogramming or altering existing programs, it has been advised that the act of reprogramming would be the equivalent of creating a new record, and that sucb action is not required to be taken to comply with the Freedom of Information Law. As I understand the situation, the Town would have to create a new computer programs to prepare the labels in the manner requested. If that is so, the Town, in my opinion, would not be required by the Freedom of Information Law to do so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5983

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

March 16, 1990

Mr. Don Hadley
Finger Lakes Times
218 Genesee Street
P.O. Box 393
Geneva, New York 14456

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

Dear Mr. Hadley:

I have received your correspondence of March 6 in which you requested an advisory opinion concerning a denial of a request by the Division of State Police under the Freedom of Information Law.

By way of background, the materials attached to your letter indicate that a State Trooper, Roberta Petix, was involved in an automobile accident in 1987 in which three people were killed. Following the accident, investigators determined that the driver of a car other than that driven by Trooper Petix was largely responsible for the accident. Nevertheless, a subsequent investigation suggested that she was speeding, a grand jury recommended that she be charged, and Trooper Petix was later convicted of speeding. She did not return to work following the accident and "entered disability retirement" on October 11, 1989.

In January, a request was made for records involving any disciplinary action that might have been taken with respect to Trooper Petix concerning the accident. The Division of State Police denied both an initial request and an ensuing appeal on the ground that the request involves "intra-agency records which are exempt from disclosure." In addition, the determination of the appeal indicated that the records are exempted from disclosure pursuant to section 50-a of the Civil Rights 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, in conjunction with the contention that the records are exempted from disclosure under section 50-a of the Civil Rights Law, section 87(2)(a) provides that records may be withheld to the extent that they "are specifically exempted from disclosure by state or federal statute." Section 50-a(1) of the Civil Rights Law, which pertains to police officers and certain other classes of public employees, states in relevant part that:

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

Notwithstanding the foregoing, the Court of Appeals, the State's highest court, reviewed the legislative history leading to its enactment and held that section 50-a is not a statute that exempts records from disclosure when a request is made under the Freedom of Information Law in a context unrelated to litigation. More specifically, in a case brought be a newspaper, it was found that:

> "Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law section 50-a was narrowly specific, 'to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action' (Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, 109 AD 2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a should not be construed to

> exempt intervenor's 'Lost Time Record' from disclosure by the Police Department in a non-litigation context under Public Officers Law section 87(2)(a)" [Capital Newspapers v. Burns, 67 NY 2d 562, 569 (1986)].

It was also found that the exemption from disclosure conferred by section 50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568).

In another more recent decision, the Court of Appeals held that the purpose of section 50-a "was to prevent the release of sensitive personnel records that could be used in litigation for the purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. Since the statute is equally applicable to police and correction officers, records prepared in conjunction with an investigation of a state trooper's conduct might, under appropriate circumstances, fall within the provision of section 50-s of the Civil Rights Law.

Those circumstances, however, are not present, in my opinion, in this instance. The subject of the records is no longer a state trooper. Consequently, I do not believe that section 50-a remains applicable as a basis for withholding. Further, the article that you transmitted indicates that a trial was conducted concerning the speeding charge made against the trooper. That proceeding has ended and the trooper was convicted. Finally, the request has not apparently been made, nor could the records be used at this juncture, in a "litigation context." If my assumptions are accurate, I do not believe that section 50-a of the Civil Rights Law is relevant or that it may be asserted as a basis for denial.

Third, aside from the application of the Civil Rights Law, in my opinion, two other grounds for denial in the Freedom of Information Law may be relevant to the issue.

One of those provisions 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." While that standard is flexible and often may result in subjective interpretations, there are numerous decisions that pertain to the privacy of puhlic 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, supra; 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 significance, which is the provision to which the Division alluded in its denials, 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.

While I agree that records prepared by the Division consist of intra-agency materials, the specific contents of the materials determine the extent to which those materials must be disclosed or may be denied.

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." As such, in the context of your question, it is my view that a record of a decision by the Division of State Police to impose disciplinary action or a penalty against a trooper would be accessible under the Freedom of Information Law. 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.

I point out, too, that in situations in which allegations have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra.]. Three of these decisions, Powhida, which was decided recently, Scaccia and Farrell, involved findings of misconduct concerning police officers. Further, Scaccia dealt specifically with a determination by the Division of State Police to discipline a state police investigator. In that case, the Court rejected contentions that the record could be withheld as an unwarranted invasion of personal privacy or on the basis of section 50-a of the Civil Rights Law. Further, it was held that, although the record consisted of intra-agency material, that record constituted a final agency determination available under section 87(2)(g)(iii) of the Freedom of Information Law.

Lastly, in its discussion of the intent of the Freedom of Information Law, the Court of Appeals in Capital Newspapers v. Burns 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 562, 566 (1986)].

For the reasons discussed above, if disciplinary action was taken against Trooper Petix regarding tbe accident, I believe that a record indicating the nature of the action taken or reflective of a finding of misconduct would be available under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Francis A. DeFrancesco, Chief Inspector
Lt. Colonel Gary Dunne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5984

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

March 19, 1990

Mr. William Adams
#80-A-4568
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. Adams:

I have received your letter of March 6. Although you referred to correspondence attached to your letter, the only document received by this office was the letter.

Your inquiry concerns a request for records of the New York City Police Department that you characterized as "exculpatory evidence." The records sought, which apparently pertain to a line-up and ballistics tests, were denied by the Department. You contend that the information is vital to your appeal, and you have asked for advice on the subject.

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. Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 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.

Records prepared by employees of a police department or the office of a district attorney, or records transmitted between those agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Second, in a recent decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "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" [see Moore v. Santucci, 543 NYS 2d 103, 107, ___AD 2d___ (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

Third, it is noted that rights conferred by the Freedom of Information Law are separate from those that may be accorded to you as a defendant under the Criminal Procedure Law, for instance. Since I cannot ascertain whether the records sought should be available to you pursuant to statutes other than the Freedom of Information Law, and since the records may be relevant to an appeal, it is suggested that you discuss the matter with your attorney.

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-5985

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

March 19, 1990

Mr. Michael James
85-A-1212 D-1-29
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. James:

I have received your letter dated January 26. Please note that it was inadequately addressed and did not reach this office until March 7.

You wrote that you submitted a request to the Kings County District Attorney's Office under section 88(1) of the Freedom of Information Law for a "final determination and opinion, order from the Second Judicial Department thst adjudicated the case". According to your letter, you received a response from the BLS Legal Services Corporation with a copy of a brief filed by the District Attorney's office concerning your case.

You requested my comments on the matter, and in this regard I offer the following remarks.

First, the provision under which your request was made, section 88(1) of the Freedom of Information Law, pertains to a section of the Freedom of Information Law that has not applied to agency records, such as those maintained by the office of a district attorney, since 1977. Section 88 applied to agency records in the Freedom of Information Law as originally enacted in 1974. The original Freedom of Information Law was repealed and replaced with the current statute, which became effective in 1978.

Second, although you wrote that your request was made to the Office of the Kings County District Attorney, the response did not come from that office, but rather from the legal assistance corporation that apparently represents you. It is unclear whether the District Attorney responded to your request.

Third, assuming that you are interested in obtaining a copy of a judicial decision, it is suggested that you request the decision from the clerk of the court in which the decision was rendered. Although the Freedom of Information Law does not include the courts and court records within its coverage, court records are generally available. In the alternative, it is likely that a copy of the decision could be obtained from your attorney at the BLS Legal Services Corporation.

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-5986

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

March 20, 1990

Mr. Charles Leahey
[redacted]

Dear Mr. Leahey:

I have received your correspondence, which again deals with your capacity to obtain medical records from the New York City Police Department. The records were apparently used to "force" you into retirement from the Department.

In brief, it is your contention that you have a constitutional right to obtain the records based upon the decision rendered in Lenihan v. City of New York, [636 F. Supp. 998 (1986)].

Although I am not an expert on the subject of constitutional law, as I understand the holding in Lenihan, rights of access to records conferred in that case were based upon the plaintiff's status as a party to a proceeding. Often in a proceeding, due process rights result in necessary disclosures, and those rights are conferred due to one's status as a party to the proceeding. Rights of access granted by the Freedom of Information Law are accorded to the public generally. As such, rights of access conferred to a member of the public under the Freedom of Information Law may differ from rights conferred upon a party to a proceeding or to a person seeking records as a litigant. As stated by the Court of Appeals, the State's highest court, "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and neither enhanced...nor restricted... because he is also a litigant or potential litigant" [Farbman v. New York City, 62 NY 2d 75, 82 (1984)].

While I am sympathetic to your position, it appears that rights of access granted by the Freedom of Information Law are separate from rights that might be accorded in a proceeding in

which considerations of due process are relevant. Under the circumstances, I do not believe that I can add to comments offered in my letter of February 12. However, it is suggested that you discuss the matter with your attorney.

I regret that I cannot be of greater 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-5987

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

March 21, 1990

Mr. Roberto Merlino
85-A-7998 (29-20)
P.O. Box 338
Napanoch, NY 12458

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

Dear Mr. Merlino:

I have received your letter of March 5, as well as the materials attached to it.

Your inquiry involves a request for records of the New York City Police Department and focuses upon the chemical analysis and chemists' notes prepared in conjunction with your arrest. According to your letter, those documents are referenced as property clerk vouchers #B196375 and as evidence envelope #357131. Although the response to your request by the Department's records access officer indicates all vouchers, reports and chemists' notes were made available, you wrote that you have not received the two documents identified above. Further, the response to your request refers to a different voucher, #B198375, rather than #B196376. Moreover, the grand jury minutes also refer to voucher #B198375 and to events occurring in September of 1982, rather than November of that year, which was when your arrest occurred. In addition, you alleged that the voucher, which apparently did not relate to you, "was used as evidence against [you]". You also pointed our that a complaint report concerning your arrest is dated September 9, 1982. However, your arreat occurred on November 5, 1982.

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

First, it is suggested that you write to Sgt. Sultana, the Records Access Officer, for the purpose of explaining to him what has been explained to me, for it appears that a mistake or series of mistakes may have been made relative to your arrest and subsequent conviction.

Second, in your letter to him, I recommend that that you request the records in which you are interested, including reference to the specific identification numbers of those records.

Third, although I am unaware of the contents of those records, similar records have been made available to you previously, and it would appear that the records in question should be disclosed to you under the Freedom of Information Law. In short, since you were convicted and any investigation concerning your arrest ended years ago, it is doubtful, in my view, that any of the grounds for denial could appropriately be asserted to withhold the records.

Lastly, it is suggested that you discuss the matter with an attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. John G. Sultana, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 5988

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

March 21, 1990

Mr. Mark E. Raabe
[redacted]

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

Dear Mr. Raabe:

I have received your letter March 3, as well as the correspondence attached to it.

You have requested an opinion concerning "the right of the public to gain access to financial records of grants financed with state tax revenue." The question has arisen in conjunction with a grant from the Water Resources Research Institute (WRRI) used to finance your research while attending Cornell University. You wrote that WRRI received funds from the Department of Agriculture and Markets, and you allege that grant money was improperly used. Having referred the matter to Dean David Call of the College of Agriculture and Life Sciences, an inquiry was made concerning your allegation, and it was concluded that there was insufficient evidence to warrant "a full investigation." Further, your request to review the monthly statements submitted by the Department of Agriculture and Biological Engineer to the WRRI was denied. Specifically, Associate Dean Kenneth E. Wing wrote that:

> "Financial records will not be released to you. Financial matters related to contracts and grants are exclusively in the domain of the sponsor, the principal investigator named on the project, the relevant department chair, and the director of research for the college."

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 may be 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. The records in question are maintained by or involve one of the four statutory colleges, the New York State College of Agriculture and Life Sciences (see Education Law, section 5712). 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 whicb 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 function in the case of the former, as opposed to "any" entity per-

forming 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.

I point out that, in the discussion of the issue in Holden, it was found that:

> "Cornell maintains custody and control of the property, buildings, furniture, and other apparatus of the statutory colleges, but title to such remains with the State (Education Law, sections 5711, 5712, 5714, 5715).
>
> "The SUNY Board of Trustees retains supervision of Cornell's operation of these colleges (Education Law, section 355, subd. 1, par. a), and Cornell must consult with the Trustees about budgets and expenditures (Education Law, section 355, subd. 1, par. f). The SUNY Trustees must approve the Board's selection of deans of the statutory colleges and are consulted with respect to tuition rates. Cornell must report to the SUNY Trustees every year about the colleges' expenditures. The statutory colleges receive public monies which must be kept in a separate fund and used only for the public colleges.
>
> "The close relationship between Cornell and the State and Cornell's dual role, as both a private and public institution, indicate that the Board is a public body as defined by section 97 of the Open Meetings Law. The conclusion also must be drawn that Cornell, as such public entity, conducts public business and performs a governmental function for the State or for an agency or department of the State. Cornell, in operating the statutory colleges, is involved in the day-to-day management of the colleges, setting tuition levels, determining spending priorities and numerous other activities which form a part of a college's existence. Indeed,

> the Board in administering the colleges, spends State monies appropriated for these four colleges. Management of public monies is public business.
>
> "The Board is the acknowledged representative of SUNY which is a corporate agency within the State Education Department charged with carrying out certain governmental functions (Education Law, section 352). In its capacity as administrator, therefore, the Board performs a governmental function for the State Education Department and necessarily for the State" (id., 59-60)

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" has not, to the best of my knowledge, been the subject of any judicial decision.

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, however, 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.

Lastly, assuming again that the Freedom of Information Law is applicable, it does not appear that any of the grounds for denial could appropriately be asserted with respect to the records in which you are interested. The only ground for denial that might be relevant is section 87(2)(d), which 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."

Based upon my understanding of the matter, no "commercial enterprise" is involved. If that is so, the provision quoted above would not, in my view, serve as a basis for denial.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Kenneth E. Wing, Associate Dean

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1735
FOIL-AO-5989

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

March 22, 1990

Mr. Harold Rotchford
[redacted]

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

Dear Mr. Rotchford:

I have received your letter of March 2, which pertains to various activities of Katonah-Lewisboro School District.

According to your letter, at a meeting of the Board of Education held in December, "a memorandum of agreement was signed by the board for settlement of a labor contract between the Superintendent and the Blue Collar workers and nurses union". You added that the contents of the agreement were not ratified but that the Superintendent "promised ratification and publication by the end of January". As of the date of your letter to this office, the contents of the contract had not been disclosed. You expressed the belief that the contents of that agreement are being withhold until the teachers' contract is settled, but that "the School Board contends they are not discussing the negotiations, on the advice of Counsel".

You have contended that "discussion and/or communications must have been held between the School Board and the Administration in secret, to the detriment of the voters, precluding any open discussion of the Staff Contracts and its' monetary compensation". As such, you believe that the Board is "guilty of preventing public debate...".

In this regard, I offer the following comments.

Your comments in my view relate to both the Freedom of Information Law, which pertains to rights of access to records, and the Open Meetings Law, which pertains to meetings of public bodies. Although both of those statutes are based upon a presumption of openness, they permit the withholding of records and the closing of meetings under certain circumstances.

With respect to the disclosure of records, one of the grounds for denial in the Freedom of Information Law, section 87(2)(c), permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations". In my opinion, collective bargaining agreements are clearly accessible continually from the time that an agreement has been reached. Consequently, I believe that an existing collective bargaining agreement must be made available, even though it may be used in relation to ongoing collective bargaining negotiations. It is emphasized that, although section 87(2)(c) permits an agency to withhold records the disclosure of which would impair present or imminent collective bargaining negotiations, the Court of Appeals, the state's highest court, has held that existing collective bargaining agreements, as well as salary and fringe benefit data, cannot be denied on the basis of that provision; on the contrary, it was found that such records must be made available under the Freedom of Information Law [Doolan v. BOCES, 48 NY 2d 341 (1979)]. As such, if an agreement has been reached with the "blue collar" and nurses union, and disclosure would not impair the negotiations with that union, I believe that the agreement must be disclosed.

With respect to meetings of the Board of Education, any such meetings must be conducted open to the public, except to the extent that the subject matter under consideration may properly be discussed during an executive session. Paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may be discussed in executive sessions.

One of the grounds for entry into executive session, section 105(1)(e), is relevant to your inquiry. The cited provision permits a public body to enter into an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article fourteen of the Civil Service Law is commonly known as the "Taylor Law", and it pertains to the relationship between a public employer (i.e., a school district) and a public employee union. Consequently, I believe that a public body clearly has the authority to enter into an executive session to engage in collective bargaining negotiations or to discuss those negotiations.

It is noted that section 105(1) of the Open Meetings Law requires that a procedure be accomplished by a public body before it may conduct 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..."

As I interpret that provision quoted above, an executive session cannot be held until a motion to do so is made and carried by a majority vote of the total membership of a public body during an open meeting. Therefore, although discussions of collective bargaining negotiations by the Board may be conducted during executive sessions, executive sessions may be held only during open meetings in conjunction with the procedure described earlier.

I hope that the foregoing serves to clarify your understanding of the duties of the Board of Education relative to the issues that you raised. 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, Katonah-Lewisboro School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5990

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

March 22, 1990

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 March 5, both of which were addressed to Barbara Shack, Chair of the Committee on Open Government, and the other members of the Committee. As you know, the staff of the Committee is authorized to respond on its behalf.

In one letter, you asked why the Village of Croton-on-Hudson "hold[s] the New York Freedom of Information Law in contempt" and why this office "stand[s] behind such contempt". Both of those questions have been previously raised, and I have responded to them as well as I can.

The second letter involves your request for advice concerning the "appropriateness" of a request directed to the records access officer of the Westchester County Board of Legislators. The records sought include:

> "1. The Laws of Westchester County as they apply to the Westchester County Board of Legislators.
>
> 2. The Laws of the Westchester County Board of Legislators.
>
> 3. The By-Laws of the Westchester County Board of Legislators."

In this regard, I offer the following comments.

First, I believe that the laws and by-laws adopted by a governmental entity constitute records accessible under 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. The records in question, in my view, would not fall within the scope of any of the grounds for denial.

Second, as indicated in previous correspondence, section 89(3) of the Freedom of Information Law requires that an applicant "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 on the terms of a request. Further, to deny a request on the basis that it is overbroad, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986); also Johnson Newspapers Corp. v. Stainkamp, 94 AD 2d 825, 826, modified on other grounds, 61 NY 2d 958 (1984)].

I am unaware of the manner in which the records sought are maintained or whether they can be located or retrieved in conjunction with the terms of your request. The laws "as they apply to the Westchester County Board of Legislators" might have been enacted recently or decades ago, and they might deal with a variety of subject areas. Whether such laws are indexed in a manner that permits their identification and retrieval is unknown to me. Further, the term "law" can refer to a variety of enactments, including local laws, ordinances, codes and the like. For example, sections of building or health codes might include reference to the County Board of Legislators. Again, whether such codes are indexed in a manner that permits identification of those sections pertaining to the County Board of Legislators is unknown to me.

In short, while some aspects of your request might have reasonably described the records sought, it is questionable whether that standard has been met with respect to each aspect of 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
cc: Records Access Officer, Westchester County
Board of Legislators

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5991

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

March 22, 1990

Mr. Rob Borsellino
State Editor
Capital Newspapers
News Plaza, Box 15000
Albany, New York 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. Borsellino:

I have received your letters of March 7 and March 8.

In the first letter, you requested an opinion "as to whether a taped conversation between a police officer at the scene of an accident and a dispatcher [is] public information." In the second, you asked for an opinion "as to whether a record indicating a license check made by a police agency would be public information."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and section 86(4) of that statute 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 upon the foregoing, if information exists reflective of a taped conversation or a license check, such information would in my view constitute a "record" subject to rights conferred by the Freedom of Information Law, and the ensuing remarks will be based upon an assumption that the information in question exists in the form of a record or 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. 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 grounds for denial that follow. In my view, the phrase quoted in the preceding sentence indicates that a single record might contain both accessible and deniable information. Further, I believe that the phrase imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, from my perspective, several of the grounds for denial may be relevant to the records in question. However, the extent to which those provisions could appropriately be asserted would be dependent upon the specific contents of records and the effects of their disclosure.

Perhaps the most relevant exception to rights of access relative to records maintained by law enforcement agencies is section 87(2)(e). That provision permits an agency to withhold records that:

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

In conjunction with the foregoing, an initial consideration is whether the records could be characterized as having been "compiled for law enforcement purposes." If, for example, records maintained by a police department were prepared in the ordinary course of business, rather than for a law enforcement purpose, section 87(2)(e) would not, in my view, be applicable. Furtber, even if the records were compiled for law enforcement purposes, the authority to withhold records pursuant to that provision is limited to those instances in which disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e). Therefore, if disclosure would not interfere with an investigation, deprive a person of a right to fair trial or impartial adjudication, identify a confidential source or reveal confidential information pertaining to a criminal investigation, or reveal non-routine criminal investigative techniques or procedures, I do not believe that section 87(2)(e) would serve as a basis for withholding.

Also of possible significance is section 87(2)(g), which enables an agency to withhold records that:

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

A tape recording of a conversation between a police officer and a dispatcher would in my view consist of intra-agency material. Similarly, a record involving a license check would in my opinion consist of intra-agency material if the check involved a communication between a police officer and an employee of the same agency or inter-agency material if the check involved a communication with a different agency. While those records fall within the scope of section 87(2)(g), as suggested earlier, their contents would determine the extent to which the records must be disclosed or may be denied. For instance, to the extent that such records consist of factual information, they would be available pursuant to section 87(2)(g)(i), unless a different ground for denial could be asserted.

The remaining ground for denial of possible application 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. It is noted that section 89(2)(a) indicates that an agency my delete identifying details from records that would otherwise be available when disclosure of those details would result in an unwarranted invasion of personal privacy. In addition, section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy. Again, the contents of the records and the effects of their disclosure would be the relevant factors in determining the extent to which disclosure might constitute an unwarranted invasion of personal privacy.

Fourth, aside from the issues previously considered, often communications between police officers and dispatchers are made by means of radio transmissions. If those transmissions are made through the public airwaves, and if members of the public having police scanners in their vehicles or homes heard or could have heard a conversation between a police officer and a dispatcher, it would be unlikely, in my view, that any grounds for denial could appropriately be asserted, particularly if a communication does not relate to pending criminal investigation and section 87(2)(e) would not be applicable [see e.g., Buffalo Broadcasting Co., Inc. v. City of Buffalo, 126 AD 2d 983 (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:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 5992

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

March 22, 1990

Mr. Albert R. Singer
Records Access Officer
NYS Department of Law
Albany, NY 12224

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

Dear Mr. Singer:

I have received your letter of March 8 in which you requested advice concerning the Freedom of Information Law.

According to your letter, a particular inmate submits several requests a week under the Freedom of Information Law. You wrote that "Each request is only for five pieces of paper, although sometimes several requests are included in the same envelope". You have contended that he is so doing "to avoid payment of copying costs", but that "this has gotten so voluminous that [you] believe now [you] combine requests he makes over a period of time and insist on payment".

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 that the Committee on Open Government promulgate regulations with respect to the implementation of section 87(1) of the Law, which includes reference to fees that may be assessed by agencies (see 21 NYCRR Part 1401). In turn, section 87(1) requires each agency to adopt regulations consistent with the Freedom of Information Law and the Committee's regulations.

Second, with respect to fees for photocopying, section 87(1)(b)(iii) states that an agency may charge up to twenty-five cents per photocopy, unless a different fee is prescribed by a statute other than the Freedom of Information Law.

Third, nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government pertains to waivers of fees. Therefore, an agency may charge up to twenty-five cents per photocopy, irrespective of the volume of a request. Further, unless the regulations promulgated by the Department of Law specify that fees must be waived, I am unaware of any provision that would require you to waive or reduce fees for copies of records sought pursuant to the Freedom of Information Law. In short, absent provisions in the Department's regulations requiring a fee waiver, I believe that you may "insist on payment" when photocopies are requested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-5993

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

March 22, 1990

Mr. William Henry
87-A-2156 C-2-263
Shawangunk Correctional Facility
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. Henry:

I have received your letter of March 7 in which you requested assistance.

According to your letter, you submitted a request to the New York City Police Department for records relating to your arrest. In response, it was apparently indicated that the Department does not maintain "data files" containing the information sought. If the Department does not maintain the records, you asked "who does" and where you might apply for the records.

In this regard, I offer the following comments.

First, a copy of the request indicates that it was made pursuant to the federal Freedom of Information and Privacy Acts. Those statutes pertain only to records maintained by federal agencies; they do not apply to the New York City Police Department. The New York Freedom of Information Law, however, is applicable to records maintained by entities of state and local government in New York. As such, if the arrest occurred in New York City, records concerning the arrest maintained by the New York City Police Department would be subject to rights conferred by the New York Freedom of Information Law.

Second, your requested involved:

> "(1). Copy(s) of all D-D:5 reports, UF-4, UF61, -250 Forms.

(2). Copy(s) of all written reports, all inclusive including everything comprehensive pertaining to this arrest of Feb 13, 1986.

(3). The Fax number to this arrest is (Q003006), the oracle No. (25028909)."

I am unaware of the meaning of the Fax or oracle numbers. Nevertheless, it is emphasized that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. As such, a request should contain sufficient detail to enable agency officials to locate and identify the records in which you are interested. Assuming that the arrest was made by the New York City Police Department, it is suggested that you resubmit the request and that you include as much detail as possible, i.e., names, dates, locations, descriptions of events and other information that might enable Department officials to locate the records. If the arrest was made elsewhere, a request should be made to the records access officer at the agency that you believe maintains the records sought.

If I have misunderstood the facts, please write again. 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-5994

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

March 23, 1990

Mr. John L. Barbarite
[redacted]

The staff of the Committee 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. Barbarite:

I have received your letter of March 7 in which you referred to correspondence sent to this office on February 28. That correspondence involved a denial of a request for records maintained by the Village of Monticello. Your recent letter indicates that the denial was sustained following your appeal, and you have requested an advisory opinion concerning the propriety of the denial.

According to the materials, a fire occurred at a house in Monticello, and the Village Board of Trustees at a meeting held on November 6 authorized that Village Attorney "to bring legal proceedings to have the abandoned building...demolished..." In February, you requested "Copies of 'papers' or legal summons which have been issued to bring about the 'cleanup' or demolition of the building." Both your initial request and your appeal were denied based upon advice given by Stephen L. Oppenheim, the Village Attorney. In a letter addressed to the Village Clerk, Mr. Oppenheim wrote:

> "Regarding the Freedom of Information request for documents prepared in legal actions, the request should be denied as calling for documents falling within the scope of the attorney-client privilege, as falling within the scope of material

> prepared solely for the purposes of litigation, and within the scope of intra- and inter-agency opinions which are neither statistical, factual, instructional nor final."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Ststed differently, all records 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 been found that records may be withheld with 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 relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not beeb 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 withheld was a confidential communication made to the attorney to obtain legal advice or services...Since this privilege is an 'ohstacle' to the truth-finding process, it should be cautiously applied..." [527 NYS 2d 113, 115, 139 AD 2d 806 (1988)].

More importantly, from my perspective, the attorney-client privilege only applies to communication between an attorney and a client. Once records are disclosed to anyone other than a client, the privilege does not apply.

Although a summons, a complaint or other legal documents may have been prepared by the Village Attorney, once those records are served or filed upon an adversary or with a court, the records in my opinion would not be privileged, for they would not involve communications between the attorney and Village officials. Consequently, I do not believe that such records would fall within the scope of the attorney-client privilege.

Similarly, 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 or a court, for example. 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 or confidential.

The remaining basis for denial offered by the Village attorney involves a contention that the records are inter-agency or intra-agency materials. While such materials may be withheld, depending upon their contents under section 87(2)(g) of the Freedom of Information Law, that provision would not apply, in my opinion, to records prepared by the Village Attorney and transmitted to a party to a proceeding or to a court. Intra-agency materials involve records transmitted among or between officers or employees of an agency, such as a Village. Inter-agency materials involve records transmitted from one agency to another agency. The recipient of a summons or other materials relating to a proceeding initiated by the Village, such as party to the proceeding or a court, would not be an agency [see definition of "agency," Freedom of Information Law, section 86(3)] or an agency employee. Therefore, such records could not in my view be characterized as inter-agency or intra-agency materials, and section 87(2)(g) would not serve as a basis for denial.

In sum, if the records in which you are interested that are maintained by the Village have been served upon or filed with a party to a proceeding or a court, or have otherwise been disclosed to persons other than clients in the context of an attorney-client relationship, I believe that they should be disclosed by the Village under the Freedom of Information Law.

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
Executive Director

RJF:saw

cc: Hon. John M. Duiguid, Mayor
Stephen L. Oppenheim, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO. 1737
FOIL-AO-5995

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

March 23, 1990

Ms. Bette Smith
[redacted]

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

Dear Ms. Smith:

I have received your recent letter in which you raised questions concerning the requirements of the Open Meetings Law and the Freedom of Information Law.

Your initial area of inquiry involves a clarification concerning provisions of the Open Meetings Law relating to the posting of notice of meetings, and you asked whether a public body is "supposed to formally designate the posting place or places (such as by resolution)...".

In this regard, section 104 of the Open Meetings Law pertains to notice and states in relevant part that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto."

In my view, the provisions involving the requirement that notice be posted "in one or more designated public locations" is intended to enable the public to know where notice will consistently be placed. As such, I believe that a public body must designate, by resolution or rule, for example, the location or locations where it will always post notice of its meetings.

In a relsted vein, you asked whether the Electrician and Plumbing Boards must post notice at "this 'designated place'." If those boards are the City's licensing boards, it is assumed that they are "public bodies" subject to the Open Meetings Law. If that is so, they bear the same responsibility to comply with the notice requirements as the governing body, for instance.

To ensure compliance with section 104, usually a location or locations is established or designated where all public bodies in a municipality post their notices. Again, I believe that the intent of the Law is to enable the public to know where notice of meetings will always he posted.

Lastly, you expressed the belief that the Freedom of Information Law requires that each agency must "post conspicuously and/or publicize in a local newspaper certain information". While the Freedom of Information Law does not contain any such requirement, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations (21 NYCRR Part 1401) concerning the procedural aspects of the Law, including reference to times and places records are available and the persons from whom records may be obtained [see Freedom of Information Law, section 87(1)(b)(i) and (ii)]. In turn, section 87(1) requires the governing body of each public corporation (i.e., a city council) to adopt uniform rules and regulations for all agencies in the municipality in a manner consistent with the Freedom of Information Law and the Committee's regulations. Further, section 1401.9 of the regulations promulgated by the Committee states that:

> "Each agency shall publicize by posting in a conspicuous location and/or by publication in a local newspaper of general circulation:
>
> (a) The locations where records shall be made available for inspection and copying.
>
> (b) The name, title, business address and business telephone number of the designated records access officers.

(c) The right to appeal by any person denied access to a record and the name and business address of the person or body to whom an appeal is to be directed."

As such, an agency must either post or publish in a newspaper the information described above. I point out that the substance of section 1401.9 has been in effect since 1974. As such, it is possible that the requirements of that provision might have been accomplished by means of publication years ago in order to comply with that provision.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Andrew Damiano, City Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5996

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

March 23, 1990

Mr. John B. Schamel
NEA/New York Field Rep.
Elmira Service Center
Mark Twain Building #200
North Main and West Gray
Elmira, New York 14901

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

Dear Mr. Schamel:

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

Your first area of inquiry pertains to a new policy concerning fees for copies of records made available under the Freedom of Information Law that is being implemented by the Savona Central School District. Specifically, a resolution unanimously adopted by the Board of Education in November of 1989 provides that:

> "Under the 'Freedom of Information Law,' school district may levy a 'reasonable charge' for providing copies of school records to interested persons. Approval is hereby given to increase the cost of these copies to Fifty cents ($.50) per page to cover school district costs."

You have asked whether the resolution is appropriate. In this regard, I offer the following comments.

In my opinion, unless there is a statute, an act of the State Legislature, that permits an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy when it reproduces records up to nine by fourteen inches [see Freedom of Information Law, section 87(1)(b)(iii)].

Based upon the legislative history of the Freedom of Information Law and its judicial interpretation, it is clear in my view that the only fee that an agency can charge is a fee for copying, unless a statute other than the Freedom of Information Law specifically authorizes the assessment of a different or additional fee.

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, it has been confirmed judicially 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 [Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. In that case, the provisions of a municipal ordinance were found to be invalid to the extent that they were inconsistent with the Freedom of Information Law.

It is noted, too, that the regulations promulgated by the Committee on Open Government, which have the force of law, preclude the assessment of search or administrative fees, unless such fees are prescribed by statute (21 NYCRR 1401.8).

The second issue pertains to the retention of an auditor by the District to prepare an audit for the District on its financial status. You wrote that the auditor's report "was prepared, paid for and submitted to the District." Nevertheless, a request for the audit was denied on the ground that "Record is not maintained by the District."

If I understand the facts correctly, the audit report would be subject to rights conferred by the Freedom of Information Law, even if it is not in the physical possession of the District.

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."

In view of the breadth of the language quoted above, I believe that the report in question consists of "information...produced...for an agency" and, therefore, constitutes a "record" subject to rights of access, irrespective of its physical location.

Assuming that the report is an agency record, 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. 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.

From my perspective, one of the grounds for denial may be relevant to rights of access. However, it is emphasized that, due to its structure, that provision 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.

If the report could be characterized as an external audit, I believe that it should be disclosed in its entirety pursuant to section 87(2)(g)(iv).

If the documentation is not an external audit but rather could be characterized as a consultant's report, it is likely that significant portions of the report, if not the entire report, must be disclosed. 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 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 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)].

Nevertheless, the Court specified that the contents of intra-agency materials determine to 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 Officer 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).

As such, even if the report is not an external audit, I believe that it would consist of intra-agency material, and that it must be disclosed to the extent that it includes statistical or factual information.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded 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:saw

cc: Board of Education, Savona Central School District
Frederick P. Hall, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5997

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

March 26, 1990

Mr. Jeff Storey
Managing Editor
The Times Herald Record
40 Mulberry Street
Middletown, New York 10940

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

Dear Mr. Storey:

As you are aware, I have received your letter and the materials attached to it.

By way of background, a request was directed to Orange County for records involving "the licensing or certification status" of two named individuals as "home day-care providers." The reporter who made the request specified that she was interested in records indicating when those individuals were certified, whether certification is currently in effect, and whether certification expired or has been revoked. The news articles attached to your letter state that the two people in question ran a "baby-sitting service" in their home and have been charged with sodomy, and that the State Department of Social Services has no record that either of two had ever sought certification as home day-care providers. However, one of the articles indicates that the director of the Orange County Day Care Council said that one of those charged "was certified at one time."

In response to your request, Geoffrey E. Chanin, Acting County Attorney, denied access, stating that:

> "It is well established that an exception to the provisions of the Freedom of Information Law lies when disclosure would interfere with law enforcement

> investigation and/or disclose confidential information. The individuals who are the subject of your request are, I believe, thus immunized from the disclosure you request."

Mr. Chanin added that:

> "general Constitutional considerations seeking to assure the fairness of the legal system as to any individuals who may be subject to investigation or eventual prosecution, contribute to my reply declining to provide you with the specific information you have requested."

Further, on the matter of an appeal of the denial of the request, Mr. Chanin wrote that:

> "The County officer who is responsible to hear appeals of persons whose FOIL requests are denied is the County Attorney. Therefore, if another Department head or other County employees were to deny such a request, the appeal should be directed to me. In this case, and in a case where an appeal is denied by the County Attorney, further appeal should be directed to the New York State Committee on Open Government, with offices in Albany, New York."

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

First, I believe that section 390 of the Social Services Law and the regulations promulgated pursuant to that statute by the State Department of Social Services, 18 NYCRR part 417, specify the procedures and conditions under which a permit or certificate may be obtained to provide day care for children. Section 390 states in part that "no place, person, association, corporation, institution or agency shall provide day care for three or more children without a permit issued therefor by the department..." Further, section 417.3 of the regulations requires that an "application be completed by persons or entities seeking a family day-care permit or certification." An application contains a variety of information, including a report of a medical examination of the proposed operator, a statement of the applicant's employment history, names and addresses of references, and similar information.

Second, in my opinion, records indicating whether a person has held a license or certificate, the dates of effect of a license or certificate and whether a license or certificate expired or revoked should be disclosed under 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.

It has consistently been advised that licenses and similar, related kinds of records are available to the public, even though they identify particular individuals. From my perspective, various activities are licensed due to some public interest in ensuring that individuals or entities are qualified to engage in certain activities, such as teaching, selling real estate, owning firearms, practicing law or medicine, etc., as well as operating day care centers, for example. I believe that licenses and similar records should be available, for they are intended to enable the public to know that an individual has met appropriate requirements to be engaged in an activity that is regulated by the state or in which the state has a significant interest.

In my view, only one ground for denial is relevant to your inquiry. Specifically, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof the disclosure of which would constitute "an unwarranted invasion of personal privacy." That standard in my opinion is flexible and agency officials must, in some instances, make subjective judgements when issues of privacy arise. However, it is clear that not every item within a record that identifies an individual may be withheld. Disclosure of intimate details of peoples' lives or personal information such as medical information, one's employment history and the like, might, if disclosed, constitute an unwarranted invasion or personal privacy; nevertheless, other types of personal information maintained by an agency, particularly those types of information that are relevant to the agency's duties, would if disclosed often result in a permisaible rather than an unwarranted invasion of personal privacy.

I believe that the kinds of information that you requested, the certification or permit status of persons, the period during which a certificate or permit remained in effect, and whether a certificate or permit expired or was revoked would be available, for disclosure of those items would, in my opinion, result in an permissible rather than an unwarranted invasion of personal privacy. As stated in American Broadcasting Companies, Inc. v. Siebert, which involved information pertaining to persons licensed to operate check-cashing businesses:

> "...the applicants sought, by license, the patronage of the public-at-large. In supplying this information to the agency, the licensees' reasonable expectation probably was that this information would be available to the public. Nor is there any indication by rule or otherwise that the applicants had any expectation or had received any assurance that this information as to their principals would be shrouded from disclosure" [442 NYS 2d 855, 858 (1981)].

Moreover, the Court concluded that:

> "Under FOIL, the public has a right of access to the names and business addresses of principals of applicants for license to operate a check cashing business, which seeks public patronage. If known by other names, that should also be disclosed" (id., 859).

Similarly, names and addresses of licenses were found to be available in Herald Company v. NYS Division of the Lottery (Supreme Court, Albany County, November 16, 1987) involving licensed lottery agents and New York State Association of Realtors, Inc. v. Paterson (Supreme Court, Albany County, July 15, 1981) involving licensed real estate brokers and salespeople.

Third, the Acting County Attorney denied that request on the ground that disclosure would interfere with a law enforcement investigation. The provision dealing with a denial claimed on that basis 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."

Although the records sought might be used in or relate to a law enforcement investigation, I believe that any such records were prepared in the ordinary course of business in a context unrelated to the investigation now pending. As such, I do not believe that the records sought could be characterized as having been "compiled for law enforcement purposes."

In good faith, I point out that in construing the federal Freedom of Information Act (5 U.S.C. section 552), the U.S. Supreme Court in John Doe Agency v. John Corp. held on December 11, 1989 that the exemption in the federal Act analogous to section 87(2)(e) of the New York Freedom of Information Law could be asserted to withhold records that were not originally created for law enforcement purposes but which were later gathered for law enforcement purposes. For a variety of reasons, I do not believe that the decision rendered by the Supreme Court should be viewed as precidential or controlling.

Although the federal Freedom of Information Act is similar in structure to its New York counterpart, those statutes are separate and distinct. In my view, there is no requirement that agencies or courts, in their construction of the State statute, must adhere to precedent appearing in interpretations of the federal Act.

The Court of Appeals has held on several occasions that the exceptions to rights of access appearing in section 87(2) "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" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In my opinion, the Court in John Doe construed an exemption in the federal Act broadly, as is indicated in the dissenting opinions in that case. While the Court of Appeals has not directly considered the issue, if it interprets the Freedom of Information Law in a manner consistent with decisions rendered to date, section 87(2)(e) would be construed narrowly in order to foster access.

Further, I am aware of one decision rendered under the New York Freedom of Information Law that dealt with the issue determined by the Supreme Court. That decision, in my view, illustrates why section 87(2)(e) should be construed narrowly, and why a broad construction of that provision would give rise to an anomalous result. Specifically, in King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees. Those minutes, which were prepared by the petitioner, were requested from the District Attorney. In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he

> "must note in the first instance that the records sought were not compiled for law enforcement purposes (P.O.L. 87[2]e). Minutes of Village Board meetings serve a different function...These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material."

Often records prepared in the ordinary course of business, which might already have been disclosed under the Freedom of Information Law, become relevant to or used in a law enforcement investigation. In my view, when that occurs, the records would not be transformed into records compiled for law enforcement purposes. If they would have been available prior to their use in a law enforcement context, I believe that they would remain available, notwithstanding their use in that context for a purpose inconsistent with the reason for which they were prepared.

Even if the records sought could be considered to have been "compiled for law enforcement purposes," the authority to withhold records under section 87(2)(e) is limited to those situations in which disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of that provision. In view of the nature of the information sought and charges made against the individuals involved, it is difficult, from my perspective to envision how disclosure of that information would have any impact upon either an investigation or any proceeding that might ensue. In short, while I do not believe that section 87(2)(e) would apply with respect to the records sought, even if it is applicable, it does not appear that disclosure would result in the effects that would justify a denial under that provision.

Lastly, at the end of his response, the Acting County Attorney wrote that "further appeal should be directed to the New York State Committee on Open Government..." In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law; it has no authority to determine appeals. Section 89(4)(a) of the Freedom of Information Law pertains to the right to appeal and states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Therefore, although copies of appeals and determinations of appeals must be sent to this office, the Committee cannot render a determination following an appeal.

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

I hope that 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: Gregory E. Chanin, Acting County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1741
FOIL-AO-5998

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

March 27, 1990

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 March 12 addressed to the Chair and the members of the Committee on Open Government.

You have sought advice concerning the "appropriateness" of a request for records directed to the records access officer of the Village of Croton-on-Hudson, and the "response options viable" under the Freedom of Information Law. The request indicates that a recent issue of the North County News reported that "Croton-on-Hudson planners considered a preliminary site proposal for the construction of four affordable houses yesterday at a work session of the Village Planning Board...". Your request involves a variety of information relating to the report in the newspaper.

Having reviewed your request, I believe that the provisions of both the Freedom of Information Law and the Open Meetings Law are likely relevant. In this regard, I offer the following comments.

It is noted initially that several aspects of your request involve agendas and transcripts of meetings conducted by the Village Planning Board and the Board of Trustees. If agendas exist, I believe they they likely would be available, for none of the grounds for withholding records described in section 87(2) of the Freedom of Information Law would be applicable. Similarly, if there are transcripts of meetings held open to the public, they would, in my opinion be available for the same reason as suggested with respect to agendas. However, there is no statute

of which I am aware that generally requires that public bodies prepare agendas or transcripts of meetings. Further, as I have advised you on many occasions, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states that, unless specific direction is given to the contrary, an agency need not create a record in response to a request.

The records that are required to be prepared with respect to meetings of public bodies are minutes. Here I direct your attention to the Open Meetings Law, which contains what might be characterized 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."

A public body may prepare expansive minutes or transcripts of meetings. However, minutes are required to include reference only to the information described in subdivisions (1) and (2) of section 106. It is noted, too, that if a public body conducts an executive session and merely discusses an issue but takes no action, minutes of the executive session need not be prepared.

Similarly, you requested statements and deliberations, "written and verbal". Written statements maintained by the Village would, in my view, constitute "records" subject to rights conferred by the Freedom of Information Law. Again, however, if verbal statements or deliberations are not maintained in the form of records, the Freedom of Information Law would not be applicable.

Some of the information sought involves records that might have been developed by or exchanged between the Croton Housing Network and engineers or architects. If I recall the matter correctly, the Croton Housing Network is a non-profit entity that is not part of government. If the Village does not maintain those records, the Freedom of Information Law would not apply.

You referred to a "lottery" that was "approved by the Village". I am unfamiliar with the lottery and, therefore, cannot advise regarding rights of access to records relating to the lottery.

With respect to the remaining records that you requested, assuming that they are maintained by the Village, it appears that they would be available, for, as you described them, none of the grounds for denial in section 87(2) of the Freedom of Information Law would apparently apply.

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

FOIL-AO-5999

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

March 27, 1990

Ms. Rose Ciotta
Buffalo News
One News Plaza
P.O. Box 100
Buffalo, NY 14240

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

Dear Ms. Ciotta:

I have received your correspondence of March 15 pertaining to a denial of access to records by the City of Buffalo.

In a letter of February 24 addressed to Stanley A. Buczkowski, Acting Commissioner of the Buffalo Parks Department, you requested:

> "--All records, memos, correspondence, vouchers, purchase orders regarding the Parks Department's purchase and receipt of liquid chlorine and HTH granular chlorine for 1985 through 1989.
>
> --All records, memos, correspondence, logs that specify use of both liquid and granular chlorine by the city and diaposition of all amounts purchased by the city for 1985 through 1989.
>
> --All records, memos, correspondence, lists on the disposition of firewood by the Parks Department and/or the city from 1985 through 1989. Also, any records pertaining to a lottery for distribution of the firewood.

> --All records, memos, correspondence on parks events. Also, copies of the permits issued by the parks commissioner, the parks department or the city for all events, carnivals, special happenings in city parks for 1985 through 1989."

Commissioner Buczkowski denied the request in its entirety. In the denial he wrote that:

> "Pursuant to section 361-15(A)(5), your request is denied at this time on the basis that disclosure would interfere with law enforcement investigations or judicial proceedings. Specifically, I am concerned that disclosure would interfere with the investigation presently being conducted by the federal government. Unless I am given permission by the United States Attorney to release these records at an earlier time, I suggest that you withdraw your request until the completion of the federal investigation."

You have requested an advisory opinion concerning the propriety of 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, the denial was based in part upon a provision of the Buffalo City Code, section 361-15(A)(5). In my view, a provision of a city code cannot serve to exempt records from disclosure. 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 Buffalo City Code was not enacted by the State Legislature, it would not constitute a "statute" that exempts records from disclosure.

Third, reliance on the Code provision discussed above is based upon a contention that "disclosure would interfere with law enforcement investigations or judicial proceedings". Equivalent language appears in section 87(2)(e) of the Freedom of Information Law, which permits an agency to withhold records that:

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

Although the records sought might be used in or relate to a law enforcement investigation, it appears that they were prepared in the ordinary course of business in a context unrelated to the investigation now pending. If that is so, I do not believe that the records sought could be characterized as having been "compiled for law enforcement purposes."

In good faith, I point out that, in construing the federal Freedom of Information Act (5 U.S.C. section 552), the U.S. Supreme Court in John Doe Agency and John Doe Government Agency v. John Doe Corp. (58 U.S. Law Week 4067) held on December 11, 1989, that the exemption in the federal Act analogous to section 87(2)(e) of the New York Freedom of Information Law could be asserted to withhold records that were not originally created for law enforcement purposes but which were later gathered for law enforcement purposes. For a variety of reasons, I do not believe that the decision rendered by the Supreme Court should be viewed as precedential or controlling.

While the majority opinion in John Doe construed the exception in the federal Act expansively to include records gathered in conjunction with a law enforcement investigation, even though the records might have been created or prepared for purposes unrelated to such an investigation, a dissenting opinion narrowly construed the phrase "compiled for law enforcement purposes". Specifically, Justice Scalia wrote that:

> "The word 'compiled' is ambiguous - not, as the Court suggests (and readily dismisses), because one does not know whether it means 'compiled originally' or 'ever compiled'...Rather, it is ambiguous because 'compiled' does not always refer simply to 'the process of gathering', or the 'assembling'...but often has the connotation of a more creative activity. When we say that a statesman has 'compiled an enviable record of achievement', or that a baseball pitcher has 'compiled a 1.87 earned run average', we do not mean that those individuals have pulled together papers that show those results, but rather that they have generated or produced those results. Thus, Roget's Thesaurus of Synonyms and Antonyms includes 'compile' in the following listing of synonyms: 'compose, constitute, form, make; make up, fill up, build up; weave, construct, fabricate; compile; write, draw; set up (printing); enter into the composition of etc. (be a component).' Roget's Thesaurus 13 (Galahad ed. 1972).
>
> "If used in this more generative sense, the phrase 'records or information compiled for law enforcement purposes' would mean material that the government has acquired or produced for those purposes - and not material acquired or produced for other reasons, which it later shuffles into a law enforcement file" (id., 4071; emphasis by Justice Scalia).

I believe that the contentions offered in the dissenting opinion are more appropriate than the holding of the majority in John Doe. Further, although the federal Freedom of Information Act is similar in structure to its New York counterpart, those statutes are separate and distinct. In my view, there is no requirement that agencies or courts, in their construction of the State statute, must adhere to precedent appearing in interpretations of the federal Act.

The Court of Appeals has held on several occasions that the exceptions to rights of access appearing in section 87(2) "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" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In my opinion, the Court in John Doe construed an exemption in the federal Act broadly, as is indicated in the dissenting opinions in that case. While the Court of Appeals has not directly considered the issue, if it interprets the Freedom of Information Law in a manner consistent with decisions rendered to date, section 87(2)(e) would be construed narrowly in order to foster access.

Moreover, I am aware of one decision rendered under the New York Freedom of Information Law that dealt with the issue determined by the Supreme Court. That decision, in my view, illustrates why section 87(2)(e) should be construed narrowly, and why a broad construction of that provision would give rise to an anomalous result. Specifically, in King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees. Those minutes, which were prepared by the petitioner, were requested from the District Attorney. In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he

> "must note in the first instance that the records sought were not compiled for law enforcement purposes (P.O.L. 87[2]e). Minutes of Village Board meetings serve a different function...These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material."

Often records prepared in the ordinary course of business, which might already have been disclosed under the Freedom of Information Law, become relevant to or used in a law enforcement investigation. In my view, when that occurs, the records would not be transformed into records compiled for law enforcement purposes. If they would have been available prior to their use in a law enforcement context, I believe that they would remain available, notwithstanding their use in that context for a purpose inconsistent with the reason for which they were prepared.

From my perspective, many of the records that you requested, by their nature, indicate that the exception concerning records "compiled for law enforcement purposes" is inapplicable. For instance, permits issued by the City to hold carnivals or "special happenings in city parks" involved public events that were likely publicized and well known to the public generally. To contend that those kinds of records, which were generated for purposes wholly unrelated to any law enforcement investigation, could now be withheld due to their use in an investigation would, in my opinion, be unreasonable and tend to subvert the purposes of the Freedom of Information Law. 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 the 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).

Assuming that section 87(2)(e) of the Freedom of Information Law could not be asserted as a basis for denial, I believe that most of the records sought should be disclosed. Vouchers, purchase orders and permits would in my view be avsilable, for none of the remaining grounds for denial could appropriately be asserted. Since certain aspects of your request pertain to "memos" and "correspondence", I point out that some of those records might 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. 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. Communications among City officials would constitute "intra-agency" materials that should be disclosed or that may be withheld, depending upon their specific contents.

In addition, although I am unfamiliar with records involving the disposition of firewood or a "lottery" concerning the distribution of firewood, there may be privacy considerations regarding those records. If, for example, firewood was distributed on the basis of an income qualification, disclosure of the identities of the recipients of the firewood might constitute "an unwarranted invasion of personal privacy" and be deniable pursuant to section 87(2)(b) of the Freedom of Information Law.

Lastly, Commissioner Buczkowski suggested that he needed "permission" from the United States Attorney to disclose the records. Certainly City officials may seek the views of staff or others prior to determining whether records should be disclosed. Nevertheless, the records sought were prepared and presumably are maintained by the City, and I know of no law in this instance that would preclude the City from disclosing the records or that would condition disclosure upon the grant of permission to do so by the United States Attorney. Moreover, although the issue was unrelated to 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 records sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557, 567 (1984)].

In sum, I do not believe that the requested records may be withheld in conjunction with the basis for denial offered by Commissioner Buczkowski. On the contrary, subject to the limitations discussed earlier, the records must, in my opinion, 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Stanley A. Buczkowski, Acting Commissioner
Hon. Dennis Vacco, United States Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6000

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

March 28, 1990

Mr. Louis J. Fascia
[redacted]

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

Dear Mr. Fascia:

I have received your letter of March 16 in which you requested an opinion concerning the Freedom of Information Law.

You asked whether "a member of the public [may] bring a personally owned photocopy machine into a public building for the purpose of reviewing and copying previously requested records". You added that the records that have been requested "are voluminous", and that you would like to review "all the records but make copies of only those [you] feel apply to [y]our investigation."

In this regard, I offer the following comments.

First, for purposes of responding to your inquiry, it is assumed that the records sought are accessible under the Freedom of Information Law and that they can be retrieved by the agency maintaining the records.

Second, section 87(2) of the Freedom of Information Law requires that "Each agency shall...make available for public inspection and copying all records...", except those records or portions thereof that fall within one or more among nine grounds for denial that follow. As such, I believe that an applicant may use his or her photocopy machine to prepare copies of records.

It is noted that in one of the first cases brought under the Freedom of Information Law, it was held in an unreported decision that an applicant could bring her photocopy machine to an agency for the purpose of making copies requested under the Freedom of Information Law (Cooke v. City of Albany, Supreme Court, Albany County, October, 1974).

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-6001

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

March 28, 1990

Ms. Jody Adams
[redacted]

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

Dear Ms. Adams:

I have received your letter of March 17 and the correspondence attached to it.

Your inquiry relates to a situation occurring in 1985 in which you allege that you were stopped by a police officer "with intent to harass - without legal basis...". You wrote that the Chief of Police asked the officer for a written report on the matter, told you that he would send a copy of the report to you, and asked if "that would satisfy" you. You said that it would not, and your request for the report was denied on the basis of section 87(2)(g) of the Freedom of Information Law. A letter concerning the report sent by the Chief to the Town Clerk stated that: "Intra-agency communication is deniable."

In this regard, the provision upon which the denial is based 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 report sent by a police officer to the Chief of Police could be characterized as "intra-agency" material. However, based upon the language of section 87(2)(g), its specific contents would determine the extent to which it may be withheld or to which it must be disclosed in accordance with subparagraphs (i) through (iv) of that provision. For instance, a memorandum transmitted between agency officials would constitute intra-agency material; however, those portions consisting of "statistical or factual tabulations or data" would be available under section 87(2)(g)(i), assuming that no other ground for denial in the Freedom of Information Law could properly be asserted.

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

FPPL-AO-100
FOIL-AO-6002

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

March 28, 1990

Mr. Neal Lewis, Esq.
Nassau/Suffolk Neighborhood
Network, Inc.
100 Veterans Blvd.
Massapequa, New York 11758

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

Dear Mr. Lewis:

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

You have sought an advisory opinion on behalf of Vincent F. Cioci and the Nassau/Suffolk Neighborhood Network, Inc. concerning a denial of a request for records maintained by the Nassau County Board of Supervisors. The records requested by Mr. Cioci included "time and leave records, salary listings and any CS-39 (Report of Personnel Action) forms available regarding Charles Fuschillo, Jr." Mr. Fuschillo apparently is employed as Special Assistant to the Board, and his salary was disclosed. The remainder of your request, however, was denied in response to the initial request by Thomas L. Carroll, Counsel to the Board of Supervisors, and following the appeal, by Owen B. Walsh, First Chief Deputy County Attorney.

Mr. Walsh wrote that the records could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, citing sections 87(2)(b) and 89(2)(b) of the Freedom of Information Law, section 96(1) of the Personal Privacy Protection Law, and the decisions rendered in [Messina v. Lufthansa German Airlines et. al., (In the Matter of Philip Ross, and Industrial Commissioner of the State of New York), 441 NYS 2d 557, 83 AD 2d 831 (1981); Krauss v. Nassau Community College,

469 NYS 2d 553 (1983); and Kryston v. Board of Education, East Ramapo School District, 430 NYS 2d 688, 77 AD 896 (1980)]. Further, it was indicated that the records could be withheld because the request did not specify the intended use of the records or the purpose for which the request was made.

In conjunction with the foregoing, you raised the following issues:

> "1. Is the information requested exempted from the Freedom of Information Law because of a potential invasion of privacy?
>
> 2. Is the seeker's intended use for the information requested relevant?
>
> 3. Has the FOI Law been violated by the County's appeal process? Mr. Walsh acknowledges receipt of the appeal on February 23, 1990, however, despite his letter being dated March 9, 1990, the envelope indicates it was mailed on March 12, 1990."

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 "time and leave" or attendance records, based upon the language of the Law and its judicial interpretation, I believe that such records are generally available. Further, while I am unfamiliar with "CS-39 forms," it appears that they are personnel records, and you suggested that they may involve disciplinary matters. Based upon those assumptions, the ensuing analysis concerning time and leave records will be applicable to the CS-39 forms as well.

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 availsble, 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.

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 to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." While thst 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 puhlic 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); 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 91978); 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].

Moreover, in a decision dealing with a request for records indicating the dates of sick leave claimed by a particular public employee 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)."

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 peraon'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 sum, subject to the qualifications described above, I believe that time and leave records pertaining to public employees are accessible under the Freedom of Information Law.

In referring to the "CS-39" form, you characterized the form as a "Report of Personnel Action." To the extent that those forms indicate disciplinary action taken against or a finding of misconduct concerning a public employee, for example, I believe that those records would, based upon judicial interpretations of the Freedom of Information Law, be available. 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." As such, it is my view that a record of a decision to impose disciplinary action or a penalty against a public employee would be accessible under the Freedom of Information Law. 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.

In point out, too, that in situations in which allegations have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra.].

I do not believe that the decisions cited by Mr. Walsh are controlling or relevant, for they involved facts unrelated to the issues presented in your leter. Messina, supra, involved records maintained by the State Department of Labor that indicated the amount of time during which unemployment insurance benefits were paid to a member of the public. The privacy considerations in that case were, in my view, completely different than those presented in the instant situation, for the records had no relevance to a person's public employment. Krauss and Kryston, supra, involved records maintained by educational agencies pertaining to students. Both were determined by applying the Freedom of Information Law in conjunction with a federal statute, the Family Educational Rights and Privacy Act (20 U.S.C., section 1232g), commonly known and the "Buckley Amendment," which generally precludes public disclosure of records identifiable to students. I do not believe that the facts in either of those cases could be equated with or applied to those that you presented.

Fourth, with respect to the relevance of an applicant's intended use of records, it has been held that the reasons for which a request is made or an applicant's potential use of records would be irrelevant, and that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., Capital Newspapers, supra, 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)]. The only instance in which the purpose for which a request is made or the intended use of records has a bearing upon rights of access involves section 89(2)(b)(iii) of the Freedom of Information Law. That provision states that an unwarranted invasion of personal privacy includes:

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

Based upon the language quoted above, it has been held that an agency may inquire as to the purpose for which a list of names and addresses has been requested. Nevertheless, your request does not involve a list of names and addresses and, therefore, I do not believe that section 89(2)(b)(iii) is applicable with respect to the records sought. Reliance upon that provision was made by Mr. Walsh relative to the decision rendered in Krauss, which involved a request for a list of students at Nassau Community College. This issue, however, involved "whether the Buckley Amendment's provision permitting disclosure by court order should be exercised" (id. 555). The court found that no such order was warranted and that the list could nonetheless be withheld under section 89(2)(b)(iii) of the Freedom of Information Law. Again, the facts in that case and the applicability of a federal statute are inapposite with regard to the issues that you raised.

Fifth, with respect to the time for responding to an appeal, section 89(4)(a) of the Freedom of Information Law states in relevant part that:

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

As such, it is possible that the limitation on the time for determining an appeal was exceeded. However, since March 9, the date of the response, was a Friday, it is also possible that it was deposited in the mail on Friday but not picked up until the following Monday, the day on which it was postmarked.

Lastly, Mr. Walsh relied in part upon Article 6-A of the Public Officers Law, the Personal Privacy Protection Law. That statute is, in my view, inapplicable. Although the definition of the term "agency" appearing in section 86(3) of the Freedom of Information Law clearly includes entities of state and local government, for purposes of the Personal Privacy Protection Law, section 92(1) of that statute defines "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Since the definition excludes "any unit of local government," I do not believe that the Personal Privacy Protection Law applies to records maintained by Nassau County. Moreover, section 96(1)(c) of the Personal Privacy Protection Law authorizes disclosure of records accessible under the Freedom of Information Law.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to Mr. Walsh and Mr. Carroll.

I hope that 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: Owen B. Walsh, First Chief Deputy County Attorney
Thomas L. Carroll, Counsel to the Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6003

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

March 28, 1990

Mr. Peter Vollmer
Senior Staff Attorney
Nassau/Suffolk Law Services
Committee, Inc.
40 Park Avenue
Bayshore, NY 11706

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

Dear Mr. Vollmer:

I have received your letter of March 16 in which you requested an advisory opinion concerning the Freedom of Information Law.

Following your reference to section 87(1)(b)(iii) of the Freedom of Information Law concerning fees, you initially asked: "What kinds of costs can be reasonably included by a state agency is assessing the actual cost of duplication" and whether an agency may "tack on any other costs to the actual photocopying cost in assessing 'the actual cost of duplication' under this section". To illustrate your question by means of a hypothetical example, "if a high-speed copying machine produces a copy at a cost of $.02 per page and it costs the state agency $2 in salary for any employee to locate the requested document", you asked whether "the actual cost of duplication [is] $.02 (photocopy cost) or $2.02 (photocopy cost plus salary of employee). Similarly, "if the actual cost of duplication' is solely the cost of the photocopying ($.02 in the hypothetical)", you asked whether an agency can "charge $.25 per page when the actual cost of reproduction is substantially less".

In this regard, based upon your questions, it appears that some of the assumptions that you have made are erroneous.

Section 87(1)(b)(iii) of the Freedom of Information Law states that an agency's rules and regulations must include reference to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

As I interpret the language quoted above, the first clause provides that an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, irrespective of the actual cost of preparing a photocopy. Therefore, even when a "high-speed copying machine" can produce photocopies at a cost of two cents per photocopy, the agency may nonetheless assess a fee of twenty-five cents per photocopy. Concurrently, there is nothing in the Freedom of Information Law that permits an agency to charge for inspection of records, or for search or review time or other clerical costs associated with preparing photocopies. As such, if two dollars worth of clerical time is needed to locate a record, and if the record consists of one page to be photocopied, again, the agency may charge no more than twenty-five cents, unless a statute other than the Freedom of Information Law permits the assessment of a different fee.

The next clause in section 87(1)(b)(iii), which deals with the "actual cost of reproduction", pertains to "other" records, i.e., those records that cannot be photocopied, such as tape recordings, computers tapes or disks, etc., or those records that are larger than nine by fourteen inches. With respect to those records, the regulations promulgated by the Committee on Open Government indicate that the actual cost of reproduction "is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries" [21 NYCRR section 1401.8(c)(3)].

In sum, when photocopies up to nine by fourteen inches are prepared in response to a request made under the Freedom of Information Law, the portion of section 87(1)(b)(iii) involving the actual cost of reproduction is, in my view, inapplicable, for an agency in such cases may, by rule, charge up to twenty-five cents per photocopy, whether the actual cost is above or below that amount.

I hope that the foregoing serves to clarify your understanding 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

OML-AO-1742
FOIL-AO-6004

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

March 29, 1990

Mr. Bruce Clifford
[redacted]

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

Dear Mr. Clifford:

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

According to your letter, due to the pendency of litigation, you were not "personally or physically allowed into the Civil Service Office" in the City of Rome. Consequently, you have directed several requests for records to the City, none of which has been answered.

The records sought include those containing your title and "character" of the position and date of the commencement of your employment as a "Grade IIA Public Sewage Treatment Plant Operator", a "Record or summary of all motions, proposals, resolutions formally voted upon and Record of Summary of final determination of job title, Sewage Plant Operator, and/or Operator/Trainee, and/or Operator II", and "If Operator II is an official job title, all records concerning creation of such title including certificate and any justification for title including records, oral or written reasons why they produced that job title during meeting and/or discussion of such job title." You pointed out in your request that, in order to assist in the location of records, a resolution concerning the matter was adopted "sometime between 1981 and 1982, probably 8/14/81".

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, with respect to the first aspect of your request, records indicating a public employee's title, the date of one's initial employment and the character or duties of a position, i.e., a job description, are, in my view, clearly available under the Freedom of Information Law. I point out that section 87(3)(b) of the Freedom of Information Law requires that each agency maintain a record that includes reference to the name, public office address, title and salary of every officer or employee of the agency. Further, a job description or similar record would in my opinion consist of factual information available under section 87(2)(g)(i) of the Freedom of Information Law or, alternatively, would be reflective of a final agency policy or a determination accessible under section 87(2)(g)(iii).

With respect to the second part of your request, I direct your attention to the Open Meetings Law, which provides direction concerning minutes of meetings. Specifically, section 106 of the 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."

With regard to the final aspect of your request, it is emphaiszed 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. To the extent that the information sought does not exist in the form of a record or records, the Freedom of Information Law would not apply. To the extent that the records do exist, I believe that a provision to which reference was made earlier would be most relevant. 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.

Third, with regard to the failure to respond to requests, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknow-

> ledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, I believe that a request may he considered to have heen constructively denied. In such a circumstance, I believe that the denial 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Lastly, that you may be involved in litigation with the City of Rome is, in my opinion, irrelevant to your rights under the Freedom of Information Law. As stated by the Court of Appeals, the state's highest court:

> "Access to records of a government agency under the Freedom of Information Law...is not affected by the fact tbat 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)].

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the City of Rome's records access officer.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, City of Rome

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1743
FOIL-AO-6005

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

March 29, 1990

Mr. Jonathan Riegel
Assistant News Editor
Vignette
Nassau Community College
College Union Building/Rm. 314
Garden City, New York 11598

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

Dear Mr. Riegel:

I have received your letter of March 14 in which you raised a series of questions concerning the application of the Open Meetings Law.

According to your letter, the Student Government Association (SGA) at Nassau Community College holds weekly senate meetings during which the senate votes "on all financial matters and expenditures of money." You added that:

> "Each request for money follows the same path. First, the Finance Committee considers each request and passes its recommendation to the SGA Executive Board. The Executive Board can either accept the recommendation of the Finance Committee or change it as they see fit. The Executive Board then tells the senate what they are recommending and the senate debates and votes. The amounts that the senate approved are then passed on to the Faculty-Student Association (FSA) who has ultimate authority to expend the money. It is very rare for the FSA to overturn a senate proposal."

You wrote, however, that meetings of the Finance Committee and the Executive Board are closed, and there is "no way of knowing why a proposal was cut, at what stage in the process it was cut, or by how much it was cut."

You indicated that the money SGA and FSA distribute "comes from a mandatory $45.00 student activities fee paid by every student to the school. The school then gives the money to FSA and it is distributed to the various campus clubs and activities..."

Although you disagree, "SGA officials claim that SGA is not a public body. It is your view that the mandatory student activities fee "constitutes public money because all students must pay it." However, SGA apparently contends that since the money belongs to FSA, a "private, not-for-profit corporation," it is not public money.

You have the raised the following questions in conjunction with the foregoing:

> "First, is it possible for a 'private' corporation to control a mandatory fee that is public money? Are there any laws governing such a situation? Second, it seems clear... that, at the very least, SGA could be considered an advisory body to FSA. As such, is SGA subject to the Open Meetings Law of New York State? Does SGA perform a governmental function for Nassau Community College, Nassau Counrty, New York State, and/or the state university system (SUNY)? Third, if SGA is 'only' an advisory body, is their finance committee covered under the law? Would their Executive Board meetings also be covered by the Open Meetings Law since they discuss and modify budgetary proposals at these meetings?
>
> "If SGA is allowed to conduct these meetings behind closed doors, are they required to keep minutes of each meeting, and would they (or should they) be made available to any and all interested parties?"

In this regard, I offer the following comments.

It is noted initially that the Committee on Open Government is authorized to advise with respect to the Open Meetings Law. Your first area of inquiry, which involves the possibility of a private corporation controlling mandatory fees, does not deal with the Open Meetings Law, and this office lacks the jurisdiction or expertise to respond.

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."

Therefore, if an entity constitutes a public body, committees, subcommittees or similar bodies consisting of members of such an entity would also be public bodies required to comply with the Open Meetings Law. Consequently, if, for example, the SGA senate is a public body subject to the Open Meetings Law, I believe that its Finance Committee and Executive Board would also be subject to the Law.

I am unaware of any judicial decisions that deal with the status of the kinds of entities in question under the Open Meetings Law. Nevertheless, for the following reasons, if the actions of the entities in question represent necessary or required steps in determining the manner in which mandatory student fees are distributed at a public educational institution (such as Nassau Community College), I believe that they are public bodies that fall within the scope of the Open Meetings Law.

First, presumably the entities in question consist of two or more members.

Second, I believe that they are required to conduct business by means of a quorum, whether or not there is any specific requirement concerning a quorum in by-laws or the acts that created them. I direct your attention to section 41 of the General Construction Law, which defines "quorum" as follows:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a

> board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole numher' 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 provision quoted above, whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that boards of the SGA or FSA must conduct business by means of a quorum, section 41 of the General Construction Law imposes such a requirement. In addition, even if section 41 of the General Construction Law is inapplicable, section 707 of the Not-for-Profit Corporation Law requires that action may be taken only by a quorum of directors of such a corporation.

Third, it appears that the entitiea in question conduct public business and perform a governmental function for Nassau Community College, which is clearly a governmental entity, for their duties in my opinion are reflective of a governmental function. In essence, it appears that a those entities perform a function for Nassau Community College that would otherwise be performed by officials of the College. If my assumptions are accurate, the SGA and the FSA, as well as committees or similar bodies consisting of their members, would constitute public bodies subject to the Open Meetings Law.

With specific regard to the FSA, the fact that it is a not-for-profit corporation is not in my opinion determinative of its status under the Open Meetings Law. By means of analogy, under the Freedom of Information Law, the companion statute to the Open Meetings Law concerning access to government records,

the state's highest court, the Court of Appeals, found that volunteer fire companies are subject to the Freedom of Information Law [see Westchester-rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. It is noted that a volunteer fire company is a not-for-profit corporation that performs its duties for a municipality by means of a contractual relationship. Even though a volunteer fire company is not itself government or a governmental entity, the court found that it performs what traditionally might be considered a governmental function and therefore falls within the scope of the Freedom of Information Law.

In so holding, the Court found that:

> "We begin by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible'... For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579)."

If the relationship between Nassau Community College and the FSA is similar to that of a volunteer fire company and a municipality, it would appear that the FSA, despite its not-for-profit status, would be an "agency" required to comply with the Freedom of Information Law.

I point out that in a recent decision pertaining to a foundation associated with a public educational institution, it was also claimed that the records fell outside the scope of the Freedom of Information Law because they were maintained by a "private, not-for-profit corporation". The records sought involved the Kingsborough Community College Foundation; Kingsborough is an institution of the City University of New York. In rejecting that contention, the Court stated that:

> "The activities of the Foundation... amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College. Even though the Foundation is set up as a not-for-profit corporation, as it is such an integral part of the College allowing it to stand as a separate entity would subvert the purpose of FOIL. I am in accord with the petitioner in rejecting as irrelevant, for the purposes of applying the FOIL, a distinction as to whether the Foundation is an independent, voluntary organization which provides public service to an agency of local government, rather than an 'organic arm of government' as the vehicle for the performance of the purposes and objectives of that agency. (Westchester Rockland Newspapers, Inc. v. Kimball, 50 NY 2d 575 [1980]). Even if the requested records were determined to be private documents of the Foundation, they are nevertheless records in the possesion of a governmental agency and as such maintained by a governmental agency under Public Officer's Law Section 86(3)(4). (Capital Newspapers v. Whelan, 69 N.Y. 2d 246 [1987]).

> "It is without question that the '...FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government...(citations omitted) (Capital Newspapers v. Whalen, supra, at 252). In the instant case the respondents have failed to meet their burden of demonstrating that the requested material is within the bounds of some 'specific statutory protection' and therefore 'the Freedom of Information Law compels disclosure not concealment'...(Westchester News v. Kimhall, supra, at 580)" [Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988].

As such, there is precedent indicating that a not-for-profit entity associated with a public educational institution constitutes an "agency" subject to the Freedom of Information Law.

I believe that the FSA board of directors should be viewed in much the same fashion. If the FSA exists due to its relationship with the College, and if the College would perform the functions of the FSA if the FSA had not been created, it could be concluded in my opinion that a faculty-student association conducts public business and performs a governmental function for the College.

Lastly, assuming that an entity is required to comply with the Open Meetings Law, section 106 of the Law contains what might be viewed as minimum requirements concerning the contents of minutes. 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. Minutea 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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Anna Mascolo, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6006

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

March 29, 1990

Mr. Napoleon Bonie
[redacted]

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

Dear Mr. Bonie:

I have received your letter of March 15.

You wrote that you are attempting to obtain [redacted] "welfare records" and that you would like to know whether your name is on [redacted] You asked how you might obtain those records.

In this regard, I offer the following comments.

First, a written request should be made to the records access officer at the agency or agencies that you believe maintain the records in which you are interested. The records access officer is the person designated to coordinate an agency's response to requests.

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 and indicate your relationship to your son.

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 first ground for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." In the case of both "welfare" and birth records, specific statutes deal with those records, and both generally require confidentiality.

Section 136 of the Social Services Law provides in brief that records concerning either an applicant for or a recipient of public assistance are confidential. However, the regulations promulgated by the State Department of Social Services include provisions under which those records may be disclosed under certain circumstances. Specifically, the regulations, 18 NYCRR section 357.3 state in relevant part that:

> "(c) Disclosure to applicant, recipient, or persons acting in his behalf. (1) The case record shall be available for examination at any reasonable time by the applicant or recipient or his authorized representative upon reasonable notice to the local district. The only exceptions to access are:
>
> (i) those materials to which access is governed by separate statutes, such as child welfare, foster care, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Service:
>
> (ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and
>
> (iii) the county attorney or welfare attorney's files.
>
> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested.

> (d) Disclosure to relatives. The duty of the agency to investigate the ability and willingness of relatives to contribute support imposed by section 132 of the Social Services Law and the liability of legally responsible relatives for support imports that the agency may inform them of the basic circumstances of the applicant's needs insofar as may be necessary and in a discussion looking to a contribution of support, of the amount of the applicant's needs and income. Such a relative is a 'person... considered entitled to such information.' (See Social Services Law, section 136[2].)"

The public assistance records pertaining to your son would likely be maintained by the county department of social services where your son resides.

With respect to birth records, section 4173(2) of the Public Healtb Law states that:

> "A certified copy of certified transcript of a birth record 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 a parent or other lawful representative of the person to whom the record of birth relates."

Birth records are maintained by the clerk of the town or city in which a person is born, unless the birth occurred in New York City, in which case the New York City Health Department maintains the records. For births outside of New York City, birth records are also maintained by the Bureau of Vital Records at the State Department of Health in Albany.

I hope that I have been assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO-101
FOIL-AO-6007

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

March 29, 1990

Mr. Alfred Blanche
88-A-6605
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. Blanche:

I have received your letter of March 15 and the materials attached to it.

You have requested a variety of records relating to your arrest from the Division of State Police and the Office of the District Attorney of Washington County. In both instances, your requests were denied in their entirety. In the denial by the Division of State Police, reference was made to section 50-b of the Civil Rights Law and various provisions of the Freedom of Information Law.

In this regard, I offer the following comments.

First, since the denial referenced earlier is based in part upon section 50-b of the Civil Rights Law, I point out that section 50-b provides direction concerning records identifying victims of sex offenses who were under the age of eighteen at the time of the alleged commission of such offense. Specifically, that provision 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 officers 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 subdivision 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; the counsel or guardian of such person; the public officers and employees charged with the duty of investigating, prosecuting, keeping records relating to the offense, or any other act when done pursuant to the lawful discharge of their duties; and any necessary witnesses for either party..."

If section 50-b is applicable, it appears that records identifiable to such a victim would be specifically exempted from public disclosure under section 87(2)(a) of the Freedom of Information Law. However, various records would apparently be available under section 50-b(2)(a) to a person charged with such an offense.

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. Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 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.

Records prepared by employees of a law enforcement agency or the office of a district attorney, or records transmitted between those agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

I point out that in a recent decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "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" [see Moore v. Santucci, 543 NYS 2d 103, 107, ___AD 2d___ (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

Third, one aspect of your request involved a pre-sentence report. As indicated earlier, section 87(2)(a) of the Freedom of Information Law states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute...". Relevant under the circumstances 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.

Lastly, in your appeal to the Division of State Police, you asked that the provisions of the Personal Privacy Protection Law be applied. In this regard, although section 95(1) of the Personal Privacy Protection Law generally grants rights of access to records to a person to whom the records pertain, section 95(7) provides that rights of access "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by section 92(8) to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of 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, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty-seven-a, eight hundred thirty-seven-b, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

As such, although the Personal Privacy Protection Law appliea to records maintained by state agencies, such as the Department of Correctional Services, rights of access conferred by that law do not include records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement of persons in correctional facilities.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary C. Dunne, Assistant Deputy Superintendent
Robert J. Winn, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6008

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

March 29, 1990

Mr. Anthony Peterson
85-A-4338
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Peterson:

I have received your letter of March 12, which reached this office on March 22.

According to the correspondence attached to your letter, a request was directed to the New York City Police Department on March 15, 1989 "for any and all complaint reports (Form #PD 313-152) of any and/or all reported acts of rape and/or sodomy against a female within the area of Central Park, from July 14, 1984 to June 30, 1985". You received an acknowledgement of the receipt of your request, which apparently referred to reports of incidents concerning dates other than those that you provided. You informed the Department of its error. However, it does not appear that the Department has yet granted or denied access to the records.

You asked that "if the proper action is not executed" by the Department "intervention by [this] office be implemented" to ensure that the Department appropriately responds to your request.

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 enforce the Freedom of Information Law or compel an agency to grant or deny access to records.

Second, with regard to the failure to respond to requests, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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..."

On the basis of the correspondence, I am unaware of whether the acknowledgement of the receipt of your request included an approximate date indicating when the records would be made available or denied. Nevertheless, in view of the length of time that has passed since your request was made, I believe that the request may be considered to have been constructively denied. As such, the denial may, in my opinion, 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, 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 is Eileen D. Millett, Assistant Deputy Commissioner for Legal Matters.

Third, section 89(3) of the Freedom of Information Law requires that an applicant "reasonable describe" the records sought. As such, a request should include sufficient information to enable the agency to locate and identify the records. I point out that I am unaware of the manner in which the Department maintains its records. I have no knowledge of whether the complaints in question are maintained separately from other complaints, or whether they are maintained chronologically or alphabetically, for example. As such, it is unclear whether the Department can, based upon its filing system, retrieve the records for a specific

period of time. If it is able to retrieve the records, I believe that they would be subject to rights of access. If it cannot, it may be necessary to request records in a different manner, for the request might not "reasonably describe" the records as required by section 89(3) of the Freedom of Information Law.

Fourth, assuming that the Department can locate the 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. Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 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.

Records prepared by employees of a law enforcement agency or the office of a district attorney, or records transmitted between those agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Lastly, since your request involves acts of rape or sodomy, the first ground for denial, section 87(2)(a), may be relevant. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, 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 officers 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 subdivision 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; the counsel or guardian of such person; the public officers and employees charged with the duty of investigating, prosecuting, keeping records relating to the offense, or any other act when done pursuant to the lawful discharge of their duties; and any necessary witnesses for either party..."

If section 50-b is applicable, it appears that records identifiable to a victim would be specifically exempted from public disclosure under section 87(2)(a) of the Freedom of Information Law. However, various records would apparently be available under section 50-b(2)(a) to a person charged with such an offense.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. John G. Sultana
Eileen D. Millett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1745
FOIL-AO-6009

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

April 2, 1990

Ms. Elizabeth O'Dell
[redacted]

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

Dear Ms. O'Dell:

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

You have requested assistance in obtaining records from the Berlin Central School District. According to the materials, on January 8, you requested the names and addresses of persons designated to serve on a planning committee. A newspaper article indicates that the committee would consist of members of the community who will meet to "develop recommendations." The article also indicates that meetings of the committee would likely be closed. In response to your request, you were informed by the Superintendent that several of those asked to serve "did not show up." He added that a final list of members would be presented and disclosed at the February board meeting. Since the names were not disclosed at that meeting, you again requested the information and were informed that the names of the members would be disclosed at the Marcb meting of the Board. As yet, however, you have not received the information sought, nor have you been informed of a reason that would permit the committee to hold closed meetings.

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 a technical perspective, I believe that two grounds for denial relate to the issue of disclosure of records identifying the names and addresses of members of the committee.

One of the grounds for denial, 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, 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. A record prepared by the District identifying a member or members of the committee could be characterized as "intra-agency material." Nevertheless, the names would consist of factual information accessible under section 87(2)(g)(i). Further, their designation as members of the committee would, in my view, be reflective of a final determination made by the Board of Education or person acting on its behalf.

The other provision of relevance 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." In my opinion, it is likely that members' home addresses would consist of personal information that is irrelevant to members' functions on the committee. Further, section 89(7) of the Freedom of Information Law states that nothing in the Law requires the disclosure of home addresses of public employees. While the committee members would not be public employees, I

believe that section 89(7) suggests that home addresses of public employees or others serving in a similar capacity need not be disclosed. However, the names of the members must in my opinion be disclosed. There is nothing intimate about the names, particularly since the members are designated to perform a public duty on behalf of the school district, which is a governmental entity.

In sum, I believe that a record or records identifying the members of the committee must be disclosed under the Freedom of Information Law.

Second, with respect to the status of the committee under the Open Meetings Law, that statute 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."

Recent decisions 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 committee in question is not a public body required to comply with the Open Meetings Law. I point out that the Goodson-Todman decision involved a citizens advisory committee designated by a town board, which, again, was found to be outside the scope of the Open Meetings Law.

The foregoing is not intended to suggest that the meetings of the committee must be closed. Rather, although the meetings are not likely subject to the Open Meetings Law, District officials or the committee could choose to conduct open meetings.

Lastly, while you did not raise the issue in your letter, the news clipping attached to your letter appears to indicate that the Board of Education held an executive session prior to a meeting. In this regard, I point out 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, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before an executive session may be held. Specifically, section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, an executive session is not separate from an open meeting but rather is a portion of an open meeting. Moreover, a public body cannot enter into an executive session to discuss the subject of its choice, for paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Enclosed is a copy of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw
Enclosure
cc: Board of Education
Dr. Wayne Jones, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6010

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

April 2, 1990

Mr. Bruce Hyrny
Board President
Community Action Agency
P.O. Box 968
Glens Falls, New York 12801

Dear Mr. Hyrny:

I have received your letter of March 28. In your capacity as President of the Board of a community action agency, you requested information concerning "client confidentiality, such as the Privacy Act of 1974, the Freedom of Information Act, etc." You wrote that the Board is developing policies on the subject, and you are questioning the propriety of providing clients' names "to elected officials serving on [the] Board for the purpose of monitoring services provided."

In this regard, I offer the following comments.

First, the two statutes to which you referred are federal acts applicable only to records maintained by federal agencies. As such, it is unlikely that those provisions directly apply to a community action agency. Similarly, the New York 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."

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government. It is my understanding that community action agencies are not-for-profit corporations. Although it appears that they perform a governmental function, it is questionable whether they constitute "govern- mental entities" or, therefore, agencies subject to the Freedom of Information Law.

It is also my understanding that community action agencies are created by means of the authority conferred by the Economic Opportunity Act of 1964. According to section 201(a) of the Act, the general purposes of a community action agency are:

> "to stimulate a better focusing of all available local, State, private and Federal resources upon the goal of enabling low-income families, and low-income individuals of all ages, in rural and urban areas to attain the skills, knowledge, and motivations and secure the opportunities needed for them to become fully self-sufficient..." [Sec. 201(a)(a)]
>
> "to provide for basic education, health care, vocational training, and employment opportunities in rural America to enable the poor living in rural areas to remain in such areas and become self-sufficient therein..." [Section 201(b)]

When a community action agency is designated, section 211 indicates that the community action agencies perform a governmental function for the state or for one or more public corporations. It is noted that a public corporation includes a county, city, town, village, or school district, for example. As such, by means of the designation as community action agencies, those agencies apparently perform their duties for the state or at least one public corporation.

Section 213 of the enabling legislation expresses an intent to enhance public participation as well as disclosure of information regarding the functions and duties of community action agencies. Specifically, subdivision (a) of section 213 states in relevant part that:

> "[E]ach community action agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. Each community action

> agency shall also provide for reasonable public access to information, including but not limited to public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible..."

Again, while it is unclear that the Freedom of Information Law applies to records maintained by a community action agency, I believe that the federal legislation quoted above indicates an intent to ensure accountability to the public by providing "reasonable public access to books and records of the agency."

Whether the Freedom of Information Law applies or otherwise, it may offer guidance concerning the disclosure of records pertaining to clients.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 the grounds for denial that follow. The phrase quoted in the preceding sentence in my opinion indicates that a single record might be accessible or deniable in whole or in part.

Second, of likely relevance under the circumstances in terms of the authority to withhold is section 87(2)(b) of the Freedom of Information Law. That provision enables an agency to withhold records or portions of records the disclosure of which would result in an "unwarranted invasion of personal privacy." While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view enable government to prevent disclosures concerning the personal or intimate details of individuals' lives. As such, with respect to grant, loan or similar programs, often the question involves the extent to which disclosure would constitute an unwarranted invasion of personal privacy.

From my perspective, a disclosure that permits the public determine the general income level of a participant in such a program 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, records contain names or addresses of "low income" persons, it is likely that disclosure of portions of records indicating their identities might justifiably be withheld.

Lastly, I am unaware of any statute that would prohibit disclosure to Board members, for example. However, it may be possible to permit services to be monitored by deleting names or other identifying details and perhaps assigning identification numbers or codes to persons receiving services.

I hope that I have been of 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-0011

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

April 3, 1990

Mr. Joseph Fournier
Lock Bag R 203285
Rahway, NJ 07065

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

Dear Mr. Fournier:

I have received your letter of March 20 in which you requested an advisory opinion concerning the Freedom of Information Law.

Your first area of inquiry is "whether the definition of "'Agency' and 'office' in Public Officers Law Section 86, includes the Office of the Clerk of the various courts of the State of New York and the individual clerks thereof...".

In this regard, 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 upon the provisions quoted above, I do not believe that the courts or court records are subject to the Freedom of Information Law. While records maintained by a court clerk might be accessible under other statutes, the Freedom of Information Law, in my view, would be inapplicable.

The second area of inquiry is whether the New York State Library is an "agency" that is required to "provide copies of their library holdings upon payment of the prescribed fee...".

The State Law Library is part of the State Education Department and therefore is, in my opinion, an agency. Similarly, I believe that its "holdings" would likely constitute agency records subject to rights conferred by the Freedom of Information Law. In general, it would appear that the holdings in question would be available for inspection and copying, unless there are restrictions upon duplication of materials imposed by the U.S. Copyright Act, for example. Where the Copyright Act serves to preclude the reproduction of copyrighted materials, the authority to reproduce records would likely be contingent upon receipt of permission to do so by the holder of the copyright.

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-6012

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

April 3, 1990

Ms. Margaret Clark
[redacted]

The staff of the Committee on 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. Clark:

I have received your recent letter, which reached this office on March 26.

Based upon your letter and the materials attached to it, on February 21, you submitted a request for certain "water reports" maintained by Tioga County. Although the request was approved, you encountered a series of delays prior to disclosure of the reports and "waited a total of 25 days" from the submission of the request before it was fully honored. Moreover, the County's Public Information Officer wrote that you would be charged "$5.00 for opening the file and $.25 per page for the material copied."

You have requested my views on the matter. In this regard, I offer the following comments.

First, with respect to the issue of fees, in my opinion, unless there is a statute, an act of the State Legislature, that permits an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy when it reproduces records up to nine by fourteen inches [see Freedom of Information Law, section 87(1)(b)(iii)]. Based upon the legislative history of the Freedom of Information Law and its judicial interpretation, it is clear in my view that the only fee that an agency can charge is a fee for copying, unless a statute other than the Freedom of Information Law specifically authorizes the assessment of a different or additional fee.

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, it has been confirmed judicially 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 [Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. In that case, the provisions of a municipal ordinance were found to be invalid to the extent that they were inconsistent with the Freedom of Information Law.

It is noted, too, that the regulations promulgated by the Committee on Open Government, which have the force of law, preclude the assessment of search or administrative fees, unless such fees are prescribed by statute (21 NYCRR 1401.8).

In short, while the County may charge up to twenty-five cents per photocopy when it duplicates records, I do not believe that it may impose an administrative or other fee absent statutory authority to do so.

Second, with respect to the time within which an agency must respond to request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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..."

Although the receipt of your request was acknowledged, it is implicit in my opinion that an agency must grant or deny access to records sought within a reasonable time following the acknowledgement. Whether the time taken to honor your request was reasonable in this instance would likely have been dependent upon the nature of the records sought and the search and review techniques needed to locate the records and determine rights of access. If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, I believe that a request may be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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."

Copies of this opinion will be forwarded to the persons designated 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:saw

cc: Senator Thomas Libous
Assemblyman Richard Miller
William Distler, County Treasurer
Thomas Emnett, County Attorney
Gary Rice, Environmental Health Officer
Ronald Dougherty, Chairman, Tioga Co. Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6013

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

April 4, 1990

Mr. Joseph Cotazino, Jr.
President
Orchard Park Neighborhood
Association, Inc.
P.O. Box 122
Voorheesville, New York 12186

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

Dear Mr. Cotazino:

I have received your letter of March 22 and the correspondence attached to it.

As I understand the situation, as President of the Orchard Park Neighborhood Association, Inc., you requested copies of a series of records from the Department of Transportation. The Department denied access to the records pursuant to section 87(2)(g) of the Freedom of Information Law. However, at a time that you did not specify, you and your attorney were permitted to "review these nine documents and take notes on them" at the Department's Holland Avenue offices. In response to your appeal of the denial, it was stated that the records were not accessible under the Freedom of Information Law. Nevertheless, Mr. Thomas Clash, Executive Assistant to the Commissioner, added that:

> "...it is the general policy of this Department to be as open ss possible in connection with matters affecting the public. Accordingly, in keeping with our policy and not as a matter of law, the documents referred to in your letter of October 12, 1989, are enclosed herewith."

Although five of the documents were in fact enclosed, four others were withheld "without any explanation." You have since requested copies of those records, but the Department has opted not to disclose them. As stated by Mr. Clash in correspondence dated February 21: "if your October 12, 1989, letter was deemed to include these matters, it is clear from our failure to supply them that it was intended that your appeal in that respect be denied."

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, the provision upon which the Department has relied to withhold the records, 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 I am unfamiliar with the specific contents of the records, it appears that section 87(2)(g) would likely justify a denial.

Third, the Freedom of Information law is permissive; although an agency may withhold records pursuant to section 87(2)(g), for example, it is not obliged to do so. As stated by the Court of Appeals, the state's highest court:

> "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 such records..." [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Fourth, there is no indication in the correspondence that the records in question were disclosed to you and your attorney without the knowledge or consent of Department officials. Assuming that the disclosure was not inadvertent and was made "knowingly and voluntarily" [see McGraw-Edison v. Williams, 509 NYS 2d 285, 287 (1986)], it would appear that the Department waived its right to prohibit you from seeking and acquiring copies of records disclosed for your inspection.

Lastly, it is noted that, long before the enactment of the Freedom of Information Law, it was found that the right copy is concomitant with the right to inspect [see In Re Becker, 200 AD 178 (1922)]. Therefore, as a general matter, if records are made available for inspection, I believe that they are also available for copying. Further, section 89(3) of the Freedom of Information Law states in part that when a record is made available, "the entity shall provide a copy of such record" upon payment of the appropriate fee.

As you requested, a copy of this opinion will be sent 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

Robert J. Freeman
Executive Director

RJF:saw

cc: Thomas Clash, Executive Assistant to the Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6014

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

April 4, 1990

Mr. Agapito Lopez
#87-A-4528
Greenhaven Correctional Facility
Drawer B
Stormville, New York 12582

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

Dear Mr. Lopez:

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

Once again, the matter deals with a request for records of the Office of Court Administration concerning a named attorney. At my suggestion, your request was directed to Mr. Samuel Younger in a letter dated February 21. As of the date of your letter addressed to this office, you had not received a response to the request.

In this regard, I offer the following comments.

With respect to the time within which an agency must respond to request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business daya 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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."

To the best of my knowledge, the person designated to determine appeals at the Office of Court Administration is Michael Colodner, Counsel. In the event that Mr. Colodner does not perform that function, it is suggested that you request that your appeal be forwarded to the appropriate person.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Samuel Younger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6015

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

April 4, 1990

Mr. Wayne Jackson
351 Larkfield Road
Suite 2
E. Northport, New York 11731

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

Dear Mr. Jackson:

I have received your letter of March 20 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you made a request to a police department to review or copy "all field reports regarding certain persons for certain years." The request was denied. You added that a field report is prepared by a police officer "at the place of occurrence."

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 upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 appli-

cable in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example. Further, it appears that the records sought pertain "to persons other than yourself. As such, depending upon the nature of the incidents to which they relate, there may be significant privacy considerations involving those identified in the records.

Perhaps the most relevant provision concerning access to 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 hasis 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.

Records prepared by employees of a law enforcement agency or the office of a district attorney, or records transmitted between those agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the content of the records in question and the effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld.

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-6016

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

April 4, 1990

Mrs. Elmer Gayder
[redacted]

The staff of the Committee on 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. Gayder:

I have received your letter of March 27, as well as the materials attached to it.

According to the correspondence, in a letter dated February 24 addressed to the Corporation Counsel of the City of Amsterdam, you requested:

> "all paperwork authorizing the existence of a 50 foot right of way the City of Amsterdam claims on Church St. where [you] reside. This information should consist of a map - drawn by whom and the date resolution - date and number authorizing this right of way. Also, any other permit information."

The Corporation Counsel, Mr. Philip V. Cortese, responded on February 28 and advised you that you must submit a request under the Freedom of Information law on "appropriate forms" that could be obtained from the City Clerk. Thereafter, a request was submitted on such a form on March 1. You have apparently received no response to the request. Further, you were informed that "no appeal officer was appointed by [the City] Council."

You have requested advice concerning the "next step" that might be taken. In this regard, I offer the following comments.

First, the Freedom of Information Law, section 89(3), and the regulations promulgated by the Committee (21 NYCRR 1401.5), which have the force of law and govern the procedural aspects of the Law, 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 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 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, such as yourself in the situation that you described, 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 tbe 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 a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. A standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above.

Second, with respect to the time within which an agency must respond to request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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."

If no appeals officer has been designated by the City Council, I believe than an appeal may be made to the Council pursuant to section 89(4)(a).

Lastly, as inferred earlier, the Committee on Open Government is required to promulgate regulations concerning the procedural implementation of the Freedom of Information Law [see Freedom of Information Law, section 89(1)(b)(iii)]. In turn, section 87(1)(a) of the Law requires 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 as may be promulgated by the committee on open government in conformity with the provisions of this article [the Freedom of Information Law], pertaining to the administration of this article."

The City of Amsterdam is a public corporation, and its governing body is the City Council, which has the responsibility to adopt rules and regulations under the Freedom of Information Law.

I point out that 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."

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to City 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: Philip V. Cortese, Corporation Counsel
City Council, City of Amsterdam

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6017

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

April 5, 1990

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 March 14 addressed to the members of the Committee on Open Government.

You have questioned the "appropriateness" of a reply to a request for records by the Village of Croton-on-Hudson and a request directed to the Village.

With respect to the former, you referred to an article appearing in the Croton Gazette that indicated that the Village Board of Trustees scheduled a hearing on March 19 to consider "Local Law Introductory No. 1 of 1990 to rezone numerous patcels of land to PRE Zones 1,2 and 3 as defined by Local Law No. 6 of 1988. The parcels and the proposed zoning are on file in the Village Office."

In conjunction with the foregoing, you requested the list of parcels referenced above, the resolution of the Board "to hold such meeting," and the "agenda, resolutions, and minutes of the meeting of the Board of Trustees of January 8, 1990, whereby said board declared itself lead agency for the SEQR review of this action..." Apparently, the Village responded by sending only the list of parcels.

Although the response to your request did not so indicate, it appears that certain of the records sought were constructively denied. If my assumption is accurate, I believe that such a denial could be appealed pursuant to section 89(4)(a) of the Freedom of Information Law.

It is noted that your request referred to a resolution to hold a "meeting." Since the event in question was a "hearing," in a technical sense, it is likely that the resolution that you requested would have pertained to a hearing rather than a meeting.

You also asked whether a fee of twenty-five cents per page should be forwarded when making a request. The problem with doing so is that an applicant may not know the number of pages comprising the records sought. It is suggested, however, that an offer to pay the requisite fees be made, for example.

Your remaining question concerns the propriety of a request for a variety of records relating to a "Notice to Interested Agencies, Village of Croton-on-Hudson, Type I action, Designation of Parcels for Parks, Recreation and Education (PRE) Zoning Districts."

To the extent that the information sought exists, it appears that it would be available. However, I am not an expert with respect to the SEQR process, and various statutes, rules and regulations other than the Freedom of Information Law may be relevant to a determination of rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Richard F. Herbek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6018

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

April 5, 1990

Ms. Virginia L. Newell
[redacted]

The staff of the Committee on 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. Newell:

I have received your letter of March 24, as well as the materials attached to it.

You wrote that you requested records two years ago from the Town of Owego and that the records were made available free of charge. However, since you initiated a lawsuit against the Town in December of 1989, you suggested that a former Town official "has passed the word along that [you] must pay 30 [cents] per page for town and county records."

You have questioned the propriety of the fee. In this regard, I offer the following comments.

In my opinion, unless there is a statute, an act of the State Legislature, that permits an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy when it reproduces records up to nine by fourteen inches [see Freedom of Information Law, section 87(1)(b)(iii)].

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, it has been confirmed judicially 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 [Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. In that case, the provisions of a municipal ordinance were found to be invalid to the extent that they were inconsistent with the Freedom of Information Law.

It is also noted that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) provide in part that an agency may provide copies of records without charging a fee and that, absent statutory authority to do so, no fee may be charged for inspection of records or search for records (see section 1401.8). In short, I believe that the only fee that may be assessed under the Freedom of Information Law involves a fee for duplicating records, and that the fee is limited to a maximum of twenty-five cents per photocopy.

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

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: Town Board, Town of Owego

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6019

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

April 5, 1990

Mr. Gerald F. Wahl
Fulreader, Rosenthal, Sullivan,
Clifford, Santoro & Kaul
1350 Midtown Tower
Rochester, NY 14604

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

Dear Mr. Wahl:

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

In your capacity as the attorney for the Rochester Housing Authority, you wrote that the Authority has received a request under the Freedom of Information Law from an attorney representing the Building Trades Union for "copies of certified payroll records filed by contractors in connection with the work performed on various housing projects in 1989". It is your view that the Authority need not provide the names and addresses of the employees.

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 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. The phrase quoted in the preceding sentences indicates that a single record might consist of both accessible and deniable information.

The only relevant ground for denial, in my view, is section 87(2)(h), which permits an agency to withhold records which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine...". In turn, section 89(2)(a) provides that identifying details may be deleted to protect against an unwarranted invasion of personal privacy from records that would otherwise be available; section 89(2)(b) includes 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 subcontractor'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 may, 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 Authority [see e.g., section 89(2)(b)(iv)]. It is noted that the names and salaries of public employees must be disclosed [see Freedom of Information Law, section 87(3)(b)]. However, section 89(7) of the Law states that home addresses of public employees need not be made available. 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 sought concerning employees of private contractors could be deleted from the payroll records in question.

Moreover, the Appellate Division recently and unanimously upheld a Supreme Court decision dealing with rights of access to records analogous to those requested from the Authority [Joint Industry Board of the Electrical Industry v. Nolan, Supreme Court, New York County, May 8, 1989, aff'd, App. Div., First Department May 8, 1990, ___ AD 2d ___]. In that case, the request involved home addresses of employees of contractors that performed services for the New York City Board of Education. The court in Joint Industry Board balanced "the right of innocent individuals to be protected from unwarranted invasions into their own lives against the right of the public to know " and determined that "the interest of the contractors employees in avoiding a substantial invasion of their privacy is favored over the minimal interest involved in the disclosure of their home addresses to petitioner". In my view, contractors' employees have an incidental relationship to government and, as suggested earlier, their names and addresses are likely largely irrelevant to the work of the Authority. The court in Joint Industry Board, citing a decision rendered by the Court of Appeals, concluded by stating that: "Petitioner's entitlement to access does not necessarily entitle it to the reports in their entirety. Indeed portions of the reports made available to the petitioner should be expunged to protect (the privacy) of the employees. Matter of Scott, Sardano v. Records Access Officer, 65 N.Y.2d 294, 298."

Enclosed are copies of both the Supreme Court and Appellate Division decisions rendered in Joint Industry Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6020

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

April 6, 1990

Mr. W.H. Collins
[redacted]

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

Dear Mr. Collins:

I have received your note of March 29, as well as the materials attached to it.

Your inquiry concerns a case of check forgery in which you submitted evidence to the Chief of the Johnson City Police Department ("J.C.P.D.") regarding the "suspected forger of [your] checks." It is your belief that the evidence warrants the reopening of the case [redacted] As I understand the correspondence, you requested rules dealing with the reopening of cases, and in response, you were informed that there are no such rules maintained by the Department, that the case is "still pending," and that "pending cases are not opened to the public unless released by the District Attorney."

On March 1, you again requested a copy of the procedure involving the reopening of your case, as well as copies of a crime lab report comparing "known handwriting samples to the forged checks," and a report "submitted to the D.A.'s office that J.C.P.D. felt was sufficient to have [you] indicted." In a response to the request by the Village Attorney, you were informed that the request "cannot be processed by this agency," and that Village officials cannot "make a determination regarding the re-opening of any criminal matter." It was suggested that you bring the matter to the District Attorney.

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 an agency need not create a record in response to a request. Therefore, if no procedures exist concerning the reopening of cases, the Village, in my opinion, would not be obliged by the Freedom of Information Law to prepare such a record on your behalf.

Second, the Freedom of Information Law pertains to agency records, and 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 upon the foregoing, any documentation falling within the scope of your request would, in my view, constitute "records" subject to rights conferred by the Freedom of Information Law.

Third, as a general matter, all agency records are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2) of the Law. Further, assuming that the Village or its police department maintain any such records, I believe that it is required to determine rights of access and disclose the records to the extent required by the Law. I point out, too, that nothing in the Freedom of Information Law would preclude Village officials from conferring with the District Attorney in an attempt to determine the extent to which records must be disclosed or may be withheld.

Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance concerning rights of access. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a

confidential source or a witness, for example. Further, the records sought might pertain to persons other than yourself. If that is so, depending upon the nature of the records and the effects of disclosure, there may be privacy considerations involving persons identified in the records.

Perhaps the most relevant provision concerning access to 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 and 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.

Records prepared by employees of a law enforcement agency or the office of a district attorney, or records transmitted between those agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the content of the records in question and tbe effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld.

Lastly, under the circumstances, it is suggested that you contact the Office of the District Attorney and/or request records from that agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: William K. Maney, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6021

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

April 11, 1990

Mr. Jack Marsh
Executive Editor
The Observer-Dispatch
221 Oriskany Plaza
Utica, NY 13501

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

Dear Mr. Marsh:

I have received your letter of March 29 in which you requested an advisory opinion.

According to your letter, the State Police "have a practice of withholding the names of suspects who MIGHT be eligible for youthful offender status" (emphasis yours). By "suspect", it is assumed that you are referring to persons who have been arrested. Based upon your understanding of the law, "it is appropriate only to withhold the names of juveniles and those who have actually been granted youthful offender status".

In this regard, I offer the following comments.

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

Second, the initial ground for denial, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". While records concerning youthful offenders might at some point fall within a statutory exemption from disclosure, that point is reached, in my view, only when or after a court adjudicates that a person is a youthful offender.

Most relevant to the issue is section 720.15 of the Criminal Procedure Law, which as amended by Chapter 411 of the Laws of 1979, provides that:

> "1. When an accusatory instrument against an apparently eligible youth is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public.
>
> 2. When a youth is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and with the defendant's consent, be conducted in private.
>
> 3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action to be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law."

Based upon the quoted provisions, I believe that it is clear that only a court has the authority to seal an accusatory instrument that identifies "an apparently eligible youth". Further, the amendment to subdivision (3) of section 720.15 narrows the applicability of subdivisions (1) and (2) and the capacity to seal records or conduct private proceedings. As such, I do not believe that records pertaining to apparently eligible youths become "exempted from disclosure" by statute unless or until a court adjudicates them as youthful offenders. Further, under section 720.15(3), the provisions regarding the sealing of an accusatory instrument are not applicable at all, as I interpret the amendment, if a youth has been charged with a felony.

In sum, until a court seals records pertaining to apparently eligible youths, I believe that those records are available to the same extent as those pertaining to adults.

Lastly, with respect to juveniles, I direct your attention to section 784 of the Family Court Act, which states that:

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

Where section 784 applies, records, in my opinion would be exempted from disclosure and outside the scope of rights conferred by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Gary C. Dunne, Assistant Deputy Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6022

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

April 12, 1990

Ms. Amara S. Willey
The Bard Observer
Bard College
Annandale, NY 12504

Dear Ms. Willey:

I have received your recent correspondence in which you asked whether any state law provides you with the right to seek information from the administration of Bard College, which is a private institution.

As you suggested, the Freedom of Information Law would not be applicable to records of a private college, for that statute pertains to 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."

Since Bard College is not a governmental entity, neither the College nor its records would be subject to the Freedom of Information Law. Further, I am unaware of any other statute that would provide a right of access to the College's records. Nevertheless, private institutions often have relationships with entities of government, such as municipal or state agencies, i.e., the State Education Department. The records maintained by those entities would fall within the scope of the Freedom of Information Law. While I am not familiar with the records that are maintained by the State Education Department, there may be some annual or other reporting requirement imposed upon private colleges, and it might be worthwhile to contact the Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6023

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

April 12, 1990

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 March 27 in which you requested advice concerning the "appropriateness" of a request directed to the Village of Croton-on-Hudson and the Village's "response options."

By way of background, on March 19, the Village held a public hearing pertaining to the rezoning of certain parcels of real property. Following the hearing, you requested: "A full transcript, video tape, audio tape of the the testimony and deliberations of all witnesses, speakers, & officials at this meeting."

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. If records that you requested are not main- tained or have not been prepared by the Village, the Freedom of Information Law, in my opinion, would not apply.

Second, assuming that any such records do exist, I believe that they would be accessible under the Freedom of Information Law. It is noted that section 86(4) of the Freedom of Information 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."

As such, if the Village prepared or maintains a transcript, videotape or audio tape of the hearing, those items would in my view constitute "records" subject to rights conferred hy the Freedom of Information Law.

I point out that it has been held that a tape recording of an open meeting is a "record" available under the Freedom of Information Law, for none of the grounds for denial could be appropriately be asserted to withhold such a record (see Zaleski v. Hicksville Union Free School District, Sup. Ct., Nassau County, NYLJ, Dec. 27, 1978). I believe that a similar conclusion would be reached with respect to rights of access to a tape recording, a transcript or a videotape of a public hearing.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Richard C. Herbek, Village Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6024

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

April 12, 1990

Ms. Mary Grace Anzel
[redacted]

The staff of the Committee on 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. Anzel:

As you are aware, your letter of February 26 addressed to Thomas Sobol, Commissioner of Education, 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 and the Open Meetings Law.

In your capacity as a member of the East Islip Board of Education, you questioned certain practices occurring in the District. For example, attached to your letter is a copy of the Acdting Superintendent's weekly report to the Board, which is stamped "confidential." You asked whether District officials can "put the confidential stamp on everything." In addition, you wrote that minutes are inaccurate, for they indicate that a resolution was unanimously approved even though you voted in the negative.

In this regard, I offer the following comments.

First, 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" 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, re-

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

As such, the written memoranda and any other materials that are prepared by District officers and employees, in my opinion, 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. Further, 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 memorandum might contain both available information and deniable or perhaps confidential information. I believe that the phrase requires that an agency review requested records to determine which portions, if any, may justifiably be withheld and that remaining portions be disclosed.

Only those portions of records that may properly be denied in accordance with the grounds for denial appearing in section 87(2) of the Freedom of Information Law can be withheld. Only a statute enacted by Congress or the State Legislature can serve to diminish rights conferred by the Freedom of Information Law, and I do not believe that a board of education can, by means of practice or policy, restrict rights of access granted by the Freedom of Information Law.

Third, since the document attached to your letter is stamped "confidential," it is emphasized that the term "confidential" in my opinion has a precise meaning. To be confidential, a statute must grant authority to maintain secrecy or to prohibit public disclosure of records. When records are confidential, section 87(2)(a) of the Freedom of Information Law, the first ground for denial, applies. That provision pertains to records that are "specifically exempted from disclosure by state or federal statute".

In the context of a school board's duties, it is unlikely that records will be "confidential" or exempted from disclosure by statute. The one area that comes to mind where a requirement of confidentiality may arise involves records pertaining to students. The Family Educational Rights and Privacy Act (20

U.S.C. section 1232g) generally requires that education records identifiable to students must be kept confidential, except with respect to the parents of the students. If the memoranda in question identify students in conjunction with their educational programs, special needs, discipline, awards and similar matters, it is likely that the federal Act referenced above would preclude the Board from publicly disclosing those aspects of the materials. Again, in those instances, records that are identifiable to students would be "confidential" and "specifically exempted from disclosure" by a federal statute.

When records are exempted from disclosure by statute, an agency cannot disclose. In all other instances, the Freedom of Information Law is permissive. In other words, even though an agency may withhold records or portions thereof, it is not required to do so. As indicated by the Court of Appeals, the State's highest court, while an agency is permitted to restrict access to those records falling within the grounds for denial, "the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records..." [see Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)]. Therefore, although records might not be confidential, i.e., exempted from disclosure by statute, they may nonetheless be deniable. Where they are deniable, an agency may choose to withhold or disclose the records.

In short, with the exception of references to students, it is unlikely in my opinion that the kind of records to which you referred could be characterized as "confidential" or that there is a legal duty to prohibit public access to those records.

Fourth, as inferred earlier, the specific contents of the memoranda determine the extent to which they may be withheld. Other than the provision discussed earlier [section 87(2)(a)], there may be several grounds for denial of possible relevance.

Memoranda transmitted among school district officials could be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law. Although that provision is one of the grounds for denial, due to its structure, it often requires disclosure of portions of 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, 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 point out that it has been held that factual information that might be "intertwined" with advice or opinions must be disclosed under section 87(2)(g)(i), unless there is a different basis for denial [see Ingram v. Axelrod, 90 AD 2d 568 (1982)].

The weekly report that you enclosed consists largely of factual information which, in my view, would be accessible under the Freedom of Information Law, unless a ground for denial other than section 87(2)(g) could appropriately be asserted.

Also of potential 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". The portion of the report describing the Superintendent's medical condition could likely be withheld as an unwarranted invasion of personal privacy.

Another ground for denial of possible significance is section 87(2)(c), which permits an agency to withhold records when disclosure would "impair present or imminent contract awards or collective bargaining negotiations". Some reports might include information concerning strategy used in collective bargaining negotiations which if disclosed would impair the negotiations.

In sum, insofar as there is a blanket of confidentiality placed on the records in question, I believe the District's action is inappropriate and inconsistent with the Freedom of Information Law. While portions of the records might justifiably be

withheld under the Freedom of Information Law, other aspects of the records might be accessible, and it is reiterated that the contents of the records determine the extent to which they are accessible or deniable.

Lastly, with respect to the contents of minutes, section 106(1) of the Open Meetings Law, which pertains to minutes of open meetings, 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."

Reference to the "vote theron" in my opinion refers to the vote of each member. I point out, too, that the Freedom of Information Law has, since its enactment, acontained an "open vote" provision. Specifically, the Freedom of Information Law requires that each agency, including a board of education, "shall maintain: a record of the final vote of each member in every agency proceeding in which the member votes" [section 87(3)(a)]. As such, when the Board votes on a matter, I believe that a record must be prepared indicating the manner in which each member cast his or her vote. Ordinarily, that record is part of the minutea. Further, in my opinion, it is implicit in the Freedom of Information Law and the Open Meetings Law that minutes be accurate and that they reflect how each member voted.

I hope that 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: Dr. Michael F. Griffin, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-102
FOIL-AO-6025

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

April 12, 1990

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 April 10 in which you requested a variety of information from this office.

In this regard, it appears that you misunderstand the nature and functions of this office. As a general matter, the Committee provides advice concerning the Freedom of Information Law, the Personal Privacy Protection Law and the Open Meetings Law. The Committee has no authority to compel an entity to grant or deny access to records. Further, while the Committee maintains information about access to records, it does not possess records generally. As such, this office does not maintain most of the information that you have requested, much of which involves federal law and legal assistance programs.

If you are interested in obtaining records of a particular agency, a request should be made to the "records access officer" of that agency. The records access officer has the duty of coordinating an agency's response to requests. In addition, 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 requested records.

I have located some of the records that you request, such as Part 8000 of the regulations promulgated by the Division of Parole and the provisions of the Executive Law that you identified. In addition, enclosed are copies of the Freedom of Information Law and the Personal Privacy Protection Law. The brochures that you requested are in the process of being printed, for our supply has been depleted.

Since you referred to the Personal Privacy Protection Law, I point out that although section 95(1) of that statute generally grants rights of access to records to a person to whom records pertain, section 95(7) provides that rights of access "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by section 92(8) to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of 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, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty-seven-a, eight hundred thirty-seven-b, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

As such, although the Personal Privacy Protection Law applies to records maintained by state agencies, rights of access conferred by that law do not include records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement of persons in correctional facilities. Therefore, the Personal Privacy Protection Law may be of minimal utility to you.

Lastly, the New York City office of the Governor is located at 2 World Trade Center, New York, NY 10047; the New York City office of the Department of State is located at 270 Broadway, New York, NY 10007.

I hope that the foregoing serves to clarify the role of the Committee on Open Government and the statutes within its advisory jurisdiction.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6026

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

April 13, 1990

Mr. Russ Haven, Esq.
Mr. Steven Romalewski
New York Public Interest Research
Group, Inc.
9 Murray Street
New York, New York 10007-2272

The staff of the Committee 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 Messrs. Haven and Romalewski:

I have received your letter of March 30 in which you sought an advisory opinion concerning a request for records directed to the Town of Babylon relating to a resource recovery garbage incinerator located in the Town.

By way of background, on January 3, a request was made to the Town Clerk for six categories of records, and it is your view that the records sought in items 1, 2 and 4 of the request involve materials in possession of the Town that should be disclosed. Those items involve:

> "1) the Operations Reports submitted to the Town by Odgen Martin Systems of Babylon, Inc. ('OMSB') for the months of July through December, 1989 which summarize, among other things, the amount of waste delivered to the incinerator, the amount of ash generated by the incinerator and the revenues generated by the incinerator;

> 2) the Meeting Notes from the 'Interface Meetings' that occurred from April 5, 1989, to the present between and among representatives of the Town, OMSB, Gershman, Brickner & Bratton ('GBB') and other parties to discuss various aspects of the incinerator and waste management in the Town....
>
> 4) any an all documentation regarding breakdowns, malfunctions and other operations problems at the incinerator from April 5, 1989, to the present, including, but not limited to, information regarding any fires that occurred at the incinerator during that time, and any temporary shutdowns that occurred at the incinerator during that time (including information describing the reasons for the problems, their duration, how they were resolved and what cost OMSB and/or the Town incurred as a result)."

OMSB is the owner of the incinerator and maintains a contractual relationship with the Town. You informed me by phone that GBB is a consultant retained by the Town.

In response to your request, the Senior Assistant Town Attorney wrote that the documents are not in the Town's possession and should be requested from OMSB and/or GBB, both of which are private firms that are not subject to the Freedom of Information Law. Nevertheless, you indicated that you have "clear evidence...that this information is in the Town's possession," and you enclosed copies of an "Operations Report" and notes of "Interface Meetings" that had previously been ohtained from the Town pursuant to requests made under the Freedom of Information Law. Moreover, the correspondence indicates that the service agreement between OMSB and the Town requires OMSB to send monthly operations reports to the Town.

In this regard, I offer the following comments.

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

Second, the 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, if the documentation that you requested is maintained by the Town, I believe that such documentation would constitute "records" subject to rights conferred by the Freedom of Information Law. Similarly, the extent that the documentation has been "produced or reproduced...with or for..." the Town, it would, in my view, consist of "records," even though the records might not be in the physical possession of the Town.

The correspondence does not specify whether the agreement between OMSB and the Town requires that monthly operations reports be prepared for the Town. If they are prepared for the Town, I believe that they would constitute agency records, irrespective of where they are kept. If the agreement does not so require, records maintained by OMSB would, in my opinion, fall beyond the scope of the Freedom of Information Law. However, a failure to transmit those reports to the Town would appear to be inconsistent with the agreement between the Town and OMSB.

With respect to meeting notes of "Interface Meetings," the notes attached to your letter were prepared by GBB. The notes suggest that the meetings are attended by representatives of the Town, OMSB and GBB, and that they are distributed to each of the three entities. Again, the attorney for the Town wrote that those records are not in the possession of the Town. While that may be so, based upon the judicial interpretation of the Freedom of Information 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.

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 tbe 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 he "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.

Therefore, while meeting notes might not be in the physical possession of the Town, it appears that they would constitute "intra-agency materials" subject to rights of access. Further, I believe that it would be the Town s responsibility to obtain and disclose such records to the extent required by the Freedom of Information Law.

The remaining category of records, as described in item 4 of the request, involves operational problems that might have occurred at the incinerator, the resolution of those problems and the resultant cost to the Town. Any such records maintained by the Town would, in my view, be available, for I do not believe that any of the grounds for denial could justifiably be asserted.

Lastly, since you questioned the accuracy of the Town's contention that it does not maintain certain records, I point out that under section 89(3) of the Freedom of Information Law, upon the request of an applicant for a record, 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 appropriate to seek such a certification. Further, while I am not suggesting that it is necessarily relevant, a recent amendment to the Freedom of Information Law, 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."

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Francel-Maria Trotter, Sr. Asst. Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6027

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

April 13, 1990

Mr. Agapito Lopez
87-A-4528
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Lopez:

I have received your letter of March 29, as well as the correspondence attached to it.

According to the materials, on January 2, you directed a request for records to Ms. Jody Mandel of the Office of the Kings County District Attorney. As of the date of your letter to this office, you had received no response to the request. You have asked that I "look into the matter...".

In this regard, I offer the following comments.

First, as you may be aware, a new district attorney was recently elected in Kings County. Further, Ms. Mandel no longer serves as records access officer; the new records access officer is Ms. Nancy F. Talcott, Assistant District Attorney. Although I will forward a copy of your request to Ms. Talcott, it is suggested that you resubmit your request to her.

Second, with respect to the time within which an agency must respond to request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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 to whom an appeal may be made is Peter A. Weinstein, First Deputy Bureau Chief of the Appeals Bureau.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nancy F. Talcott, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6028

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

April 13, 1990

Mr. David L. Lewis
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 April 2, as well as the correspondence attached to it.

According to the materials, you requested from the Urban Development Corporation records "pertaining to all bids on the Request for Proposals by [the] agency pertaining to a feasibility study for a proposed biomedical research park on the site of a state mental health facility in the Bronx". You specified in the request that you want "the names and addresses of all companies who submitted bids and the amounts of the bids", and the "technical details that will explain how the proposals differ from one another".

The request was denied pursuant to section 87(2)(c) and (d) of the Freedom of Information Law. You wrote that you do not understand how those provisions would justify a denial. In addition, you indicated that you were informed that the "staff recommendations" to be submitted to the Board of Directors of the Corporation will not be made public.

You have requested an opinion 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. 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 grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record may contain both accessible and deniable information. That phrase, in my view, also imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Second, your request involves "bids on the request for proposals". While I am not an expert on the subject, I believe that bids and records submitted in response to requests for proposals ("RFF's") and the process relating to bids and RFP's are different. As I understand the matter, prior to the purchase of goods or services, an agency might solicit bids. So long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency seeks proposals by means of RFP's, there is no obligation to accept the proposal reflective of the lowest cost; rather, the agency may engage in negotiations with the submitters regarding cost as well as the nature or design of goods or services to be purchased, or the nature of the project in accordance with the goal sought to be accomplished. As such, the process of evaluating RFP's is generally more flexible and discretionary than the process of awarding a contract following the submission of bids.

Third, the contents of the records, the nature of the industry in which the submitters of RFP's are involved, and the effects of disclosure would in my opinion be the factors relevant in determining rights of access to the records in question.

In my view, in accordance with the factors described in the preceding paragraph, section 87(2)(c) and/or section 87(2)(d) might permit a denial of access to records or perhaps portions of records.

As you are aware, section 87(2)(c) provides that an agency may withhold records which "if disclosed would impair present or imminent contract awards...". In the case of an agency soliciting bids, if, for example, an agency seeking bids has received s number of hids, 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 justifiahly be denied. If the deadline for submission of bids has heen reached, all of the submitters are on an equal footing and, as suggested earlier, an agency is generally obliged to accept the lowest appropriate hid. In that situation, the bids would, in my opinion, be available.

In the case of RFP's, even though the deadline for submission of proposals might have passed, an agency may engage in negotiations with the submitters resulting in alterations in proposals and costs. Whether disclosure at that juncture would "impair" the process of awarding a contract is, in my view, a question of fact. In some instances, disclosure might impair the process; in others, disclosure may have no harmful effect or might even encourage firms to be more competitive, thereby resulting in benefit to the agency. Due to a lack of knowledge of the facts relating to the issue, I cannot offer specific guidance concerning the application of section 87(2)(c). Nevertheless, assuming that the deadline for submission of proposals has been reached, I do not believe that the names and addresses of the submitters could properly be withheld. Similarly, since the proposals are subject to negotiation, it is difficult to envision how disclosure of figures reflective of total proposed costs would "impair" the process.

Section 87(2)(d) permits an agency to withhold records or portions thereof that:

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

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.).

As suggested earlier, the nature of the records submitted and the area of commerce in which the firms submitting proposals are involved would in my opinion determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of the firms. Further, a unique or novel process described in records might, if disclosed, result in competitive harm for a time; however, over the course of time, such a process might become widely known within an industry or perhaps supplanted by a more economical or technically advanced method. Therefore, as in the case of section 87(2)(c), the proper assertion of section 87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the firm that submitted the records.

Lastly, with respect to staff recommendations, a different ground for denial is likely relevant. Specifically, section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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 the records in question would constitute "intra-agency" materials. As such, the Corporation's duty to disclose or authority to withhold those records would be dependent on the specific contents of the records.

I hope that the foregoing serves to clarify your understanding of the issues. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Virginia M. Ryan
Valerie Caproni, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6029

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

April 13, 1990

Mr. Greg Mingo
83-A-660
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. Mingo:

I have received your letter of March 31 concerning difficulties encountered in your efforts to obtain sentencing transcripts.

In this regard, I offer the following comments.

It is noted at the outset that the Freedom of Information Law pertains to records maintained by agencies. 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, in my opinion, is not applicable to the courts or court records.

While the Freedom of Information Law may not apply, court records are often accessible pursuant to other provisions of law (see e.g., Judiciary Law, section 255). I believe that the custodian of court records is the clerk, and it is suggested that you raise the issue with the clerk of the appropriate court.

I regret that I cannot be of greater 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-6030

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

April 13, 1990

Mr. Kenneth K. Fisher
Fisher & Fisher
189 Montague Street
Brooklyn, NY 11201

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

Dear Mr. Fisher:

I have received your letter of April 2 in which you raised questions relating to requests for proposals issued by municipalities to "potential vendors of goods or services, or potential real estate developers".

You wrote that the requests for proposals, often known as "RFP's", "typically ask for the backgrounds of the respondents' principals, the experience of the firm in similar matters, the approach to the particular situation which the firm would use, and sometimes a financial offer (which is subject to negotiation)". You have asked whether the responses to RFP's submitted by interested firms would be subject to disclosure and whether the duty to disclose would be affected "by the status of the RFP process, e.g. before the final response deadline; while the selection is being made; or after it is made".

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more 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 grounds for denial that follow. The phrase

quoted in the preceding sentence indicates that a single record may contain both accessible and deniable information. That phrase, in my view, also imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Second, the contents of the records, the nature of the industry in which the submitters of RFP's are involved, and the effects of disclosure would in my opinion be the factors relevant in determining rights of access to the records in question. From my perspective, three of the grounds for denial may be relevant to the issue.

Section 87(2)(b) 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, the first of which pertains to "disclosure of employment, medical or credit histories...". Those provisions might be asserted in appropriate circumstances to withhold portions of records pertaining to individuals, i.e., principals or employees, identified in the records. The provisions concerning the protection of privacy in my opinion apply only to records identifiable to natural persons; I do not believe that they could be asserted to withhold records that deal with an entity's employment history, for example [see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Argiculture and Markets, Supreme Court, Albany County, May 10, 1989].

Also of likely relevance is section section 87(2)(c), which provides that an agency may withhold records or portions thereof that:

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

From my perspective, the key word in section 87(2)(c) is "impair", and the potential for harm as a result of disclosure is the determining factor regarding the propriety of a denial under that provision.

If, for example, an agency seeking proposals has received a number of proposals, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted proposals. Further, disclosure of the identities of submitters or the number of submitters might enable another potential submitter to tailor his proposal in a manner that provides him with an unfair advantage in the process. In such a situation, harm or "impairment" would likely be the result, and the records in such a circumstance could in my view justifiably be denied. However, after the dead-

line for submission of bids or proposals has been reached, often the passage of that event results in the elimination of the harm envisioned by section 87(2)(c). Nevertheless, since agencies may negotiate with firms following the deadline for submission of proposals, whether the extent to which disclosure would "impair" the process would be dependent upon the attendant facts.

Alao of likely relevance 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 proceas 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.).

As suggested earlier, the nature of the records submitted and the area of commerce in which the firms submitting proposals are involved would in my opinion determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of the firms. Further, a unique or novel process described in records might, if disclosed, result in competitive harm for a time; however, over the course of time, such a proceas might become widely known within an industry or perhaps supplanted by a more economical or technically advanced method.

Therefore, as in the case of section 87(2)(c), the proper assertion of section 87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the firm that submitted 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-6031

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

April 16, 1990

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:

Your letter of April 5 addressed to the State Archives has been forwarded to the Committee on Open Government. As you are aware, the Committee is responsible for advising with respect to the Freedom of Information Law.

In conjunction with section 57.09 of the Arts and Cultural Affairs Law, you asked whether "all records [must] be kept in one specific location for public access", i.e., in the office of a town clerk. Further, if that is not the case, you asked whether the records access officer is "obliged to seek the public records kept in the office of the public official using them in order to provide copies or for inspection by the public".

In this regard, I am unaware of any statute or rule that requires that public records be maintained in "one specific location". Although a town clerk, for example, is the legal custodian of all town records [see Town Law, section 30(1)], town records might be kept in a variety of locations, such as a town highway garage, in the office of a code enforcement officer, with a town supervisor [see Town Law, section 29(4)], etc., or at the homes of certain town officials. For example, in Town of Northumberland v. Eastment, it was found by a court "that there is no present requirement that the bookkeeper keep the pertinent books at the town offices", and that there is "discretion in determining where the books are to be kept so long as they are accessible to the public" [493 NYS 2d 93, 95 (1985)].

In addition, the functions of records access officers are described in the regulations promulgated by the Committee on Open Government pursuant to the Freedom of Information Law (21 NYCRR Part 1401). Specifically, section 1401.2(a) of the regulations states in part that:

> "The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have the past been authorized to make records or information available to the public from continuing to do so."

As such, a town board, for instance, may designate one or more records access officers. Further, the records access officer has the duty of "coordinating agency response" to requests for records.

Lastly, in your letter to the State Archives, you requested copies of a particular publication. I was informed that the publication sought is out of print.

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-6032

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

April 16, 1990

Mr. J. Miceli
84-A-6855
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. Miceli:

I have received your letter of April 6.

You wrote that you are interested in obtaining information concerning yourself and your attorney, and you asked where you would write to obtain the information. You also seek to obtain certain records from a federal district court, particularly a pre-sentence report concerning your attorney, who was recently convicted of a crime.

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. That statute pertains to agency records. Further, 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."

Based upon the provision quoted above, 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 federal agencies, federal courts or the courts of New York. As such, I cannot offer specific guidance concerning rights of access to records maintained by a federal court.

Second, as a general matter, a request for records maintained by agencies pertaining to yourself should be directed to the "records access officer" at the agency or agencies that you believe would have records pertaining to you. The records access officer has the duty of coordinating an agency's response to requests for records. Further, 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.

Third, with respect to records pertaining to your attorney, I point out that section 468 of the Judiciary Law requires the Chief Administrator of the Courts to maintain and make available an "official register" that identifies attorneys admitted to practice in New York. That provision also states that: "Where the official register indicates that an attorney has resigned from the bar, or has been removed or suspended from practice by an appellate division of the supreme court and has not been readmitted to practice, that fact shall also be disclosed".

To seek information contained in the official register, it is suggested that you write to Mr. Samuel Younger, Office of Court Administration, 270 Broadway, New York, NY 10007.

Enclosed as requested is a copy of "Your Right to Know", which describes 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6033

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

April 16, 1990

Mr. Steven Bebee
[redacted]

Dear Mr. Bebee:

I have received your letter of April 4 in which you requested assistance in obtaining records from the Family Court in Wayne County.

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to advise with respect to the 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 does not apply to the courts or court records.

Of possible relevance to the matter is section 166 of the Family Court Act. That statute states that:

> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

Since the matter is outside the jurisdiction of this office, if you encounter further difficulty, it is suggested that you contact the Office of Court Administration, which is located at the Empire State Plaza, Agency Building 4, Albany, NY 12223. Its office of counsel can be reached by phone at (518) 474-7469.

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-6034

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

April 16, 1990

Mr. John T. Stevens
89-A-2600
Washington Correctional Facility
Lock 11 Road
P.O. Box 180
Comstock, New York 12821-0180

Dear Mr. Stevens:

I have received your letter of April 7.

According to your letter, you are being "erroneously investigated by the Immigration and Naturalization Service." In order to prove your citizenship, you wrote that you might be able to to so by obtaining records from the Social Security Administration and perhaps other federal agencies. As yet, however, your attempts to gain access to such records have been unsuccessful. You have asked how you might use the Freedom of Information Act to request the records.

In this regard, the Committee on Open Government is an agency of New York State that is authorized to advise with respect to the New York State Freedom of Information Law. That statute generally applies to records maintained by entities of state and local government in New York. The Freedom of Information Law does not apply to federal agencies, and I cannot, therefore, provide specific guidance.

The federal Freedom of Information Act, 5U.S.C. section 552, applies to records maintained by federal agencies. As such, requests made pursuant to that Act should be directed to the Freedom of Information officers at the agencies that you believe maintain records of interest to you. A request should contain sufficient detail to enable agency officials to locate the records.

Enclosed is a copy of a sample letter of request for records under the federal Act that was prepared for journalists. Although portions of the sample letter would not be appropriately used, since you are not a journalist, it might be useful to you in preparing a request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6035

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

April 16, 1990

Mr. Robert Wood
[redacted]

Dear Mr. Wood:

I have received your letter of April in which you requested assistance in obtaining court records.

In brief, you wrote that you have attempted to obtain materials pertaining to yourself concerning a criminal charge for a crime that you "never committed." Although you requested records under the Freedom of Information Law from the Neversink Town Court, you had not, as of the date of your letter to this office, received a response.

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

Second, while the Freedom of Information Law does not include court records within its coverage, other provisions of law often grant rights of access to those records. One such statute is section 2019-a of the Uniform Justice Court Act, which pertains to records of town and village justice courts. The first sentence of that provision states in part that: "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..." Therefore, unless justice court records may be withheld or have been sealed under some other provision of law, I believe that they must be disclosed pursuant to the Uniform Justice Court Act.

You did not indicate whether you were convicted of the charge or whether the charge was dismissed in your favor. If you were convicted, I believe that the records would generally be available. If the charge was dismissed, the records might have been sealed pursuant to section 160.50 of the Criminal Procedure Law. If the latter is so, it is suggested that you confer with your attorney for the purpose of attempting to gain access to the records.

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: Town Justice, Town of Neversink

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6036

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

April 16, 1990

Mr. Edward A. Davis
89-A-2418-B219
Mt. McGregor Prison
P.O. Box 2071
Wilton, New York 12866

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

Dear Mr. Davis:

I have received your letter of March 31 in which you raised questions and described problems concerning access to records.

Your first question involves "who in the New York State Health Department voted on Article 13 E" of the Public Health Law, and how you "get a record of titles and names" of those who voted. In this regard, officials in the Health Department do not vote on legislation; the members of the State Legislature (the Senate and the Assembly) vote on legislation. The provision in question was enacted as Chapter 244 of the Laws of 1989. Records indicating how state legislators voted on the bill enacted as Article 13-E of the Public Health Law may be requested from the Records Access Officer of the Assembly and the Secretary of the Senate in Albany.

The next area of inquiry involves a denial of a request for certain "ACA standards" and a directive concerning "clothing issue" by an official at your facility. Since I am unfamiliar with ACA standards or the contents of the records in question, I cannot provide specific guidance. However, while the Freedom of Information Law provides broad rights of access, based upon your description of the records, several grounds for denial in the Freedom of Information Law may be relevant.

For instance, records prepared by agency staff and transmitted within the agency or between agencies would fall within the scope of section 87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

Also of possible significance is section 87(2)(e)(iv) of the Freedom of Information Law, which 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 deciaion 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 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 liklihood 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 or 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)."

It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and apparently would not if disclosed preclude police officers from carrying out their duties effectively.

Another ground for denial of possible relevance is section 87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life or safety of any person."

In sum, since I am unaware of the contents of the records sought or the effects of their disclosure, I cannot advise with certainty as to the propriety of the denial. However, for the reasons previously described, there may have been appropriate grounds for the denial of portions of the records.

You also referred to the denial of a request for an "index," and I assume that the reference involves the "master index" described in the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law. Those regulations are based upon section 87(3)(c) of the Freedom of Information Law, which requires that each agency maintain:

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

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, 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 states that:

> "(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in this possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. the mast 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 made 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.

When a request is denied, the denial 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 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.

Lastly, you asked whether the Committee on Open Government is "an extension of Prisoners Legal Services." The Committee has no legal relationship with Prisoners' Legal Services. The Committee was created by the enactment of the Freedom of Information Law and is a unit of the Department of State.

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-6037

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

April 16, 1990

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 April 8, as well as the materials attached to it.

According to your letter, you transmitted a request for certain records to the Town of Greenburgh by means of your fax machine. The request was denied by the Town Clerk, Susan Tolchin, who also serves as records access officer. Ms. Tolchin apparently indicated that requests made by fax transmission were not permitted and that "an outdated FOIL request form was used."

You attached a copy of the Town's local law adopted pursuant to the Freedom of Information Law. The local law states in part that requests should be made in writing; it makes no reference to the use of a form.

You asked whether fax machines may be used to request records and whether you are obligated to use a request form supplied by an agency. In addition, you wrote that the Town "requires that all requests for access to and/or copies of records be approved in writing by the supervisor or Department head of the Greenburgh Department currently in possession of the record before the record is made available for inspection by the Records Access Officer." You questioned the propriety of the procedure, for it often results in delays.

In this regard, I offer the following comments.

First, the Freedom of Information Law, section 89(3), and the regulations promulgated by the Committee (21 NYCRR 1401.5), which have the force of law and govern the procedural aspects of the Law, 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 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 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, such as yourself in the situation that you described, 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 a failure to use such a form 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 ss his or her written request.

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

Second, there are no judicial decisions of which I am aware that deal with the use of fax transmissions to request records under the Freedom of Information Law. Absent a judicial determination to the contrary and assuming that such a request is directed to the appropriate person, i.e., the records access officer, I am unaware of any basis for refusing to accept a request made by means of a fax transmission.

Third, if I understand the situation correctly, the official that maintains physical custody of Town records must approve a request before it is forwarded to the records access officer for final approval. In my view, such a procedure would be inconsistent with both the Town's local law and the regulations promulgated by the Committee on Open Government dealing with the duties of the records access officer [see 21 NYCRR section 1401.2(a)]. While the records access officer may consult with officials concerning a determination to grant or deny access to records, I believe that the designated records access officer has the duty to make such a determination. As you described the matter, at least two officials must approve a request. In my view, the records access officer, again, perhaps in consultation with others, has the responsibility to grant or deny access to records.

I point out that the local law includes the designation of two records access officers. One is the Town Clerk, who serves as records access officer for all Town records, with the exception of records maintained by the Police Department. The other records access officer is designated by the Chief of Police.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Susan Tolchin, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6038

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

April 17, 1990

Mr. Frank Miles
83-B-1932
P.O. 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. Miles:

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

According to your letter, your request for various records of the Office of the District Attorney of Ulster County pertaining to your case was denied. The initial denial indicates that the records sought "pertain to investigations [that are] being actively pursued" by the Office of the District Attorney. You wrote that you were unaware of any pending investigation, for the records sought relate to your conviction, which occurred several years ago. Nevertheless, in response to that letter, you were informed that:

> "The records that you request this office to provide to you pursuant to the Freedom of Information Law are exempt from disclosure under Public Officers Law 87[2][e](i), (iii) and (iv). The law enforcement exemption (Public Officers Law Section 87) is not rendered unavailable because the investigation into this matter was concluded prior to the trial in this matter."

In addition, in none of the responses from the Office of the District Attorney were you advised of the right to appeal or the identity of the person to whom an appeal could be made.

You have requested assistance in 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, the provisions cited in the denial permit an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations of judicial proceedings...
>
> 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 I am unfamiliar with the records sought, I cannot advise with certainty whether the provisions quoted above would justify a denial. Nevertheless, it is clear in my view, that those provisions may appropriately be asserted only to the extent that the harmful effects described therein would arise as a result of disclosure.

For instance, section 87(2)(e)(i) may be asserted only to the extent that disclosure would "interfere" with law enforcement investigations or judicial proceedings. If the investigation in this instance ended years ago, and if no judicial proceedings would, at this juncture, be conducted in relation to the investigation, it is difficult to envision how a denial based upon section 87(2)(e)(i) would be proper.

With respect to section 87(2)(e)(iii), it is possible that disclosure would identify a confidential source, for example. If that is so, that provision might have properly been asserted.

Perhaps the leading decision concerning section 87(2)(e)(iv) 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 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 liklihood 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 tbings 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 or 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 tecbniques 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)."

I point out, too, that in a recent decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "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" [see Moore v. Santucci, 543 NYS 2d 103, 107, ___AD 2d___ (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

Third, with respect to the right to appeal a denial, pursuant to regulations promulgated by the Committee on Open Government under the Freedom of Information Law:

> "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" [21 NYCRR 1401.7(b)].

Further, a recent decision rendered by the Court of Appeals, which cited the provision quoted above, indicates that a failure to inform an applicant of the right to appeal may permit the applicant to initiate a proceeding under Article 78 of the Civil Practice Law and Rules. The decision states that:

> "Petitioner commenced this article 78 proceeding to compel production of certain documents after his Freedom of Information Law request, initially directed to the District Attorney, was denied in a letter signed by the District Attorney's records access officer. Inasmuch as the district attorney failed to advise petitioner of the availability of an administrative appeal in the office (see 21 NYCRR 1401.7[b]) and failed to demonstrate in this proceeding that procedures for such an appeal had, in fact, even been established (see, Public Officers Law section 87[1][b]), he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [Barrett v. Morgenthau, 74 NY 2d 907, 909 (1990)].

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the Office of the District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Michael Kavanagh, District Attorney
Joan Lamb, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6039

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

April 17, 1990

Honorable James P. Jeffreys
Councilman - Town of Milan
Wilcox Memorial Town Hall
Route 199, P.O. Box 42
Red Hook, New York 12571

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

Dear Councilman Jeffreys:

I have received your letter of April 6 in which you requested advice concerning access to records of the Town of Milan.

According to your letter and the materials attached to it, in your capacity as a member of the Town Board, you submitted a series of requests to Vincent Scelba, Town Supervisor, to examine various financial records of the Town. However, you wrote that your attempts to do so have been "stalled by the Supervisor." You also indicated that two other Board members have unsuccessfully sought to review Town financial records.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, from my perspective, books of account, bills, vouchers, checks, contracts, ledgers and similar documents involving Town finances are available, for none of the grounds for denial would apply.

Moreover, the Town Law imposes certain responsibilities upon a town supervisor concerning to maintenance and disclosure of financial records. Specifically, section 29(4) of the Town Law states that the supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be the public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In addition, subdivision (1) of section 119 of the Town Law states in part that:

> "When a claim has been audited by the town board the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours." Similarly, as suggested earlier, vouchers, contracts, abstracts and similar documents, are, in my opinion, available to any person pursuant to the Freedom of Information Law.

Second, I believe that procedures concerning the implementation of the Freedom of Information Law should have been (or should be, if none exist) promulgated by the Town Board. By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires that Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 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."

In this instance, the governing body of a public corporation, the Town of Milan, is the Town Board, and I believe that the Town Board, rather than the Supervisor or any single member of the Board, is authorized to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

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 persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:

> (i) make records 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 coordinsting agency response" to requests and assuring that agency personnel act appropriately in response to requests.

While I am unaware of the identity of the Town's designated records access officer, usually the records access officer is the town clerk, for the clerk is the custodian of town records in accordance with section 30(1) of the Town Law.

Third, since you have apparently not received any response to your requests, I point out that section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such records 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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."

Based upon the foregoing, the Town Board or a person or body designated by the Board may determine appeals following actual or constructive denials of access to records.

In sum, I believe that the records sought are accessible under the Freedom of Information Law and/or the Town Law to any person, including members of the Town Board. Further, the Town Board in my view has general responsibility for ensuring compliance with the Freedom of Information Law and promulgating procedures in accordance with the Law. It is suggested that you review any regulations that might have been adopted pursuant to the Freedom of Information Law. If you believe that they require amendment or alteration, perhaps the matter should be brought before the Board.

Enclosed for your review are copies of the Freedom of Information law, the regulations promulgated by the Committee, and model regulations designed to enable agencies to easily adopt appropriate rules and regulations.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw
Encl.

cc: Hon. Vincent Scelba, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-(0060)

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

April 17, 1990

Ms. Jackie Scott, Clerk/Treasurer
Village of Alexandria Bay
Alexandria Bay, New York 13607

The staff of the Committee on 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. Scott:

As you are aware, I have received your letter of April 11.

You have sought advice concerning a request directed to the Village of Alexandria Bay. The request involves a variety of information and asks that "every thing be broken down as far as possible." For instance, items 1, 3, 5, 8 and 10 of the request involve:

> "1. All dates, minute book page numbers and subject matters that were brought before the board regarding Thompson Resorts and Uncle Sam Boat Tours while John Cunningham served as trustee and as mayor. Please clarify individually...
>
> 3. All legal expenses for the Village of Alexandria Bay for the fiscal years that John Cunningham has been mayor. I need these broke down as far as possible...
>
> 5. A list of all present and past: appointed officials, department heads and salaried persons, starting dates, $500.00 raise dates and permanent appointment dates (as far back as the records go)...

8. Complete cost breakdown of the case against officers David and Beutel...

10. During the term of office of John Cunningham as mayor, how many times has the board gone into executive session and for how long each time."

Other aspects of the request are similar, for they involve dates, breakdowns of costs or seek to elicit information by raising questions.

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 states in part that any agency generally is not required to create a record in response to a request. As such, if breakdowns of expenditures exist and can be located, I believe that those records would be accessible under the Freedom of Information Law. However, if no such breakdowns exist, the Village, in my opinion, would not be required to prepare breakdowns or new records in order to respond to a request.

In a related vein, the Freedom of Information Law does not require that agency officials answer questions in response to requests for information. In item 10, for example, if there is no record indicating the frequency or length of executive sessions held during the term of a mayor's office, the Freedom of Information Law would not require agency officials to review minutes of meetings for the purpose of tabulating the number or length of executive sessions. An applicant could, however, review minutes for the purpose of enumerating the number of executive sessions held during a particular period of time.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. The Court of Appeals has held that an applicant has reasonably described the records sought when, based upon 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 might 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 without individually reviewing each and every record within a class of records. For example, in item one of the request, minutes might include reference to "Thompson Resorts and Uncle Sam Board Tours." However, if the minutes are not indexed by subject matter, a search of all minutes within a given period would be required to locate the minutes of interest. In my view, under those circumstances, a request would not reasonably describe the records sought.

Some of the items in the request likely involve records that could readily be located, as in the case item 4 involving consultant fees paid to a particular firm, or item 7, in which a copy of a certain aspect of the most recent audit of the Village by the State Comptroller was requested.

In sum, it is reiterated that an agency need not create or prepare records in response to a request, and that some aspects of the request might not have reasonably described 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. Freemsn
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6041

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

April 17, 1990

Mr. Frank Perrella
86-A-7876
Great Meadow Correctional Facility
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. Perrella:

I have received your letter of April 10 in which you questioned the propriety of certain practices of the Office of the Suffolk County District Attorney in relation to the Freedom of Information Law.

You wrote that "by their tactics they cause needless delay in responding to the requesters order for copies and add additional expense by requiring that all requests be made on their own provided form." Further, you indicated that "if one asks for a form without stating what is desired, no form will be provided, and if one submits a request by other than certified mail requesting a form, the request will not be acknowledged."

In this regard, I offer the following comments.

First, the Freedom of Information Law, section 89(3), and the regulations promulgated by the Committee (21 NYCRR 1401.5), which have the force of law and govern the procedural aspects of the Law, 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 deny s request for records. A delay due to a failure to sue 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, such as yourself in the situation that you described, 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 that 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 tbe 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 a failure to use such a form 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.

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

Second, there is nothing in the Freedom of Information Law that deals specifically with requests made by mail. However, it is implicit, in my view, that an agency must accept and respond to appropriate requests made by mail. Further, I believe that regular mail must be accepted and that an agency could not reasonably or validly require that requests be made by certified mail.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Records Access Officer, Suffolk Co. District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6042

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

April 18, 1990

Mr. J. Miceli
84-A-6855
SHU - 258
P.O. Box AG
Fallsburg, New York 12733

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

Dear Mr. Miceli:

I have received your letter of April 9.

You requested information concerning both state and federal access laws and indicated that you would like to obtain records pertaining to yourself, and others, particularly informants. You also sought guidance in obtaining a copy of "Tbe President's Report on Organized Crime."

In this regard, the Committee on Open Government is authorized to advise with respect to the New York Freedom of Information Law, wbich generally applies to records of entities of state and local government in New York. Each state has enacted a statute concerning access to records. Further, a separate statute, the federal Freedom of Information Act (5 U.S.C. section 552), pertains to records maintained by federal agencies.

Second, with respect to the New York Freedom of Information Law, each agency should have designated one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests for records. As such, a request made under the Freedom of Information Law sbould be directed to the records access officer at the agency or agencies that you believe maintain records in which you are interested. If you seek records pertaining to yourself, it is suggested that you provide reasonable proof of your identity.

Third, both the New York and the federal statutes require that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records.

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. The federal Act is similar in that it requires the disclosure of federal agency records, unless exemptions to rights of access can appropriately be asserted.

Since you referred to your interest in obtaining records from law enforcement agencies pertaining to yourself and others, it is likely that several grounds for denial appearing in the New York Freedom of Information Law 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 he applicable in a variety of situations, i.e., where a records identifies a confidential source or a witness, for example. Further, since the records sought might pertain to persons other than yourself, depending upon the nature of the records and the effects of disclosure, there may be privacy considerations involving persons identified in the records.

Perhaps the most relevant provision concerning access to 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 and 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). It is likely that section 87(2)(e)(iii) would be particularly significant in view of the records in which you are interested.

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.

Records prepared by employees of a law enforcement agency or the office of a district attorney, or records transmitted between those agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the content of the records in question and the effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld.

Although the specific language of the federal Act differs from that contained in the New York Freedom of Information Law, the exceptions in that statute are aimilar to those described in the preceding paragraphs.

Lastly, with respect to the President's Report to which you referred, it is suggested that you write either to the White House or since Judge Kaufman authored the report, to his chambers. The address for the latter is:

U.S. Court of Appeals
U.S. Courthouse
Foley Square
New York, New York 10007

Alternatively, perhaps the report, as well as a copy of the federal Freedom of Information Act, could be obtained through your facility library.

Enclosed for your review is a copy of the New York Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6043

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

April 18, 1990

Mr. Gerald C. Engles
88-A-8207
B/E-1 cell
Attica Correctional Facility
Attica, New York 14011-0149

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

Dear Mr. Engles:

I have received your letter of April 11 in which you requested assistance concerning tbe use of the Freedom of Information Law.

According to your letter, while incarcerated at the Rikers Island, a New York City correctional facility, you were involved in an "incident" with an officer. It is your understanding that correctional facilities "have a daily surveillance video taping of every day movement within the facility." You apparently seek to use the Freedom of Information Law to request a videotape of tbe incident and other, related information.

In this regard, I offer the following comments.

First, a request for records made under the Freedom of Information Law should be made to the "records access officer" at the agency that maintains the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests for records. The Official Directory of the City of New York indicates that the records access officer for the New York City Department of Correction, which operates the facility at Riker's Island, is Ms. Ruby Ryles. Her office is located at the Department of Correction, 60 Hudson Street, New York, New York 10013.

Second, 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 in which you are interested.

Third, 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."

As such, a videotape or documentation maintained by an agency would, in my view, constitute "records" subject to rights of access conferred by the Freedom of Information Law.

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.

Although the Freedom of Information Law grants broad rights of access to records, a recent decision upheld a denial of access to a videotape maintained by a correctional facility that was requested by an inmate "depicting his transfer to Special Housing Unit." In Lonski v. Kelly [540 NYS 2d 114 (1989)], the Appellate Division, Fourth Department, concluded that "the videotape falls within the FOIL exemption for materials which, if disclosed, would endanger the life or safety of any person." The Court found that:

> "The videotape reveals the geographical layout of the Special Housing Unit and discloses the identities of inmates and officers who occupy that portion of the prison. The risk of violence toward

> prison employees, and the threat to the safety of employees and inmates and to the general public in the event of an escape, warrant the conclusion that disclosure would endanger the life or safety of individuals" (id.).

If the videotape that you are seeking is similar to that requested in Lonski, it is likely that it could be withheld in response to a request made under the Freedom of Information Law pursuant to section 87(2)(f). That provision permits an agency to deny access to records when disclosure would "endanger the life or safety of any person." If the videotape is relevant to a judicial proceeding in which you are involved, it is possible that it may be available to you, as party to the proceeding, pursuant to other provisions of law.

I am unfamiliar with the nature of other records that might have been prepared concerning the incident. As such, I cannot offer specific guidance concerning rights of access. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example. Further, the records sought might pertain to persons other than yourself. If that is so, depending upon the nature of the records and the effects of disclosure, there may be privacy considerations involving persons identified in the records.

Perhaps the most relevant provision concerning access to 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 and 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).

As indicated earlier, 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.

Records prepared by agency employees or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the content of the records in question and the effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld.

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-6099

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

April 18, 1990

Ms. Karen Meierdiercks
[redacted]

The staff of the Committee on 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. Meierdiercks:

I have received your letter of April 10 in which you requested a "determination" concerning rights of access to records.

You have asked whether, under the Freedom of Information Law, you are entitled to obtain "portions of the records of the Dog Control Officers of the Town of Woodbury, New York, which contain descriptions of a certain 'German Pointer Dog' and dates the DCO held him at their shelter." You wrote that your request for that information was denied, and that you seek the information to determine whether a dog belonged to you. In addition, you indicated that when you responded to Town's newspaper advertisement about the dog, "the DCO refused to give [you] access to or information about the dog, saying they had already given him away, although they were aware that [you] had been calling them."

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 cannot compel an agency, such as a town, to grant or deny access to records. As such, the Committee cannot render what might be characterized as a "determination."

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. I point out that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that

fall within the scope of the grounds for denial that follow. In my opinion, the phrase quoted in the preceding sentence indicates that a single record might contain both accessible and deniable information. I believe that the phrase also imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, since the Town gave the dog away, it is assumed that the dog was adopted. If that is so, two of the grounds are likely relevant to the issue.

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." Although that standard is flexible and may result in subjective interpretations, it has consistently been advised that disclosure of the name, address or other details identifying a person who adopts a dog would result in an unwarranted invasion of personal privacy. Therefore, insofar as the records in which you are interested include such identifying details, I believe that those portions of tbe record or records could justifiably be withheld.

The other provision of likely significance is section 87(2)(g). Although that provision is one of the grounds for denial, 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, unless a different ground for denial applies [i.e., section 87(2)(b)]. 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 a dog control officer or other Town officials could in my opinion be characterized as "intra-agency materials." However, those portions of the records describing a dog or indicating the dates during which the dog was kept at a shelter would in my view consist of factual information that would be available under section 87(2)(g)(i) of the Freedom of Information Law.

In sum, I believe that the records in which you expressed interest should be disclosed, but that any personally identifiable details included within those records could be deleted to protect against an unwarranted invasion of personal privacy.

Copies of this opinion will be sent to Town 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: Dog Control Officer
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6045

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

April 25, 1990

Mr. Paul M. Whitaker
Attorney and Counselor at Law
170 Washington Avenue
Albany, New York 12210

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

Dear Mr. Whitaker:

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

As I understand the matter, various records were requested from the State Liquor Authority late in 1989 concerning an application for a license change reviewed by the Authority. Among the items sought are a hearing officer's report, including his findings and recommendations. Ensuing correspondence indicates that the hearing officer's report was denied on the ground that it consists of "a pre-decisional memorandum." Based upon our conversation and the remainder of the correspondence, there appears to have been a series of misunderstandings and an absence of communication within the Authority. However, the record is question has not been disclosed.

You have requested my comments and intervention. In this regard, I offer the following comments.

First, I have contacted Richard Chernela, the Authority's records access officer, on your behalf in an effort to learn more of the situation. Mr. Chernela informed me that he believed that the matter had been resolved in February. He also indicated that John Vobis, the Acting Executive Officer for the Authority, no longer serves in that capacity, that he was on vacation and that his secretary had resigned. Each of those factors apparently contributed to the problem.

Mr. Chernela also said that it is his understanding that a hearing officer's report is supposed to be a summary of facts rather than opinions.

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

In my view, the only ground for denial of possible significance is section 87(2)(g). While that provision represents one of the grounds for withholding records, due to its structure, it often requires disclosure. Specifically, 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.

While a hearing officer's report could be characterized as "intra-agency material," its contents would determine the extent to which it must be disclosed or may be withheld. If, as Mr. Chernela suggested, the reports consists of a summary of facts, it would likely be available to a party pursuant to section 87(2)(g)(i).

Third, section 89(6) of the Freedom of Information Law states that:

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

Therefore, if records are accessible under provisions other than the Freedom of Information Law, nothing in the Freedom of Information Law can be cited to withhold those records.

Of apparent relevance under the circumstances is section 302 of the State Administrative Procedure Act. Subdivision (1) of that statute states that:

> "The record in an adjudicatory proceeding shall include: (a) all notices, pleadings, motions, intermediate rulings; (b) evidence presented; (c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; (d) questions and offers of proof, objections thereto, and rulings thereon; (e) proposed findings and exceptions, if any; (f) findings of fact, conclusions of law or other recommendations made by a presiding officer; and (g) any decision, determination, opinion or report rendered."

Further, subdivision (2) of section 302 states in part that:

> "Upon request made by any party upon the agency within a reasonable time, but prior to the time for commencement of judicial review, of its giving notice of its decision, determination, opinion or order, the agency shall prepare a record together with any transcript of proceedings within a reasonable time and shall furnish a copy of the record and transcript or any part thereof to any party as he may request."

Based upon the foregoing, if section 302 of the State Administrative Procedure Act is applicable, it appears that the record in question must be disclosed pursuant to that statute, notwithstanding the Freedom of Information Law.

A copy of this opinion will be forwarded to Mr. Chernela.

I hope that 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: Richard Chernela, Public Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1254
FOIL-AO-6046

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

April 26, 1990

Mr. David Boyle
[redacted]

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

Dear Mr. Boyle:

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

You wrote that you have experienced "extreme difficulty in obtaining information" from the Woodstock Public Library. The Library functions within a public library district that was created pursuant to Chapter 499 of the Laws of 1989. According to your letter, library tax bills "were received as a shock by taxpayers who found the bills to be far in excess of the amounts stated in the mailings and a promotional videotape produced by the library board of trustees sometime prior to the Sept. 7, 1989 referendum". Thereafter, you requested various records from the Library, including a "certificate of registration of copyright" concerning the videotape, releases signed by parents whose children appeared on the tape, minutes of the Library Board relating to the discussion of the videotape and minutes of the Library Board's discussion of the contract leading to the production of the videotape.

In response to your requests, Ms. Stern, the Director of Library, expressed difficulty in understanding certain aspects of the requests. She also asked that you submit requests on the Library's forms. In addition, with respect to minutes of meetings, you wrote that Ms. Stern informed you that your request will be honored sometime in June.

In this regard, I offer the following comments.

First, in view of the legislation creating the library district, I believe that it is an "agency" required to comply with the Freedom of Information Law. In addition, its Board of Trustees must in my view comply with the Open Meetings Law due to its status as a public body and in accordance with section 260-a of the Education Law.

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

With respect to a "certificate of registration of copyright", if such a record exists and is maintained by the Library, I believe that it would be accessible, for none of the grounds for denial would apply. While I am not an expert regarding the Copyright Act, it is noted that a work may be copyrighted without being registered with the U.S. Copyright Office. I have no knowledge of whether the videotape was so registered.

With regard to the request for releases, one of the grounds for denial of access to records, section 87(2)(b), permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". It is likely in my view that the releases could be withheld on that basis. Further, section 4509 of the Civil Practice Law and Rules states that:

> "Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database, searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute."

If the provision quoted above is applicable, the releases would be exempted from disclosure by statute [see Freedom of Information Law, section 87(2)(a)].

Third, with respect to the time within which an agency must respond to request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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."

Fourth, since reference was made to a form, I point out that the Freedom of Information Law, section 89(3), and the regulations promulgated by the Committee (21 NYCRR 1401.5), which have the force of law and govern the procedural aspects of the Law, 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 deny a request for records. A delay due to a failure to sue 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, such as yourself in the situation that you described, 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 that 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.

A standard form may, in my opinion, he 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.

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

Lastly, I direct your attention to the Open Meetings Law, which contains direction concerning the preparation of minutes of meetings of public bodies. Section 106 of that statute provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, 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 tbe 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, minutes of open meetings must consist, at a minimum, of reference to motions, proposals, resolutions, action taken, the date and the vote of each member. However, minutes need not consist of a verbatim account of statements made or discussion occurring at meetings. However, the Law specifies that minutes of open meetings must be prepared and made available within two weeks. In situations in which minutes have not been approved within that period, to comply with law, it has been advised that minutes be disclosed after being marked as "draft" or "unapproved", for example. By so doing, the public can learn of what generally transpired at a meeting; concurrently, a recipient of those minutea is effectively notified that the minutes are subject to change.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ms. D.J. Stern, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6047

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

April 27, 1990

Mr. William H. Cook
[redacted]

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

Dear Mr. Cook:

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

You have raised questions concerning rights of access to records maintained by the Lewiston-Porter Central School District. Specifically, you wrote that the District "has refused to release the exact monetary terms" of a settlement reached with its former superintendent following that person's "dismissal, reinstatement, suspension, and finally, resignation." You also expressed the view that it is "highly embarrassing" for your local newspaper "to be forced to file a 'Freedom of Information Act' request in order to inform the...community of legal and other associated costs that have been incurred by the Board as a result of Dr. Stephens' dismissal." In addition, the Board, according to your letter, has refused to disclose a management study that it commissioned last year. The study apparently is intended to be used "to restructure the administration of the District."

In this regard, first, based upon the language of the Freedom of Information Law and its judicial interpretation, I believe that the settlement agreement in which you are interested, as well as similar settlements generally that pertain to public employees, are accessible.

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

Perhaps the most relevant ground for denial 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". In addition, section 89(2)(b) lists five examples of unwarranted invasions of personal privacy.

Although subjective judgments must often of necessity be made when questions concerning privacy arise, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In 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 bur 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.

Under the circumstances, it is my view that disclosure of the terms of the settlement agreement would result in a permissible ratber than an unwarranted invasion of personal privacy. The record is, in my opinion, relevant to the performance of the official duties of the employee, as well as the administration.

Also of significance is section 87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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. Under the circumstances, a settlement agreement could likely be characterized as "intra-agency" material. Nevertheless, I believe that the record is reflective of a "final agency determination" and would be accessible on that basis [see Farrell, Geneva Printing, Sinicropi, supra].

Further, in its discussion of the intent of the Freedom of Information Law, the Court of Appeals 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).

Second, with respect to the management study, which appears to have been prepared either by District employees or consultants retained by the District, 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), which was quoted in full earlier.

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.

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 tbat 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 tbat 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.

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 restruct 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, supra, 567).

Third, 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 municipality to its attorney are available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassu 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 who the attorney "spends his 'paychecks.'"

In sum, subject to the qualifications discussed above, I believe that the records sought should be disclosed.

Lastly, while agencies may disclose records in response to an oral request or on their own initiative, they may in my opinion require that requests for records be made in writing. As such, I question why you consider it embarrassing for a newspaper to be required to request records pursuant to the Freedom of Information Law.

In an effort to enhance compliance with the law, a copy of this opinion will be sent to the President of the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
cc: Robert Filocamo, President, Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6048

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

April 27, 1990

Mr. Joseph Luis Morales
89-N-6426 S.H.U. C-31
River View Correctional Facility
P.O. Box 243
Ogdensburg, NY 13669

Dear Mr. Morales:

I have received your recent letter, in which you requested information concerning the status of the River View Correctional Facility. Based upon your statements, inmates from New York City are sent to the facility pursuant to an agreement between the City and the State.

In this regard, the Committee on Open Government is authorized to advise with respect to rights of access conferred by the Freedom of Information Law. The Committee does not maintain records generally, and it has no records concerning the subject of your inquiry. However, I offer the following comments and suggestions.

First, to seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that you believe maintains the records in which you are interested. The records access officer has the duty of coordinating the agency's response to requests for records.

To request records kept at a facility of the Department of Correctional Services, the regulations promulgated by that agency under the Freedom of Information Law indicate that such a request may be made to the facility superintendent. With respect to records kept at the Department's central offices in Albany, a request may be made to the Deputy Commissioner for Administration.

Second, 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.

I hope that I have been of assistance and that the foregoing serves to clarify the role of the Committee on Open Government.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1755
FOIL-AO - 6049

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

April 27, 1990

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 10 addressed to the Committee on Open Government. You have sought advice concerning the "appropriateness" of requests made under the Freedom of Information Law directed to the Village of Croton-on-Hudson.

The first request was based upon a newspaper article involving the establishment of a "walking trail" located between properties owned by the Village that will "pass through lands to be purchased and/or condemned, in particular a Franzoso property". On the basis of the article, you requested transcripts of meetings during which public bodies within the Village discussed and decided issues relating to the walking trail, plans for the walking trail, and deeds, contracts, maps and tax records indicating zoning and tax status of the lands through which the trail will pass.

The second request is related, for it involves the disposition of the Franzoso parcel, and you sought a variety of information concerning the property and the transaction.

First, as you are aware, 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 or prepare a record in response to a request. If records that you requested are not maintained or have not been prepared by the Village, the Freedom of Information Law, in my opinion, would not apply. Rather than requesting transcripts of meetings, which likely do not exist, it is suggested that, in the future, minutes of meetings be requested. While the Open Meetings Law requires the preparation of minutes, there is no requirement that a transcript or verbatim account of a meeting be prepared. I point out that the Open

Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, section 106 of the 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."

As such, with respect to open meetings, minutes must, at a minimum, consist of a record or summary of all motions, proposals, resolutions and any other matters upon which votes are taken. Minutes of open meetings are, in my view, available in their entirety. With respect to action taken in an executive session, a record or summary of the final determination of action must be prepared and made available to the extent required by the Freedom of Information Law. If no action is taken during an executive session, minutes of the executive session need not be prepared.

Second, rights of access to certain of the records sought, assuming that such records exist, would be dependent upon the contents of the records and the effects of their disclosure.

For example, one aspect of the request involved reports concerning the Franzoso property prepared by Village and County engineers or Health Department employees. Those reports would in my opinion 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.

Lastly, I am unaware of whether the transaction between the Village and the owner of the parcel in question has been consummated. If it has not been completed, records relating to the issue might be withheld pursuant to section 87(2)(c) of the Freedom of Information Law. That provision enables an agency to withhold records when disclosure would "impair present or imminent contract awards...". On the other hand, if the transaction has been consummated, a contract between the Village and the seller would in my opinion be accessible. I cannot effectively comment with respect to rights of access to other records, for I am unfamiliar with their nature or content.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Herbek, Village Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6050

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

April 30, 1990

Ms. Leslie Becher
Staff Attorney
NYS Department of Correctional
Services
The State Office Building Campus
Albany, New York 12226

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

Dear Ms. Becher:

I have received your letter of April 16, as well as the correspondence attached to it.

You have requested an advisory opinion concerning a request for a copy of a transcript of a hearing conducted by the Division of Human Rights in which the Department of Correctional Services is a party. In response to the initial request, you were informed that parties may read the transcript, but that, if a party seeks to purchase a transcript, the party "shall be referred to the appropriate reporting agency." When that statement was questioned, the Division's Commissioner Designate wrote that: "The purchase of a copy of a transcript of a Division hearing is subject to the terms of an agreement between the Division and all reporting agencies doing work for the Division," and she attached a letter addressed to the Division by the Vice-President of the reporting firm that prepared the transcript. In that letter, it was stated that:

> "An oral agreement was made with the State Division of Human Rights and all the reporting agencies doing work with them that we would charge the Division $4.00 per page for their hearings in-

> stead of the state rate of $5.10 per page. In turn, the Respondent ordering the transcripts would be charged $2.00 per page for their copies.
>
> "This arrangement has been in existence for years and we, as the vendor, have always abided by it along with the Division."

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 that 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."

Therefore, assuming that the Division maintains the transcript in question, I believe that the transcript clearly constitutes a "record" subject to rights of access. There appears to be no issue concerning your right to review the transcript or to obtain a copy; the issue involves the fee that may be assessed for a copy and the process of obtaining a copy.

Second, as a general matter, if a record is accessible, section 87(2) of the Freedom of Information Law states that it is available for inspection and copying. Further, section 89(3) states that an agency must prepare a copy of an available record upon payment or offer to pay the appropriate fee.

Third, section 87(1)(b)(iii) of the Freedom of Information Law deals specifically with the fees and requires that an agency's rules pertain 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 or reproducing any other record, except when a different fee is otherwise prescribed by statute."

As such, unless a statute other than the Freedom of Information Law permits an agency to do so, I do not believe that an agency may charge in excess of twenty-five cents per photocopy.

In my view, two statutes may be relevant in determining the issue.

Second 302 of the State Administrative Procedure Act pertains to the record prepared in an sdjudicatory proceeding. Subdivision (2) of that statute states in relevant part that:

> "Upon request made by any party upon the agency within a reasonable time, but prior to the time for commencement of judicial review, of its giving notice of its decision, determination, opinion or order, the agency shall prepare the record together with any transcript of proceedings within a reasonable time and shall furnish a copy of the record and transcript or any part thereof to any party as he may request. Except when any statute provides otherwise, the agency is authorized to charge not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or the rate specified in the contract between the agency and a contractor if prepared by a private contractor."

The language quoted above refers to a "contract" between the agency and a firm that prepares transcripts for the agency that specifies the rate to be charged by the firm. The Division and the firms that prepare transcripts for the Division, according to the Vice-President of one such firm, have an "arrangement" concerning fees. If section 302 is intended to envision a written contract, rather than an unspecified "arrangement," I do not believe that the Division could charge more than twenty-five cents per photocopy; rather, I believe that the Division would be obliged by the Freedom of Information Law to duplicate a transcript at a rate of no more than twenty-five cents per photocopy.

In addition, section 15 of the State Finance Law indicates in subdivision (1) that a "document printed pursuant to law" shall not be distributed to any person, "except upon payment of a fee therefor..." The transcript, as I understand section 302 of the State Administrative Procedure Act, is a document that must be prepared pursuant to law. However, suhdivision (5) of section 15 of the State Finance Law states that: "Nothing herein

contained shall apply to reports, documents, or pamphlets furnished to the governor, a member of the legislature, a representative of the press, the head of any state department." Therefore, if section 15 of the State Finance Law is applicable, in response to a request by the Commissioner of the Department of Correctional Services, or presumably by a person acting on his behalf, the Division would be required to supply a copy of the transcript at no charge.

In sum, if section 15 of the State Finance Law is applicable, it appears that a copy of the transcript might be required to be made available at no cost to the Department. Further, if there is no contract, and if that term is intended to mean a written agreement under section 302 of the State Administrative Procedure Act, between the Division and the reporting firm, the maximum fee that could be charged, in my opinion, would be twenty-five cents per photocopy.

Copies of this opinion will be sent to the Division's Commissioner Designate and its Counsel.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Margarita Rosa, Commissioner Designate
Lawrence Kunin, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-103
FOIL-AO-6051

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

April 30, 1990

Ms. Beulah D. Jones, M.D.
[redacted]

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

Dear Dr. Jones:

I have received your letter of April 9.

You expressed a series of difficulties concerning "record correction" by the Civil Service Commission. According to your letter, you asked that certain records contained within your personnel file be corrected, and the Commission apparently made the appropriate changes. However, when you requested a copy of the corrected record, the request was "refused." You added that they "refused to give [you your] personnel file..." You asked that I "see to it" that the files are corrected and that copies of your personnel file are disclosed to you.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to rights of access to government records. The Committee is not empowered to require that agencies correct or disclose records.

Second, you did not specify which civil service commission maintains the records that are the subject of your inquiry. If the commission is a state agency, it is likely that your rights are greater that if the records are maintained by a municipal agency.

The Freedom of Information Law applies generally to records maintained by entities of state and local government. That statute pertains to records of an "agency," and the term "agency" for purposes of the Freedom of Information Law is defined in section 86(3) of that 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 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.

It is likely that records pertaining to you that are factual in nature would be accessible under the Freedom of Information Law. However, there is nothing in the Freedom of Information Law that pertains specifically to the right to correct or amend records that may be erroneous or misleading, for example.

A different statute, the Personal Privacy Protection Law, applies to records maintained by entities of state government. For purposes of that statute, section 92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office of any other governmental entity performing a governmental or propriety function for the state of New York, except the judiciary of the state legislature or any unit of local government and shall not include offices of district attorneys."

As such, the Personal Privacy Protection Law does not apply to records of local governments.

In brief, with certain exceptions, section 95(1) of the Personal Privacy Protection Law grants rights of access to personally identifiable information to the subjects of the information. In addition to the right to inspect and copy records pertaining to oneself, section 95(2) of that statute provides the subject of a record with the right to request that the

agency amend the record when the subject believes that the record "is not accurate, relevant, timely or complete." If the agency refuses to make the amendment, the subject of the record may appeal the agency's determination. If the appeal is denied, the subject has the right to file with the agency "a statement of disagreement with the agency's determination," that becomes part of the record.

Enclosed are copies of both the Freedom of Information and the Personal Privacy Protection Laws for your review.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1756
FOIL-AO-6052

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

April 30, 1990

Mrs. Margaret Bartlett
[redacted]

The staff of the Committee on 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. Bartlett:

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

The issue involves the apparent refusal of the West Hempstead Union Free School District to disclose minutes of meetings of the Board of Education until the minutea are approved. One of the documents attached to your letter is correspondence addressed to you by Gregory J. Guercio, the District's attorney. He referred to our discussion of the matter, and we agreed that there is no "case in point" that deals directly with the issue.

Despite the absence of case law, or perhaps due to the specific direction provided by the Open Meetings Law, I believe that the responsibility of the Board is clear. In this regard, I offer the following comments.

First, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, section 106 of that statute provides 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."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Minutes of executive sessions reflective of action taken, the date and the vote must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. I point out that if a public body conducts an executive session and merely engages in a discussion but takes no action, there is no requirement that minutes of the executive session be prepared.

Second, 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. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes 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.

Third, with respect to the Freedom of Information Law, I point out that the Law makes no distinction between drafts as opposed to "final" documents. The Law pertains to all agency records, and section 86(4) defines that 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."

Due to the breadth of the language quoted above, once a document exists, it constitutes a "record" subject to rights of access, even if the record is characterized as "draft" or is unapproved. Further, as a general matter, minutes consist of a factual rendition of what transpired at an open meeting. On that basis, I believe that they are accessible [see Freedom of Information Law, section 87(2)(g)(i)]. Additionally, in the case of an open meeting, during which the public may be present and, in fact, may tape record the meeting [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], there would appear to be no valid basis for withholding minutes, whether or not they have been approved.

In an effort to enhance compliance with the law, a copy of this opinion will be forwarded to Mr. Guercio.

I hope that 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: Gregory Guercio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6053

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

April 30, 1990

Mr. Howard Landman
Vice President, Board of Education
Wantagh Union Free School District
District Administrative Offices
Beltagh Avenue
Wantagh, New York 11793

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

Dear Mr. Landman:

I have received your correspondence, which did not reach this office until April 20.

You asked that I comment concerning your memorandum sent to members of the Board of Education of the Wantagh Union Free School District dealing with requests for information made by members of the Board.

The memorandum seeks to provide policy guidance when a member of the Board seeks District records. In brief, the memorandum indicates that any Board member may request records in that person's capacity as a member. In such cases, the Board would discuss the request, determine whether it is "justified," and, if that is so, give priority in terms of retrieving the information. If, however, the request is not approved, because it is considered a "unilateral" request, the member would be instructed to resubmit the request under the Freedom of Information Law. It is assumed that a "unilateral" request would involve a request that is not made on behalf of the Board as a whole or that has not been made in conjunction with the performance of one's official duties as a Board member. The memorandum indicates that "curiosity" or an "individual desire to know" would not be a sufficient reason for approving a request.

In my opinion, the portion of the memorandum described above is reasonable, for it provides a flexible method of dealing with an issue that is generally not contemplated or considered specifically by law. From my perspective, one of functions of a Board involves acting collectively, as an entity. The Board of Education, as the governing body of the School District, generally acts by means of motions carried by an affirmative vote of a majority of its total membership. In my view, in most instances, a school board member acting unilaterally, without the consent or approval of a majority of the total membership of the Board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law. For example, the federal Family Educational Rights and Privacy Act (20 U.S.C. section 1232g) deals with access to and the confidentiality of education records pertaining to students. The federal regulations promulgated pursuant to the Act indicate that an educational agency's policy must include reference to disclosure of personally identifiable information, criteria for determining the school officials who may review such information, and the circumstances under which information will be disclosed in conjunction with "a legitimate educational interest" (34 C.F.R. section 99.6(a)(4)]. As such, a board member would not have the right to review any an all educational records identifiable to students; disclosure would be dependent upon District policy and criteria used to determine whether disclosure should be made pursuant to a legitimate educational interest.

Again, if a request by a Board member is made "unilaterally" and is denied on that basis, the member, like any member of the public, could request records under the Freedom of Information Law. In such a case, the memorandum states that, in response to a request, the request could be answered in one of the following three ways:

> "1) Provide the information requested.
>
> 2) Deny the request including a reason for such denial, along with a complete explanation of the individual's right to appeal the decision and the procedures for such an appeal.
>
> 3) Indicate that more time is needed to collect the information necessary in order to process the request. A written statement to that effect, accompanied by an approximate date of completion, is required in writing."

In my view, the preceding is consistent with the obligations imposed by the Freedom of Information Law.

In short, from my perspective, the memorandum appears to deal with with issue of requests by Board members in a reasonable manner.

I hope that 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-6054

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

April 30, 1990

Mr. James F. Carey
#84-C-0854
Auburn State Correctional Facility
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.

Dear Mr. Carey:

I have received your letter of April 11, as well as the correspondence attached to it.

In brief, you wrote that your requests for records of the Department of Correctional Services have not been answered. You also requested advice concerning the means by which you may obtain a copy of the Department's "master index."

In this regard, I offer the following comments.

First, according to the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law, a request for records kept at a correctional facility should be directed to the facility superintendent; a request for records kept at the Department's Albany offices may be made to the Deputy Commissioner for Administration.

Second, with respect to the time within which an agency must respond to request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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.

Third, reference to the master index appears in the Department's regulations. Those regulations are based upon section 87(3)(c) of the Freedom of Information Law, which requires that each agency maintain:

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

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, 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 states that:

"(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in this 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 made 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.

The custodian of records at a facility is the superintendent.

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-6055

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

April 30, 1990

Mr. Richard Norris
[redacted]

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

Dear Mr. Norris:

I have received your letter of April 13 and the correspondence attached to it.

You wrote that you have made several requests for records of the Village of Phoenix, but that the clerk always puts "roadblocks" in your way. In some cases records have been denied, such as "W-2 records," or fees for copies are costly; in others, the clerk sets an appointment for viewing records that is inconvenient to you. Further, in an attempt to define the phrase "unwarranted invasion of personal privacy," the clerk wrote that it means "unnecessary or unjustified reason to see things that are important to another person, but none of your business." You have requested a "determination" on the matter.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee cannot render a binding determination or compel an agency to grant or deny access to records. Nevertheless, 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. 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.

Second, 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." 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].

With respect to W-2 forms, I believe that portions of those forms could justifiably be withheld as an unwarranted invasion of personal privacy. However, those portions identifying a public employee and that person's gross wages, would, in my opinion, be accessible, for those items are clearly relevant to the performance of one's official duties. As such, in response to a request for those records, I believe that the clerk would be obliged to make copies, from which various portions of the records could be deleted to protect against an unwarranted invasion of personal privacy.

Second, 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 an act of the State Legislature authorizes the assessment of a different fee. If a record is accessible in its entirety, an applicant may inspect the record at no charge.

Third, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law, and the Committee has done so (see 21 NYCRR Part 1401). In turn, section 87(1) of the Law requires the governing body of a public corporation, i.e., a village board of trustees, to adopt rules and regulations consistent with the Freedom of Information Law and the Committee's regulations.

With respect to the times during which records may be requested and reviewed, section 1401.4 of the Committee's regulations states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Please note that the foregoing is not intended to suggest that agency officials are required to respond to requests at the time the records are requested, for section 89(3) of the Law states that an agency has five business days from the receipt of a request to respond. As such, although I believe that agencies must accept requests during regular business hours, agency officials are not required to respond instantly to a request.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Barbara L. Dix, Clerk Treasurer, Village of Phoenix

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1757
FOIL-AO-6056

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

May 1, 1990

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 14 in which you requested advice concerning the "appropriateness" of a request made under the Freedom of Information Law and directed to the Village of Croton-on-Hudson.

According to your letter, the North Country News reported that the Village Board of Trustees "has retained a third party to issue a report on that property known as Black Rock." Thereafter, you requested copies of:

> "1. The deliberations and resolutions of the Croton Village Board in the matter of retaining the third party;
>
> 2. The bids and applications from third parties to the Croton Village Board;
>
> 3. Purchase orders, letters of intent, retaining the third party; and
>
> 4. The contract between the Village of Croton and the third party."

In this regard, I offer the following comments.

First, as indicated in previous correspondence, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if, for example, there is no record of the deliberations of the Board of

Trustees concerning the selection of the "third party," the Village would not, in my opinion, be obliged to prepare a new record reflective of its deliberations concerning the issue.

Second, assuming that the Board acted to retain such a third party, such action must in my view be recorded in minutes of the meeting during which action was taken. Section 106 of the Open Meetings Law 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."

Further, subdivision (3) of section 106 requires that minutes of open meetings be prepared and made available within two weeks of such meetings; if action was taken during an executive session, minutes indicating the nature of the action taken must be prepared and made available within one week of the executive session. Therefore, based upon the facts that you provided, I belive that minutes involving the action taken to retain the third party and/or a resolution on the subject must be disclosed.

Third, with respect to the remainder of the records sought, 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. 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 grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record may contain both accessible and deniable information. That phrase, in my view, also imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

The contents of the records, the nature of the industry in which the submitters of bids are involved, and the effects of disclosure would in my opinion be the factors relevant in determining rights of access to the records in question. From my perspective, three of the grounds for denial may be relevant to the issue.

Section 87(2)(b) 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, the first of which pertains to "disclosure of employment, medical or credit histories...". Those provisions might be asserted in appropriate circumstances to withhold personal information in records pertaining to individuals, i.e., principals or employees, identified in the records. The provisions concerning the protection of privacy in my opinion apply only to records identifiahle to natural persons; I do not believe that they could be asserted to withhold records that deal with an entity's employment history, for example [see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Argiculture and Markets, Supreme Court, Alhany County, May 10, 1989].

Also of likely relevance is section section 87(2)(c), which provides that an agency may withhold records or portions thereof that:

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

From my perspective, the key word in section 87(2)(c) is "impair", and the potential for harm as a result of disclosure is the determining factor regarding the propriety of a denial under that provision.

If, for example, an agency seeking bids 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 proposals. Further, disclosure of the identities of submitters or the number of submitters might enable another potential submitter to tailor his proposal in a manner that provides him with an unfair advantage in the process. In such a situation, harm or "impairment" would likely be the result, and the records in such a circumstance could in my view justifiably be denied. However, after the deadline for submission of bids has been reached, often the passage of that event results in the elimination of the harm envisioned by section 87(2)(c). As such, if a contract has been awarded, I do not believe that section 87(2)(c) would serve as a basis for withholding.

Also of possible relevance 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.).

As suggested earlier, the nature of the records submitted and the area of commerce in which the firms submitting bids are involved would in my opinion determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of the firms. Further, a unique or novel process described in records might, if disclosed, result in competitive harm for a time; however, over the course of time, such a process might become widely known within an industry or perhaps supplanted by a more economical or technically advanced method. Therefore, the proper assertion of section 87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the firm that submitted the records.

Subject to the qualifications discussed above, I believe that the records must be disclosed upon payment of requisite fees for photocopies.

I hope that 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: Richard Herbek, Village Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6957

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

May 3, 1990

Mr. Mike Rifkin, Vice President
Executive Director of Operations
0199 - Drug, Hospital & Health Care
Employees Union, RWDSU/AFL-CIO
310 West 43rd Street
New York, New York 10036

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

Dear Mr. Rifkin:

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

You have requested an advisory opinion concerning the propriety of a denial of a request for records of the State Education Department. In brief, on behalf of Local 1199 of the Drug, Hospital and Health Care Employees Union, you sought a list of names and addresses of registered nurses in particular counties. The request was apparently accompanied by an affidavit, a copy of which you enclosed, in which it was stated that the list:

> "will not be sold or released to any other person or organization and will not be used for any fund-raising or commercial purpose, or for any other purpose which would constitute an unwarranted invasion of personal privacy as defined in Public Officers Law [section] 89, subdivision 2(b)."

The affidavit also indicates that the purpose of the request is:

> "To facilitate the publication of a magazine devoted to RN issues and events, to inform and educate RN license holders on developments in the health care industry and the activities of local 1199 on behalf of registered nurses."

Despite the statements made in the affidavit, the initial request was denied by the Department's records access officer based upon a finding that the list would be used for commercial or fund-raising purposes.

Thereafter, you appealed the denial to the Commissioner. In the appeal, you expressed disagreement with the denial for the following reasons:

> "1. Local 1199 is a certified not for profit organization;
>
> 2. the publications we intend to send to Registered Nurses will have no commercial or fund raising purpose -- now or in the future;
>
> 3. no solicitation is intended -- now or in the future -- for dues, fees or any other purpose; and
>
> 4. the only purpose of our utilization of these lists will be to distribute a publication that is solely designed for discussion of RN issues, health care issues and their impact on Registered Nurses."

The Commissioner upheld the denial, stating that the "Local 1199 has a fund-raising purpose," despite your assertion to the contrary. It was added that: "To suggest that the dissemination of a newsletter identifying the activities of a local chapter of a union to non-members has no fund-raising purpose, is not credible and is wholly without merit."

In this regard, I offer the following comments.

By way of background, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, section 89(2)(b) of the Law provides a series of examples of unwarranted invasions of peraonal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists wold be used for commercial or fund-raising purposes" [section 89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the Law. As a general matter, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records [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)]. However, due to the language of section 89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relief upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought. In that decision, it was stated that:

> "The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for

> commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgment for that of the respondents" (id.).

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses.

The affirmation of the denial by the Commissioner cites two decisions. Both in my view, however, involved situations that were factually different from those presented here. Person-Wolinsky Associates, Inc. v. Nyquist [377 NYS 2d 897 (1975)] involved a request for the names of candidates for the State certified public account examination by an entity in the business of offering a review course prior to the examination. The petitioner was a profit-making entity that clearly sought the list for commercial purposes, and the denial of the list was upheld on that basis. I believe that the list in that case could have been held for a different reason as well. Disclosure of a list of candidates might later be compared with the names of those who passed the exam, enabling the public to identify those who failed the exam, thereby resulting in embarrassment to those persons. The other decision, Federation of NYS Rifle and Piston Clubs, Inc. v. NYC Police Department, [73 NY 2d 92 (1989)], involved a request for a list of holders of permits for rifles and shotguns. However, the petitioner, a not-for-profit entity, sought to mail a circular to those identified on the list which contained "a statement of 'annual membership rates' to be completed and returned with the requisite payment" (id. at 96). As such, the Court of Appeals found that:

> "It is not disputed that a primary reason for conducting this general mail solicitation is to obtain membership dues to support the organization's activities. Simply put, the proposed mailing is to raise funds" (id., emphasis added by the Court).

The Court noted that:

> "If, as is inquestionably true here, dues received are intended to support the general activities of the organization and to further its over-all objectives, the solicitation activity is 'fund-raising'" (id. at 97).

If, as stated in your appeal, the publication intended to be distributed to those identified on the list "will have no commercial or fund-raising purpose -- now or in the future," and if "no solicitation is intended -- now or in the future -- for dues, feea or any other purpose," it is questionable, in my view, whether section 89(2)(b)(iii) could be asserted as a basis for denial. Assuming that your statement is accurate and was made in good faith, the statement in the denial that your assertions are "not credible" appears to be conclusory and without a factual basis. Absent an indication that the list would be used for a commercial or fund-raising purpose, or if the likelihood that the list would be used for such a purpose is remote, it would appear that the denial was inappropriate. It is noted that there is relatively little decisional law concerning the issue. To date, the decisions on the subject have involved the purpose for which a list would be used. There is no decision of which I am aware that deals with the nature of an organization seeking a list as a basis for determining rights of access.

Copies of this opinion will be forwarded to officials at the State Education Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Hon. Thomas Sobel, Commissioner
Robert Diaz, Counsel
Susan Mekus, Division of Professional Licensing Services
Gene Snay, Records Access Officer
Deborah Glasbrener, Office of Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6058

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

May 3, 1990

Ms. Isabel McCormick
[redacted]

Dear Ms. McCormick:

I have received your letters of April 20 and May 2 in which you described problems in obtaining records from the Franklin County Family Court. The records apparently relate to your grandchildren.

Attached to the first letter is correspondence addressed to you by the Family Court Clerk. The Clerk referred to an earlier response and wrote that he does not have the authority to release the records in question to you.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which is applicable 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 does not apply to the courts and court records.

Second, without additional information concerning the nature of the records sought or the content of the letter referenced in the Clerk's correspondence, I cannot offer specific guidance. However, section 166 of the Family Court Act, entitled "Privacy of records", states that:

> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child it committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

I regret that, under the circumstances, I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Quentin P. Woods, Family Court Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1104
FOIL-AO-6059

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

May 3, 1990

Mr. Donald E. Creadore
Todtman, Epstein, Young,
Goldstein & Tunnick, P.C.
605 Third Avenue
New York, NY 10158

The staff of the Committee 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. Creadore:

I have received your letter of April 24, as well as the correspondence attached to it. You have requested an advisory opinion concerning the propriety of a denial of access to records by the Department of Law.

By way of background, your client, Oster Realty, Inc., is the owner and landlord of a supermarket located in Yorktown Heights that is leased by A&P. You wrote further that:

> "Pursuant to a November 23, 1988 agreement (the "Agreement") entered into between the State of New York and The Great Atlantic & Pacific Tea Company ("A&P") and APW Partners, together with their respective wholly-owned subsidiaries, Shopwell, Inc. and Waldbaum's Inc., A&P must vacate one of its three locations it currently leases or owns in the Yorktown Heights community."

Paragraph 4 of the Agreement states that:

> "A&P and APW shall provide twenty (20) days advance notice to the Attorney General of the divestiture or aublease of any retail food store pursuant to this Agreement, and shall describe any such

> divestiture or sublease by submitting reasonable supporting documentation. Consummation of any divestiture or sublease shall be subject to the approval of the Attorney General, whose approval shall not unreasonably be withheld."

In conjunction with the foregoing, you requested.

> "(1) All written requests submitted pursuant to paragraph 4 of the Agreement (i.e., 'written reports setting forth how the [A&P and APW] intend to comply, are complying and have complied with the terms of this Agreement'); and
>
> (2) All correspondence, reports or notices submitted by A&P and/or APW pursuant to Paragraph 4 of the agreement."

In response to the request, Richard Rifkin, Counsel to the Attorney General and Records Access Officer, acknowledged the receipt of reports from A&P concerning the steps that have been taken to comply with the Agreement. However, he denied the request, stating that:

> "These reports contain information of a confidential nature which is intended only to enable this office to monitor compliance. This is proprietary information of the company. Consequently, it would be an invasion of privacy were these documents to be made available. They are exempt from disclosure pursuant to section 87.2(b) of the Public Officers Law (the Freedom of Information Law)."

It is your view that Mr. Rifkin's reliance upon section 87(2)(b) of the Freedom of Information Law as the basis for the denial is "meritless".

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, as you are aware, the provision cited earlier, section 87(2)(b), enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". 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 not specifically relevant to the issue, Article 6-A of the Public Officers Law, the Personal Privacy Protection Law, when read in conjunction with the Freedom of Information Law, in my opinion, makes it clear that the protection of privacy 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 records in question pertain to entities rather than natural persons, I do not believe that section 87(2)(b) could appropriately be asserted as a basis for denial.

Moreover, in an recent decision involving a request for a list of names and addresses, the opinion of this office was cited and confirmed, and the court held that "the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence" (American Society for the Prevention of Cruelty to Animals v. New York State Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In citing its agreement with the opinion rendered by this office, the Court quoted a portion of the opinion in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons" (id.).

Third, in an effort to learn more of the matter, I have contacted Mr. Rifkin. He informed me that the reports in question are intended to enable the Attorney General to determine whether the parties are acting in good faith in carrying out the Agreement. He added that the reports contain a variety of information, including descriptions of efforts to find buyers, the persons or entities witb whom the parties are negotiating and possible prices for the property.

Based upon the information offered by Mr. Rifkin, while I do not believe that section 87(2)(b) would justify a denial of access, a different provision may be relevant to a determination of rights of access. Specifically, section 87(2)(d) of the Freedom of Information Law 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.).

In my view, the nature of the records submitted and the area of commerce in which the firms submitting the records are involved would determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of the firms. Therefore, the proper assertion of section 87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the firms that submitted the records.

According to Mr. Rifkin's description of their contents, it appears that the records sought, or perhaps portions of those records, could properly be withheld pursuant to section 87(2)(d).

In sum, the basis for denial cited by Mr. Rifkin in his response to your request is, in my view, without merit. Nevertheless, it is likely that the records or portions thereof might justifiably be withheld under section 87(2)(d).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Rifkin, Counsel to the Attorney General
Alan Aviles, Freedom of Information Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6068

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

May 7, 1990

Ms. Michele R. Mastrangelo
#85-C-0476, E-4-13
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.

Dear Ms. Mastrangelo:

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

The first item of correspondence is a request for a coroner's report and related records sent to the Office of Medical Examiner of Monroe County. The second was sent to the County Health Department and/or County Jail. In that letter, you requested various medical records pertaining to yourself. The correspondence indicates that both requests were made on April 3; neither, however, had apparently been answered as of the date of your letter to this office.

You have requested assistance in obtaining 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.

Second, with respect to the coroner's report and related records, subdivision (2) of section 677 states that:

> "The report of any autopsy or other examination shall state every fact and circumstance tending to show the condition of the body and the cause and means or manner of death. The person perform-

> ing an autopsy, for the purpose of determining the cause of death, shall enter upon the record the pathological appearances and findings, embodying such information as may be prescribed by the commissioner of health, and append thereto the diagnosis of the cause of death and of the means or manner of death. Methods and forms prescribed by the commissioner of health for obtaining and preserving records and statistics of autopsies conducted within the state shall be employed. A detailed description of the findings, written during the progress of the autopsy, and the conclusions drawn therefrom shall, when completed, be filed in the office of the coroner or medical examiner."

Further, subdivision (3)(b) of section 677 states in relevant part that:

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

As such, the records prepared by a coroner pursuant to section 677 of the County Law are essentially confidential regarding all but the district attorney and the next of kin. In terms of the Freedom of Information Law, those records could be withheld under section 87(2)(a), which pertains to records that are specifically exempted from disclosure by statute.

Since you wrote that you are interested in acquiring the records in conjunction with an appeal, there may be other vehicles available to you that could be used to obtain the records, and it is suggested that you discuss the matter with your attorney.

Since you wrote that you are interested in acquiring the records in conjunction with an appeal, there may be other vehicles available to you that could be used to obtain the records, and it is suggested that you discuss the matter with your attorney.

Third, with respect to medical records, the Freedom of Information Law often permits certain aspects of those records to be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by agency 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.

Moreover, since 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 involving treatment at a correctional facility, as well as medical records maintained by private or "outside" hospitals.

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 - Room 2517
Empire State Plaza
Albany, New York

Lastly, with regard to the time within which an agency must respond to request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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."

As you requested, enclosed are copies of the Freedom of Information Law and an explanatory brochure on the subject.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

cc: Records Access Officer, Office of the Medical Examiner
Records Access Officer, Health Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1105
FOIL-AO-6861

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

May 8, 1990

Mr. Harold Purdy
[redacted]

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

Dear Mr. Purdy:

I have received your recent letter in which you wrote that you have, for some two decades, been "persecuted, harassed, slandered, etc.", often by persons whom you do not know. You described problems in finding work and in attempting to attend religious services, and you requested assistance in the matter.

In this regard, the Committee on Open Government is authorized to advise with respect to rights of access to records maintained by entities of state and local government in New York. Those rights are generally governed by the Freedom of Information Law and the Personal Privacy Protection Law. If you can review records pertaining to yourself, perhaps steps can be taken to attempt to solve your problems.

The Freedom of Information Law pertains to agency records, and for purposes of that statute, the term "agency" is defined to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [see Freedom of Information Law, section 86(3)].

As such, the Freedom of Information Law applies to records of state agencies as well as entities of local government. 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. It is likely that records pertaining to you that are factual in nature would be accessible under the Freedom of Information Law.

The Personal Privacy Protection Law applies to records maintained by entities of state government. For purposes of that statute, section 92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office of any other governmental entity performing a governmental or propriety function for the state of New York, except the judiciary of the state legislature or any unit of local government and shall not include offices of district attorneys."

As such, the Personal Privacy Protection Law does not apply to records of local governments.

In brief, with certain exceptions, section 95(1) of the Personal Privacy Protection Law grants rights of access to personally identifiable information to the subjects of the information. In addition to the right to inspect and copy records pertaining to oneself, section 95(2) of that statute provides the subject of a record with the right to request that the agency amend the record when the subject believes that the record "is not accurate, relevant, timely or complete." If the agency refuses to make the amendment, the subject of the record may appeal the agency's determination. If the appeal is denied, the subject has the right to file with the agency "a statement of disagreement with the agency's determination," that becomes part of the record.

A request for records should be made to the agency that you believe maintains records of interest to you and 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 for records.

It is also noted that both the Freedom of Information Law and the Personal Privacy Protection Law 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, such as names, dates, identification numbers, descriptions of events and similar details.

Enclosed are copies of the Freedom of Information and the Personal Privacy Protection Laws for your review.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6062

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

May 9, 1990

Mr. Murray Weiss
Associate Editor
New York Post
210 South Street
New York, NY 10002-7807

The staff of the Committee 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. Weiss:

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

According to your letter, you have requested "a variety of reports, documents and information related to officers in the National Guard, including requests for salaries and travel logs for the agency's commanding officer". You added that:

> "Most of the above requests have not been answered and information generally considered to be of a fundamental publicly available nature have not been provided. Some of the requests date back several months, including one in which 'summaries' of a monthly agency report were requested."

In an effort to learn more of the matter, I have contacted several officials of the agency in receipt of your requests, the Division of Military and Naval Affairs, on your behalf. Based upon my conversations with representatives of the Division, I was informed that numerous records have been disclosed to you, but that three requests remain outstanding.

One involves out of state travel by General Flynn, who head the Division. According to Colonel Peter Kutschera, General Flynn's 1989 itinerary has been made available to you. The remainder of that request involves similar information for the years 1986 to 1988. Those records apparently do not exist in the same format as those concerning travel in 1989, and Colonel Kutschera indicated to you on March 23 that the information in question is not maintained in a "single retrievable record". Nevertheless, he added thst the Division is continuing to work on that request and that he would advise you regarding its progress.

The second outstanding request involves "summaries". It is my understanding that there may be several records that could be characterized as summaries. One involves General Flynn's travel and salary; another is a so-called "DAMPRE summary report", which is a voluminous computer generated report involving attendance of National Guard members at regularly scheduled drills and "training events". That report includes personal information, such as home addresses and social security numbers. I was told that when you were informed of the nature of the report, you modified the request. Colonel William Brass, the Division's records access officer, explained that the DAMPRE reports contain summaries at the end of those reports, and that those summaries are the subject of your request. The summaries consist of numbers of personnel and include what were characterized as "readiness ratings". Further, the reports, although maintained by the Division, are generated by the federal National Guard Bureau in Washington. As such, Colonel Brass contended that the Division lacks the authority to grant or deny access to the reports, and he has arranged to have the National Guard Bureau determine rights of access and inform you of its decision.

The third outstanding request involves records reflective of General Flynn's total salary for 1986 through 1989, and I was informed that the information falling within the scope of that request will be disclosed.

In conjunction with the foregoing, I offer the following comments, some of which are general.

First, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in 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 grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record may contain both accessible and deniable information. That phrase, in my view, also imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Second, since there appears to have been a degree of confusion concerning exactly which records were requested, I point out 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 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. Although a request might be quite specific, depending upon the nature of an agency's record-keeping system, an agency may or may not be able to locate a record or records. While an agency might not maintain a single retrievable record containing certain information, it might nonetheless have the capacity to locate other records containing equivalent information. In short, to the extent that the Division can locate, identify and retrieve the records sought, I believe that your requests would have reasonably described them.

Third, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states in part that, unless specific direction is provided to the contrary, an agency need not create or prepare a record in response to a request. Therefore, to the extent that the information sought does not exist, the Division would not in my opinion he obliged to prepare new records in order to comply with a request.

With respect to information maintained electronically, i.e., in a computer, to the extent that information is accessible under the Freedom of Information Law and may be extracted by means of existing computer programs, I believe that an agency is obliged to disclose. On the other hand, if information sought that would otherwise be available can be retrieved only by means of new programming or altering existing programs, those steps would, in my opinion, represent the equivalent of creating new records. I am unaware of whether the foregoing is necessarily pertinent to your requests.

One of the exceptions to the general rule that an agency need not create a record under the Freedom of Information Law involves payroll records. Section 87(3) of the Law states in relevant part that:

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

Fourth, several of the grounds for denial may be relevant to rights of access to the records sought. The extent to which they may appropriately be asserted would be dependent upon the contents of records and the effects of disclosure.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Although that standard is flexible and reasonable people may have different views regarding privacy, the courts have provided significant direction, particularly with respect to the privacy of public employees.

I note that, in a discussion with Counsel to the Division, it was indicated that the status of national guardsman as state or federal employees is unclear. For example, for purposes of section 17 of the New York Public Officers Law, which deals with defense and indemnification of state officers and employees, the State Attorney General has advised that National Guard personnel in an inactive duty training or annual training status are state employees under section 17. However, Counsel informed me that

the same personnel are considered federal employees under the federal Tort Claims Act. Consequently, the National Guard appears in many respects to be a hybrid in terms of the application of state and federal law.

Nevertheless, 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]. Based upon the judicial interpretation of the Freedom of Information Law, as a general matter, I believe that records pertaining to public employees regarding salaries, payments, reimbursements, travel and travel expenses, as well as similar information, would be available, for those kinds of information are relevant to the performance of one's official duties and disclosure in those instances would constitute a permissible rather than an unwarranted invasion of personal privacy. Portions of those kinds of records indicating social security numbers, home addresses and the like, which are irrelevant to the performance of a public employee's duties could justifiably be withheld as an unwarranted invasion of personal privacy.

I am unaware of whether your requests involving the attendance of members of the National Guard involve aggregate information or records pertaining to particular individuals. However, 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])" [67 NY 2d 564-565].

Another ground for denial of possible significance 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, 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 staff of the Division and transmitted within the Division or to other agencies would, in my view, fall within the scope of section 87(2)(g). However, as suggested earlier, the contents of inter-agency or intra-agency materials determine the extent to which those materials must be disclosed or may be withheld. For example, the characterization of a document as "intra-agency material" is not alone determinative of rights of access, for such a record might include advice or opinions that may properly be withheld, as well as statistical or factual information that should be disclosed, unless a different ground for denial may properly be asserted.

With regard to the reports generated by the U.S. National Guard Bureau, again, I was informed that rights of access to those reports would be determined by the Bureau.

In my opinion, the Division has been placed in an anomalous position as a result of the terms of federal regulations. The Freedom of Information Law pertains to agency records, and section 86(4) of the Freedom of Information Law defines "record" to include:

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

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

Based on the foregoing, reports maintained by the Division are in my opinion "records" subject to the rights of access, irrespective of their origin or use. Further, the Court of Appeals has construed the definition of "record" as broadly 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)]. In response to a request for records, the issue that generally arises involves the extent to which one or more of the grounds for denial may properly be asserted, and that issue is determined by the agency that maintains the records.

Nevertheless, federal regulations forwarded to me by Counsel to the Division indicate that determinations regarding disclosure of records must, in some instances, be made by a federal agency, rather than the Division or an equivalent state agency in a different jurisdiction.

The regulations, which apparently were promulgated by the Departments of the Army and the Air Force, outline "policy and procedures for the disclosure of federal records to the public under the Freedom of Information Act". That provision is a federal statute which generally applies to records maintained by entities of the federal government. However, in a section entitled "Applicability", it is stated that: "This regulation applies to the Army and Air National Guard, notwithstanding any local or State laws". In addition, a provision entitled "Army/Air National Guard records" states that:

> "Requests for Army/Air National Guard Federal records, including ARNG and ANG military and technician personnel records, will be processed IAW AR 340-17 and AFR 12-30. Release authority has been delegated to the State adjutants general. Denials or partial denials for requested information may only be accomplished by the initial denial authority (IDA), who is the Chief, National Guard Bureau."

As I understand the regulation, a determination to grant or deny access to a record maintained by the Division, a state agency, that is prepared by a federal agency is in certain cases made by the federal agency. I know of no similar regulations, and prohibitions concerning disclosure are generally conferred by a statute, i.e., an act of Congress or the State Legislature.

rather than by means of a regulation. By forwarding your request to the National Guard Bureau for its determination, the Division in my view complied with the federal regulation quoted above. That regulation, however, appears to be inconsistent with the requirements imposed by the New York Freedom of Information Law. Further, while a federal agency may without question determine rights of access to its records under the federal Freedom of Information Act, it is questionable in my opinion whether a federal agency, by means of regulations, can determine rights of access to records maintained by a state agency that would ordinarily be subject to a state's access law.

It is noted that the federal Freedom of Information Act (5 U.S.C. section 552) includes an exemption covering national security information and indicates that records may be characterized as "classified" or confidential under certain circumstances. The State Freedom of Information Law contains no analogous exemption. Assuming that the state statute is or may be applicable, the only similar exception is section 87(2)(f), which permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person". It might be contended that "readiness ratings" or related records could be with held pursuant to section 87(2)(f) or, alternatively, pursuant to the exemption in the federal Act described above. However, I believe that the application of those provisions as a basis for withholding would, of necessity, be based upon the specific contents of records and the effects of their disclosure. In addition, as indicated at the outset, a portion of a record might properly be withheld, while the remainder should be disclosed.

Lastly, with respect to the time within which an agency must respond to request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my

opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Colonel Peter Kutschera
Colonel William Brass
Lt. Colonel Roger Lunden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO 106
FOIL-AO-6063

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

May 10, 1990

Mr. Leo C. Halpern
Civil Rights Law Advocate
[redacted]

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

Dear Mr. Halpern:

Your letter addressed to the Office of Counsel at the Department of State has been forwarded has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to advise with respect to access to government records.

You asked whether you may obtain medical and psychiatric records from the New York City Health and Hospitals Corporation "citing the N.Y. State Freedom of Information Act and the N.Y. Personal Privacy Protection Act of 1984."

In this regard, I offer the following comments.

The Freedom of Information Law pertains to agency records, and for purposes of that statute, the term "agency" is defined to include:

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

As such, the Freedom of Information Law applies to records of state agencies as well as entities of local government such as New York City and the Health and Hospitals Corporation. 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.

The Personal Privacy Protection Law applies to records maintained by entities of state government. For purposes of that statute, section 92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office of any other governmental entity performing a governmental or propriety function for the state of New York, except the judiciary of the state legislature or any unit of local government and shall not include offices of district attorneys."

Based upon the foregoing, the Personal Privacy Protection Law does not apply to records of local government, such as New York City.

With respect to medical records, the Freedom of Information Law often permits certain aspects of those records to be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by agency 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.

However, 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.

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 - Room 2517
Empire State Plaza
Albany, New York

Similarly, section 33.16 of the Mental Hygiene Law generally requires the disclosure of mental health records to the subject of those records by a mental health facility.

As requested, enclosed are copies of the Freedom of Information and the Personal Privacy Protection Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 1759
FOIL-AO-6064

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

May 10, 1990

Mr. Daniel Sullivan
[redacted]

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

Dear Mr. Sullivan:

I have received your letter of April 22, as well as the correspondence attached to it.

As I understand the matter, you submitted a complaint regarding a New York City police officer to the Civilian Complaint Review Board. Although the complaint was investigated, there was insufficient evidence to impose disciplinary action against the officer. Although the Police Department has disclosed the Board's final decision to you, you wrote that the transcript of the proceedings and minutes of the Board's meeting were withheld. You have questioned the propriety of the denial.

In this regard, although the Freedom of Information Law provides substantial rights of access, for the following reasons, it appears that the records sought were appropriately withheld.

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

Second, the first ground for denial, section 87(2)(a), enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute is section 50-a of the Civil Rights Law. That statute, which pertains to police and correction officers, states in part in subdivision (1) that: "All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency...shall be considered confidential

and not subject to inspection or review with the express written consent of such police officer...except as may be mandated by lawful court order." Further, in interpreting section 50-a in a case involving grievances made against correction officers, the Court of Appeals, the state's highest court, found that:

> "Documents pertaining to misconduct or rules violations by correction officers - which could well be used in various ways against the officers - are the very sort of record which, the legislative history reveals, was intended to be kept confidential" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

The Court also found that the purpose of section 50-a "was to prevent release of sensitive personnel records that could be used in litigation for the purposes of harassing or embarrassing correction officers" (id. 193). Since the statute is applicable equally to police and correction officers, it appears that the records prepared in conjunction with an investigation of a police officer's conduct would fall within the provisions of section 50-a of the Civil Rights Law.

In addition, although it has been held in several cases that a final determination indicating a finding of misconduct on the part of police officers is public [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); and Town of Woodstock v. Goodson-Todman Enterprises, Ltd. v. Town of Woodstock, 505 NYS 2d 540 (1986)], in situations in which charges or allegations have been dismissed, it has been advised that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to section 87(2)(b) of the Freedom of Information Law.

Second, although the Open Meetings Law contains provisions concerning minutes of meetings, I do not believe that statute would require disclosure of the records in which you are interested.

Similar to the Freedom of Information Law, the Open Meetings Law requires that meetings of public bodies be conducted open to the public, unless a meeting may be closed in conjunction with provisions pertaining to executive session or exemptions from the Law.

Assuming that the Open Meetings Law would have applied, section 105(1) permits a public body to conduct a closed or 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."

Since the issue appears to have involved the employment history of a police officer or perhaps a matter leading to his discipline, I believe that an executive session could properly have been held.

When action is taken during an executive session, minutes must be prepared pursuant to section 106(2) of that statute, which states that:

> "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."

The Board's final determination was made available to you, but other information that could be withheld under the Freedom of Information Law need not be disclosed.

I point out the Open Meetings Law does not require the preparation of a transcript, and that the transcript you seek was likely prepared in conjunction with a proceeding that would not have been subject to the Open Meetings Law. It is assumed that the transcript relates to a hearing. Such a hearing would likely have been exempted from the requirements of the Open Meetings Law. Section 108(1) of the Law exempts from coverage quasi-judicial proceedings; section 108(3) exempts matters made confidential by law. In this instance, the confidentiality imposed by section 50-a of the Civil Rights Law, which was discussed earlier, would have removed a meeting or hearing, for example, from the coverage of the Open Meetings Law.

In sum, while I am sympathetic to your position, it appears that the records in question could properly have been withheld.

I hope that the foregoing serves to clarify the matter. Should any further questions arise, please contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Eileen D. Millett
Sgt. John G. Sultana

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6085

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

May 11, 1990

Mr. Stephen Thompson
86-C-1263 D-4-45
Auburn Correctional Facility
135 State Street
P.O. Box 618
Auburn, NY 13024

Dear Mr. Thompson:

I have received your recent letter and the correspondence attached to it.

According to the materials, you requested various records from Onondaga County Court, citing the federal Freedom of Information and Privacy Acts. You complained that the Court has failed to respond, even though thirty days have passed.

In this regard, I offer the following comments.

First, the statutes cited in your request are federal acts that apply only to records maintained by federal agencies.

Second, the Committee on Open Government is authorized to advise with respect to the New York Freedom of Information Law. That statute generally pertains to records maintained by agencies of state and local government in New York. Further, 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, neither the New York Freedom of Information Law nor the federal Freedom of Information Act would, in my opinion, apply to records maintained by a county court.

Lastly, although the statutes referenced above are not applicable, often court records are accessible 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 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-6066

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

May 11, 1990

Mr. George Mendez
[redacted]

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

Dear Mr. Mendez:

I have received your letter of April 20, which reached this office on April 26.

According to your letter, on November 9, you requested information "relating to school bus pick-up and drop-off points on private property" from Gerald P. Glose, the Assistant Superintendent for Business at the Frontier Central School District. You enclosed a copy of the request, which involves:

> "1. All communications regarding the request for transportation on private property in regards to Coachlite and Camelot apartments. Said communications to include but not be limited to requests, memos, investigation reports, data used etc. including the names of any investigator and names of any and all persons on any committees investigating same.
>
> 2. All communications as outlined in #1 for Brook Gardens Trailer Park.
>
> 3. All communications as outlined in #1 for Eagelcrest Mobile Home Park.
>
> 4. All communications as outlined in #1 for any other private property received in the last 5 years" (emphasis yours).

As of the date of your letter to this office, you had received no response to the request.

In this regard, I offer the following comments.

First, with respect to the time within which an agency must respond to a request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as indicated above, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. It has been held that request reasonably describes the records when agency officials, based upon the terms of a request, can locate and identify the records. Since I am unfamiliar with the District's record-keeping or filing systems, I cannot ascertain whether the records in question can be located on the basis of your request. Nevertheless, I believe that Mr. Glose or some other District official should have responded to your request months ago in some manner.

Third, 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 or prepare a record in response to a request.

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. Without knowledge of the contents of records falling within the scope of your request, I cannot provide specific guidance concerning the extent to which any such records must be disclosed. However, several of the grounds for denial might be relevant.

The first ground, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is the Family Educational Rights and Privacy Act [20 U.S.C. section 1232(g)], a federal law that deals with records maintained by educational agencies or institutions that identify students. In brief, that statute generally prohibits a school district from disclosing personally identifiable information concerning students without the consent of the parents of the students. It is noted that the federal regulations promulgated pursuant to the Act indicate that personally identifiable information includes not only a student's name, but also the names or addresses of a student's parents (34 C.F.R. section 99.3). Therefore, insofar as the records contain personally identifiable information pertaining to students, those portions of the records could likely be withheld.

Section 87(2)(b) of the Freedom of Information Law is related to comments offered above, for it permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Again, while I am unfamiliar with the records in question, there may be privacy considerations.

Section 87(2)(g) enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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. Communications among or between District officials would consist of "intra-agency materials" that would be accessible or deniable, depending upon their specific contents. A map showing "pick-up" or "drop-off" points or a record indicating routes taken by buses would in my opinion consist of factual information that would be available pursuant to section 87(2)(g)(i).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerald P. Glose

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6067

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

May 14, 1990

Honorable Robert K. Sweeney
Member of the Assembly
Legislative Office Building
Room 833
State of New York
Albany, New York

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

Dear Assemblyman Sweeney:

As you are aware, I have received your letter of May 2 and the correspondence attached to it.

According to the materials, on March 5, you wrote to the Suffolk County Water Authority on behalf of State and County legislators participating in a joint legislative conference and requested that the Authority provide a variety of documentation. Having received no response to the request, a second request was made on March 19. The receipt of the request was acknowledged on March 28 by Joseph F. Dalo, the Authority's records access officer. Mr. Dalo indicated that he was in the process of compiling the information sought, some of which was made available during the first week in April. Soon thereafter, another letter was prepared concerning "missing items," records that had not been disclosed. In addition, you wrote that you were informed by the Authority that you should not expect to receive "any further information whatsoever."

In your original request, you sought the following:

> "* The written SWCA policy on employment and hiring practices, and the hiring of consultants and attorneys.

* All expenses incurred and billed by each member of the SWCA board for each year from 1985 to present.

* Copies of credit card expenses, car phone bills and travel and conference expenses for each member of the board for each year from 1985 to present.

* For each member of the board with a SCWA car, the model and year of the vehicle and the car they replaced (model and year).

* SCWA budget for each year from 1985 to present.

* Budget allocation for advertising for each year from 1985 to present.

* Salary schedules of board member for each year from 1985 to present."

In your letter of April 11, you requested information concerning items that were deleted or were unclear, as follows:

"* With regard to vehicles, there is no prior vehicle listed for board member White and no vehicle at all for board member Tripp. Also, please advise as to the price paid for each of the current board members vehicles.

* On your second item, expenses incurred by board members, there appears to be a substantial time period missing.

* Please advise as to who the telephone answering service is for; what the New York Telephone bills are for; and who the Metro One car phone bills are for. With regard to Metro One, only three months of bills were submitted (Sept., Oct., and Nov., 1988), and phone numbers were deleted from each bill.

* Finally, please advise as to whether there is a retirement fund or plan for board members, and if so the details. By 'retirement fund' we mean any funds, plan, program, etc. that is intended to compensate board members in any fashion upon separation from SCWA service."

You indicated that telephone numbers were deleted from the car phone bills of the Authority's chairman, and that the bills are paid by the Authority. As such, you have requested an advisory opinion concerning rights of access to the information sought and asked whether "the deletion of phone numbers from the car phone bills is proper when that information has been specifically requested."

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 that 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 definition makes specific reference to public authorities, it is clear in my view that the Suffolk County Water Authority is an "agency" required to comply with the Freedom of Information Law.

Second, the Freedom of Information Law generally pertains to existing records. Section 89(3) of the Law provides in part that, unless specific direction is provided to the contrary, an agency need not create or prepare a record in response to a request.

Third, all agency records are subject to rights conferred by the Freedom of Information Law, 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."

It is noted that the Court of Appeals has construed the definition as broadly as its specific language suggests [see e.g., Westchester Rockland 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law. The denial appearing in 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. 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.

Insofar as the information sought exists and is maintained by or for the Authority, I believe that two of the grounds for denial are particularly relevant. However, the extent to which those or any of the grounds for denial could be appropriately asserted is, in my view, questionable.

Much of the information sought, such as policies, budgets, salary schedules, vouchers and the like would fall within the scope of section 87(2)(g) of the Freedom of Information Law. Although that section 87(2)(g) represents a basis for denial, due to its structure, it often requires substantial disclosure. Specifically, 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, 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.

I believe that records described above could be characterized as intra-agency materials. Nevertheless, in view of their content, they would apparently consist of statistical or factual information accessible under section 87(2)(g)(i) or final agency policy or determinations available under section 87(2)(g)(iii), unless another basis for denial applies. As such, section 87(2)(g) would not, in my opinion, serve as a basis for denial.

The other ground for denial that is relevant 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." 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, Eash Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Capital Newspapers v. Burns, supra; Sinicropi v. County of Nassau, 76 AD 2d 838 91989); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981].

If an officer or employee of the Authority uses a mobile telephone in the course of his official duties, bills involving the use of tbe telephone would, in my opinion, be relevant to the performance of his or her official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to the officer or employee serving as a government official.

informants in the context of law enforcement, or persons seeking certain health 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 could 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 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 calls made by a member of the Authority, 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), it is likely that the calls made by the Authority's chairman 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.

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 point out, too, that the Court of Appeals on several occasions has found that an agency cannot merely assert a basis for denial; rather, it has been held that:

> "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" [Capital Newspapers, supra, 566; see also, Farbman v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Since phone bills list the numbers called, the time and length of calls and the charges, it has been contended by some 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 is but one decision of which I am aware that deals with the issue. In Wilson v. Town of Islip (Supreme Court, Suffolk County, December 4, 1989), one of the categories of the records sought involved bills involving the use of cellular telephones. In that portion of the decision, Judge Geiler wrote that:

> "...it is held that respondents were justified in supplying just what petitioner had literally asked for, to wit, the cellular telephone bills, and were not required to go beyond the language and furnish more detail than was specified. Moreover, to reveal more detailed information respecting the calls would violate Public Officers Law Sec. 87(2) 'Which permits an agency to deny access to records or portions thereof that...(b) if disclosed would constitute an unwarranted invasion of personal privacy'...The telephone numbers of the call recipients would be revealed by the production of such records."

The foregoing represents the entirety of the Court's decision regarding the matter; there is no additional analysis of the issue. I believe, however, that a more detailed analysis is required to deal adequately with the matter.

When phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. An indication of the phone number would disclose nothing regarding the nature of a conversation. Further, even though the numbers may be disclosed, nothing in the Freedom of Information Law would require an individual to indicate the nature of a conversation. In short, I believe that the holding in Wilson is conclusory in nature and lacks a substantial analysis of the issue.

This is not to suggest tbat the numbers appearing on a phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance,

In Wilson, the court specified that the request involved only the bills, i.e., the charges, and concluded gratuitously, without analysis, that the phone numbers concerning calls made could be withheld. There appears to have been no articulation of a specific justification for withholding the numbers.

Further, in Capital Newspapers, supra, the Court provided a description of the intent and utility of the Freedom of Information Law in a manner that may be pertinent to the records 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 providing the electorate with sufficient informaiton to 'make intelligent, informed choicea 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" (id. at 566).

Lastly, since you raised issues concerning the timeliness of response to your requests, I point out that section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Walter Hazlitt
Joseph F. Dalo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6068

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

May 15, 1990

Mr. Marc P. Zylberberg
Senior Assistant
County of Dutcheas
22 Market Street
Poughkeepsie, NY 12601

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

Dear Mr. Zylberberg:

As you are aware, I have received your letter of April 23 and the materials attached to it.

As the legal representative of Dutchess County, you wrote that you are asked to advise County officials concerning issues relating to records that are considered "confidential". You added that the County has recently developed a computerized indexing system relating to those records.

You have asked whether access to the records in question, as well as the indices used to retrieve or identify those records, should be "restricted", whether staff may confirm the existence of records without disclosing them, whether separation agreements should be treated in the same manner as records involving divorce, and whether a person who ordinarily has no right of access who has received a letter consenting to disclosure by a party may obtain records. In addition, where a statute limits disclosure to a party or that person's designated attorney, and a party has changed attorneys without having filed a notice that so specifies, you asked whether the new attorney may "sign and date a handwritten statement that he is the attorney, staple this to the file and allow him access to the file."

In this regard, as you aware, the advisory authority of the Committee on Open Government and its area of expertise involve the Freedom of Information Law. From my perspective, the answers to your questions are likely dependent upon the specific language of statutes other than the Freedom of Information Law.

The first ground for denial appearing in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". The records that you described are specifically exempted from public disclosure, and the terms of those statutes in many instances provide guidance to be used in responding to your questions.

For instance, access to records relating to matrimonial proceedings is governed by section 235(1) of the Domestic Relations Law, which 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 act, conclusions or 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 matrimonial proceeding, for example, are considered confidential.

However, subdivision (3) of section 235 states that:

> "Upon the application of any person to the county clerk or other officer in charge of public records within a county for evidence of the disposition, judgment or order with respect to a matrimonial action, the clerk or other such officer shall issue a 'certification 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. Further, based upon the foregoing, I believe that records involving separation and divorce are vested in the same manner, and that, with the exception of the "certification of disposition", records cannot be disclosed, except as provided in subdivision (1) of section 235.

With respect to sealed records involving youthful offenders, I believe that the sealing provisions are intended to preclude the fact that an incident may have occurred from being used against a youth to his detriment. As such, confirmation that a file exists might effectively subvert the intent of the sealing requirements.

With regard to the remaining issues, while I do not intend to avoid responding, I believe that answers to those questions can be ascertained only by reviewing provisions dealing with particular records.

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-6069

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

May 15, 1990

Mr. Arthur Deschamps
89-D-0104 C-6-41
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. Deschamps:

I have received your recent letter in which you requested assistance.

You wrote that you requested records from the St. Lawrence County Department of Social Services, which, in your view, would have resulted in a dismissal of charges that resulted in your conviction. The documents apparently refer to a child placed in foster care, as well as "statements and payment vouchers". The records were denied on the basis of section 372 of the Social Services Law.

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

Second, the initial ground for denial, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". Under the circumstances, it appears that the records are exempted from disclosure by statute. Section 136 of the Social Services Law provides, in brief, that records identifiable to an applicant for or recipient of public assistance are confidential. In addition, section 372 of the Social Services Law provides specific guidance concerning disclosure of records concerning children in foster care and others. Subdivision (4)(a) of section 372 states that:

> "All such records relating to such children shall be open to the inspection of the board and the department at any reasonable time, and the information called for under this section and such other data as may be required by the department shall be reported to the department, in accordance with the regulations of the department. Such records kept by the department shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court, or by a judge of the family court when such records are required for the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice."

As such, I believe that disclosure of the records in question would be determined on the basis of the Social Services Law rather than 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-1607

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

May 16, 1990

Mr. John Van Horne
[redacted]

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

Dear Mr. Van Horne:

I have received your letter of April 24 concerning rights of access to records.

According to your letter, while writing an article on the construction of a new City University of New York (CUNY) gymnasium, you requested the following documents:

> "blueprints of the proposed building, itemized cost estimate, site borings (measurements of depth to bedrock) and a an arborist's report (commissioned by C.U.N.Y.) outlining a plan to minimize the impact of the building on trees."

You added that SUNY as refused to disclose any of the documents, "claiming that the new building was still in the planning stages and therefore the documents were not subject to public disclosure.

You have requested my views on the 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 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."

Since CUNY is a governmental entity, an agency, I believe that any documentation maintained by or produced for CUNY would constitute a "record" subject to rights conferred 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. Since I am unfamiliar with the contents of the records or the stage of the process in which CUNY is involved, I cannot provide specific guidance. However, it appears that some of the records, or perhaps portions of the records, should be disclosed.

One of the grounds for denial may be particularly relevant. However, that provision, due to its structure, often requires disclosure. Specifically, records prepared by agency staff, or by a consultant retained by an agency, may be characterized 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. 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 intra-agency materials, which would include consultant reports, the State's highest court, the Court of Appeals, stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, 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 is exempt to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to expreas 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; Mater 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 the 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, intra-agency materials or records prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

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 (ambulance records, list of interviews, 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 Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979); Xerox Corporation v. Town of Webster, 65 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.

Cost estimates and site borings would likely consist in part if not in their entirety of "statistical or factual tabulations or data." Similar statistical or factual information might be found in an arborist's report.

Also of possible significance is section 87(2)(c), which permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards..."

Whether that provision or perhaps other grounds for denial might appropriately be asserted to withhold the records in question would be dependent upon the nature of the records and the effects of their disclosure. Nevertheless, despite the fact that the project may be in the "planning stages," some aspects of the records should, in my view, be disclosed in response to a request made under the Freedom of Information Law.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Martin J. Warmbrand, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6071

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

May 16, 1990

Mr. David Hernandez
88-A-7818
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. Hernandez:

I have received your letter of April 27 in which you seek assistance in obtaining 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 record 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 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. Therefore, it is suggested that you apply to the sentencing court for a copy of the report.

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

OML-AO-1763
FOIL-AO-6072

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

May 16, 1990

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 April 27.

You described a committee appointed by a governing body consisting of two members of the body. The committee held a meeting during which a third member of the governing body was in attendance. Since the governing body consists of five, you suggested that a quorum of that body was present. Although the meeting was tape recorded, no clerk was present. You added that "Actions were taken/motions made and voted on, with a quorum of the governing body present."

You asked whether it is "permissible that only a tape be made and a tape kept as the only records of such a meeting, or of any meeting subject to the provisions of the Open Meetings Law". You also questioned bow long a tape recording must be kept.

In this regard, I offer the following comments.

First, I believe that some aspects of your letter may be based upon an inaccurate assumption. The committee, as you described it, would in my opinion constitute a public body required to comply with the Open Meetings Law. However, I do not believe that the gathering in question constituted a meeting of the governing body.

Section 102(2) of tbe Open Meetings 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."

Based upon the foregoing, it is clear in my view that a governing body, as well as a committee designated by a governing body consisting of at least two of its members, would constitute a public body that falls within the requirements of the Open Meetings Law. However, the meeting in question involved a committee; the third member of the governing body who attended is not a member of the committee. As such, I do not believe that the presence of the third member would have transformed the meeting of the two member committee into a meeting of the governing body. In essence, I would consider the third member, for purposes of the meeting at issue, to have the status of a member of the public.

Second, since the committee is a public body, I believe that it is required to prepare minutes to the extent required by law. As you may be aware, section 106(1) concerns minutes of open meetings and states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

It is common to tape record meetings as an aid in the preparation of minutes. However, while a tape recording would likely contain the elements of minutes, I believe that minutes should be nonetheless reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, a municipality might need a permanent written record readily accessible to officials who must refer to or rely upon the minutes in the performance of their duties. I point out, too, that 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).

Lastly, with regard to access to tape recordings, I point out that the Freedom of Information Law 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."

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

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].

Third, separate from the Freedom of Information Law are new provisions found in the "Local Government Records Law" (Article 57-A of the Arts and Cultural Affairs Law), which became effective on August 5, 1988. Section 57.19, which requires the establishment of a local government records management program, states in part that:

> "The governing body, and the chief executive official where one exists, shall promote and support a program for the orderly and efficient management of records, including the identification and appropriate administration of records with enduring value for historical or other research. Each local government shall have one officer who is designated as records management officer. This officer shall coordinate the development of an oversee such program and shall coordinate legal disposition, including destruction of obsolete records. In towns, the town clerk shall be the records management officer."

Further, section 57.25(1) states that:

> "It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public

> business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office. In towns, records no longer needed for the conduct of the business of the office shall be transferred to the custody of the town clerk for their safekeeping and ultimate disposal."

Subdivision (2) of section 57.25 states that public records cannot be destroyed without the consent of the Commissioner of Education. In turn, the Commissioner is authorized to develop schedules indicating minimum retention periods for particular categories of records. As such, local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. I believe that tape recordings of meetings must be retained for a minimum of four months following the preparation of the minutes.

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-6073

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

May 16, 1990

Mr. Harold Rubenfeld
[redacted]

Dear Mr. Rubenfeld:

Francis X. Ryan of the Department of State has forwarded copies of your correspondence involving a denial of a request for a record apparently maintained by the Great Neck Parks District. The Committee on Open Government, a unit of the Department of State, is authorized to advise with respect to the Freedom of Information Law.

As I understand the correspondence, you requested various information from the Park District. Although much of the information was provided, a copy of a Park District official's employment application was denied on the ground that disclosure would result in an "unwarranted invasion of personal privacy."

Mr. Ryan asked that I assist you in 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, one of the grounds for denial, section 87(2)(b), permits an agency, such as the Park District, to withhold records or portions thereof the disclosure of which would constitute an unwarranted invasion of personal privacy.

Although the 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 an application, for example, I do not believe that they could necessarily be cited to withhold those kinds of documents in their entirety.

If, for example, an individual must have certain types of experience of educational accomplishments as a condition precedent to serving in a particular position, those aspects of a documentation would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agencies or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that the record sought contains information pertaining to the requirements that must have been met to hold to the position, it should be disclosed, for I believe that disclosure of those aspects of the document would result in a permissible rather than an unwarranted invasion of personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Further, although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see section 87(3)(b)]. On the other hand, information included in the document that is irrelevant to criteria required for holding the position, such as grade point average, class rank, home address, social security number and the like, could in my opinion be deleted prior to disclosure of the remainder of the record to protect against an unwarranted invasion of personal privacy.

Lastly, an applicant may appeal a denial of access to records pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the Clerk of the Parks 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:saw
cc: Gloria Brady, District Clerk
Francis X. Ryan, Regional Director
Hon. Stan Lundine, Lieutenant Governor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6074

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

May 16, 1990

Mr. Harold 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 letters of April 29 and May 11. You have raised a series of issues concerning your attempts to obtain records from the Town of Ticonderoga.

One of the issues involves what you characterized as a failure to respond within the time limits prescribed by law. In this regard, I point out that advice previously rendered may no longer be applicable. Section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a reocrd reasonably described, shall made 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 approximately date when such request will be granted or denied..."

Section 1401.5(d) of the regulations promulgated by the Committee on Open Government states that, when an agency acknowledges the receipt of a request, it has up to ten additional business days from the date of acknowledgement to grant or deny access to the records sought. Nevertheless, a recent Appellate Division deci-

sion invalidated that aspect of the regulations on the ground that the Freedom of Information Law contains no such limitation [Lecker v. New York City Board of Education, 549 NYS 2d 673, ___ AD 2d ___ (1990)]. Therefore, there is no specific or finite period within which an agency must grant or deny access following its acknowledgement of the receipt of a request. In view of the Lecker decision, it has been advised that an agency must grant or deny access to records within a reasonable time following its acknowledgement of the receipt of a request.

Second, it is my understanding that copies of records have been made available by the Town, but that you have not yet paid the requisite fees. If that is so, I do not believe that the Town would be required to honor ensuing requests, whether the requests involve the inspection or reproduction of records, until you have paid the appropriate fees.

With respect to your requests that records be certified, the provision concerning certification in the Freedom of Information Law, section 89(3), involves an assertion that records copied by an agency are true copies. As such, I do not believe that an agency official can certify unless he or she can visibly compare a copy with an original record.

Third, you complained that tape recordings of meetings have been erased. As you are aware, the State Education Department has developed schedules indicating minimum retention periods for certain categories of records. It is my understanding that tape recordings of minutes must be retained for at least four months following the preparation of written minutes of meetings. When that period has passed, I believe that the tapes may be erased and reused.

Lastly, I have discussed the issues described above and others with Ms. Wilma Ryan, the Town Clerk. Based upon our conversations, it is my view that Ms. Ryan has consistently sought to comply with the Freedom of Information Law and to carry out her duties reasonably and efficiently.

Sincerely,

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-6075

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

May 17, 1990

Mr. Robert Ramirez
#360-90-00139
15-15 Hazen Street
East Elmhurst, NY 11370

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

Dear Mr. Ramirez:

I have received your letter of April 30.

You wrote that you have attempted, apparently without success, to obtain a copy of your "index records" from the New York City Board of Correction. You asked that this office "make sure" that you obtain the records in question.

In this regard, I offer the following comments.

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

Second, I am unfamiliar with the phrase "index records", and it is unclear from my perspective whether that phrase has a precise meaning that would identify particular records. I point out, however, a request should generally be made to the "records access officer" at the agency that maintains the records. The records access officer has the duty of coordinating an agency's response to requests. Further, 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 and identify 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. Without knowledge of the nature of the records in question, I cannot offer specific guidance concerning rights of access to the records in which you are interested. However, enclosed for your review is a copy of the Freedom of Information Law.

Lastly, I point out that section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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

Enc.

> 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 reson for the executive session is because of their discussion involving 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" or "contractual items," the only ground for entry into executive session of apparent relevance would be 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 know 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. It does not appear that section 105(1)(e) could properly have been asserted to discuss the issues described in the materials.

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 collectivve negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we beleive that the public body should made it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle, supra].

You also referred to a "consent agenda" and asked whether each item should be "acted upon individually instead of collectively." Further, you asked whether minutes must include the salaries of persons appointed by the Board. In short, I know of no requirement that votes be taken regarding individual items, or that minutes include salaries of appointees.

In an effort to enhance compliance with the Law, copies of this correspondence will be sent to the Board of Education and Mr. Pereira.

I hope that 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

cc: Board of Education
Lawrence F. Pereira, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6076

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

May 18, 1990

Mr. Robert J. Irwin, Jr.
#88-T-397
Post Office box 149
A.C.F.
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. Irwin:

I have received your letter of April 28 in which you requested assistance in obtaining 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 record 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 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. Therefore, it is suggested that you apply to the sentencing court for a copy of the report.

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-6077

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

May 18, 1990

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 27.

You have asked who makes the decision to charge for postage when copies records are made available.

In this regard, section 87(1) of the Freedom of Information Law requires the governing body of a public corporation, such as a town board, to promulgate rules and regulations consistent with the Law and the general rules and regulations adopted by the Committee on Open Government. The Committee's regulations require the designation of a records access officer and state in part in section 1401.2(a) that:

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

In addition, section 1401.8 of the regulations authorizes an agency to charge fees consistent with the Law. It also states that an agency may provide copies of records without charging a fee.

As such, an agency's policy regarding the assessment of fees is set by its governing body. However, I believe that the governing body may give the records access officer discretion to charge or waive fees. In many instances, when requests involve a small number of copies, some agencies provide the records access officer with discretionary authority to waive fees.

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

OML-AO 1764
FOIL-AO-6078

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

May 18, 1990

Mr. Charles L. Hunt
[redacted]

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

Dear Mr. Hunt:

I have received your letter of May 3, as well as the materials attached to it. You have raised a series of questions concerning the implementation of the Freedom of Information Law and the Open Meetings Law by the Iroquois Central School District.

The first issue involves access to a settlement agreement between the District and one of its employees, and the correspondence refers to an advisory opinion that I sent to Lawrence F. Pereira, District Superintendent, on January 18. His letter to you indicates that opinions rendered by this office are advisory, which is true, and that counsel advised Mr. Pereira that none of the decisions cited in my opinion are "directly on point." As such, he denied the request. Having reviewed my opinion, I believe that adequate information and case law were provided to enable the District to reach a different conclusion. I point out that one of the decisions involved a situation in which a settlement agreement was reached between a teacher and a school district following the initiation of charges but prior to reaching a determination that would have been rendered under section 3020-a of the Education Law. In that case, Buffalo Evening News, Inc. v Board of Education of the Hamburg Central School District (Supreme Court, Erie County, June 12, 1987), the court found that the agreement was available and relied heavily on an opinion rendered by this office. Enclosed is a copy of the decision; a second copy will be sent to Mr. Pereira.

The other area of inquiry involving the Freedom of Information Law concerns a claim that the Board of Education "has not enacted a Freedom of Information policy in accordance [with] the law." You asked "how much time is allowed to develop the rules and regulations." As indicated in my letter to you of January 24, the current version of the Freedom of Information Law (Public Officers Law, Article 6) became effective on January 1, 1978. In response to your question, section 87(1)(a) of the Law states that: "Within sixty days of the effective date of this article, the governing body of each public corporation shall promulgate...rules and regulations... pursuant to such general rules as may be promulgated by the committee on open government in conformity with this provisions of this article..." Therefore, the Board should have adopted the appropriate rules and regulations early in 1978.

Your other areas of inquiry deal with the Open Meetings Law. You indicated that meetings are called to order at 6:45, when the Board enters in to executive session "while stating that the School Board will meet at 7:30." Further, you enclosed a copy of a notice published in the Buffalo Evening News indicating that the Board would meet at 7:30 p.m.

In this regard, I point out 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. Therefore, an executive session is not separate from an open meeting; rather, it is a portion of an open meeting. Moreover, a public body must accomplish a procedure, during an open meeting, before it may conduct an executive session. Section 105(1) of the 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..."

Based upon the foregoing, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, the Law specifies and limits the subjects that may appropriately be considered during an executive session.

It is noted, too, that a public body must provide notice of the time and place of every meeting in accordance with section 104 of the Open Meetings Law. If the School Board intends to convene at 6:45, I believe that its notice must so indicate, even if its first order of business involves the introduction of a motion for entry into an executive session.

Having reviewed minutes of a meeting attached to your letter, I noticed that a motion to conduct an executive session was made "to discuss personnel and contractual items." Based upon case law, those descriptions of the subject matter to be discussed in executive session would be inadequate.

It is noted initially that, under the Open Meetings Law as originally enacted, the so-called "personnel" exception for executive session 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..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" in a tangential manner or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy 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, demotions, 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. The issues described in the materials that you forwarded could not, in my opinion, have been appropriately discussed under the "personnel" ground for entry into executive session.

Further, judicial decisions indicate that a motion containing s recitation of the language of the grounds for executive session or "personnel," for example, without more, fsils to comply with the Lsw. For instance, in reviewing minutes that referred to various bases for entry into executive session, it was held that:

> "[T]he minutes of that 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-6079

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

May 18, 1990

Mr. Michael Gonzalez
86-A-7359
P.O. Box AG
Fallsburg, New York 12733

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

Dear Mr. Gonzalez:

I have received your letter of May 4.

In brief, in response to a request for records maintained by your facility, you were informed that rights of access to those records are governed by section 18 of the Public Health Lsw, rather than the Freedom of Information Law. Moreover, you were told that the fee for locating and copying those records would exceed the fee that may be imposed by the Freedom of Information 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 maintsined 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 Lsw, 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 than 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

cc: Kevin Hunt
Janice Turso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6080

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

May 18, 1990

Mr. Alvin M. Greene
Attorney at Law
5784 Main Street
Williamsville, NY 14221-5702

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

Dear Mr. Greene:

I have received your letter of May 11.

You wrote that your client and a taxpayer committee that she heads are "trying to pry information out of the Village of Depew." Your concern involves the hours during which the Village permits inspection of records, which are "10 a.m. to 2 p.m. three days a week." You have requested my views on the matter.

In this regard, I offer the following comments.

First, as you may be aware, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Law (21 NYCRR Part 1401). In turn, section 87(1) of the Law requires each agency to adopt rules and regulations consistent with the Freedom of Information Law and the Committee's regulations.

Second, with specific respect to the issue raised, section 1401.4 of the regulations promulgated by the Committee provides that:

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

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

Please note that the foregoing is not intended to suggest that agency officials are required to respond to requests at the time that records are requested, for section 89(3) of the Law states that an agency has five business days from the receipt of a request to respond. As such, although I believe that agencies must accept requests during regular business hours, agency officials are not required to respond instantly to a request.

Lastly, there is but one decision of which I am aware that might be relevant to the issue. In a situation in which an applicant sought to inspect a large number of records, the agency informed him that he could do so between 8:30 a.m. and 5:00 p.m. on business days. The court found that the agency "rationally and reasonably" complied with the Freedom of Information Law "by offering to make the voluminous records sought available to petitioner in the manner and at the times" described earlier [Schanbarger v. NYS Commissioner of Social Services, 99 AD 2d 621, 622 (1984)]. As such, there is precedent indicating that an agency acts in compliance with the Freedom of Information Law when it makes records available during regular daily business hours.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Board of Trustees, Village of Depew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-C0851

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

May 18, 1990

Mr. James Veeder
HCR 3, Box 104
Margaretville, NY 12455

Dear Mr. Veeder:

I have received your letter of May 17 in which you indicated that you wrote to this office "a full two years ago requesting information on how to file a request" under the Freedom of Information Law. Further, you specifically asked how to request information from the State Police, local police and from a town court.

In this regard, although this office receives hundreds of written inquiries per year, we generally respond in writing within two to three weeks of the receipt of those inquiries. If you received no response to a letter written two years ago, I would conjecture that your letter was never received by the Committee. In any case, I apologize for the delay and offer the following comments concerning your questions.

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 upon the foregoing, the Division of State Police or a local police department would clearly constitute an "agency" required to comply with the Freedom of Information Law. However, the courts and court records fall outside the coverage of the Freedom of Information Law.

While court records are not subject to the Freedom of Information Law, other provisions of law often grant broad rights of access to those records. For example, in tbe case of a town justice court, section 2019-a of the Uniform Justice Court Act states in relevant part that: "The records and dockets of tbe court except as otherwise provided by law shall be at reasonable times open for inspection to the public..." It is suggested that a request for court records be made to the clerk of the court.

Second, a request made under the Freedom of Information Law should be made to the "records access officers" at the agencies that you believe maintain records in which you are interested. Each agency should have designated a records access officer who has the duty of coordinating the agency's response to requests for records. At tbe local government level, the clerk is usually the records access officer.

Third, 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 and identify the 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. Enclosed is a copy of the Freedom of Information Law for your review.

I hope that I have been of some assistance. Should any furtber 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-6082

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

May 21, 1990

Mr. Leroy Pierce
87-C-0077
P.O. Box 618
135 State Street
Auburn, New York 13021

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

Dear Mr. Pierce:

I have received your letter of May 7.

You wrote that you are interested in gathering records pertaining to yourself from "State controlled mental hospitals," and you asked whether you can use the Freedom of Information Law to obtain those records.

In this regard, I offer the following comments.

First, although the Freedom of Information law provides broad rights of access, the first ground for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is section 33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility by 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, New York 12229. I believe that requests for records maintained by other mental health facilities should be directed to those facilities. I point out that under section 33.16, there are certain limitations on rights of access.

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

FOILAO 6883

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

May 21, 1990

Mr. Frank L. Gennuso
Reg. No. 85C0127, AKA 85-C-0127
Attica Correctional Facility
P.O. Box 149
Attica, New York 14011-0149

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

Dear Mr. Gennuso:

I have received your letter of May 7 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you submitted a request to the records access officer at the Department of Correctional Services for its affirmative action plan prepared in compliance with federal law. As of the date of your letter to this office, you had received no response to the request.

In this regard, I offer the following comments.

First, with respect to the time within which an agency must respond to a request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

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 Department has prepared and adopted the affirmative action plan that you described, I believe that it would be accessible. I direct your attention to section 87(2)(g). 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.

It would appear that such a plan, if it exists, would constitute "intra-agency material." However, I belive that it would be reflective of the policy of the Department and, therefore, would be available under section 87(2)(g)(iii).

I hope that I have heen of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6084

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

May 21, 1990

Mr. Wayne Singleton
85-A-1925
Auburn Correctional Facility
P.O. Box 618, C-20-38
Auburn, New York 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. Singleton:

I have received your letter of May 4 in which you requested assistance.

According to your letter, the records in which you are interested are maintained by the New York City Police Department and pertain to an investigation that apparently led to your conviction. You wrote that the case "is over five years old, and there is no longer any pending investigation on this matter, and most of the information was presented at [your] trial." Nevertheless, it is your belief that there are other records that you would like to obtain. As such, you asked "just what [you are] allowed to receive.

In this regard, I offer the following comments.

Due to the structure of the Freedom of Information Law, it is virtually impossible to provide specific guidance concerning the records that must be disclosed. In brief, 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 written in terms of the potential for harm that would arise if records are disclosed. As such, the contents of records and the effects of disclosure are often the determining factors used to ascertain rights of access to records, as well as the authority to withhold records.

Since I am unfamiliar with the nature of the records that might have been prepared in conjunction with the investigation, I cannot offer specific guidance concerning rights of access. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example. Further, the records sought might pertain to persons other than yourself. If that is so, depending upon the nature of the records and the effects of disclosure, there may be privacy considerations involving persons identified in the records.

Perhaps the most relevant provision concerning access to 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 and 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).

As indicated earlier, 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.

Records prepared by agency employees or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the content of the records in question and the effects of tbeir disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld.

Enclosed for your review is a copy of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6085

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

May 21, 1990

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 May 3, which again deals with an agency's ability to charge for postage when it mails copies of records to an applicant in response to a request made under the Freedom of Information Law.

Some of the issues that you raised were answered in earlier correspondence. To reiterate, there is nothing in the Freedom of Information Law that deals directly with the issue, and the provisions dealing with fees pertain to the cost of photocopying records up to nine by fourteen inches or reproducing other records that cannot be photocopied. Further, I know of no judicial decisions that have considered an imposition of a fee for postage.

As indicated to you in previous correspondence, 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.

While nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) deals with the cost of or the assessment of charges for postage in the event that copies are mailed to an applicant, 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 an postage. Nevertheless, I believe that an agency may charge for postage if it so chooses.

Since you added that you do not have a copy of the Freedom of Information Law, enclosed is a copy for your review.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6986

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

May 21, 1990

Mr. Michael Gilbride
[redacted]

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

Dear Mr. Gilbride:

I have received your letter of May 5 and the materials attached to it.

According to the correspondence, on March 30, you requested records from the New York City Board of Education indicating your "standing on a preferred eligible list for teacher of English Day High School," and information concerning where you stand in terms of being reachable on the list. The receipt of your request was acknowledged, and the deputy records access officer wrote that it was anticipated that a response would be given by April 27. As of the date of your letter to this office, you had received no further response.

In this regard, I offer the following comments.

First, with respect to the time within which an agency must respond to a request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 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. I point out that section 71.3 of the rules and regulations promulgated under the Civil Service Law state in part that: "Eligible lists may be published with the standing of the persons named in them." As such, assuming that the records sought are maintained by the Board, I believe that they would be accessible under 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-6087

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

May 22, 1990

Mr. Randolph Hinton
79-A-0906
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Hinton:

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

According to your letter, requests were made on April 24 to both the Superintendent and Head Clerk at your facility for certain records needed for use in a judicial proceeding. As of the date of your letter, you had received no response to the request.

In this regard, with respect to the time within which an agency must respond to request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person at the Department of Correctional Services designated to determine appeals under the Freedom of Information Law is Counsel to the Department.

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-6088

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

May 22, 1990

Mr. Claudio Adorno
84-A-7915
Greenhaven Correctional Facility
Drawer B
Stormville, New York 12582

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

Dear Mr. Adorno:

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

You have complained that the Attorney Registration Unit of the Office of Court Administration has failed to respond to a request made on April 9 for records required to be maintained pursuant to section 468-a of the Judiciary Law.

In this regard, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 believe that the person designated to determine appeals at the Office of Court Administration is Michael Colodner, Counsel.

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-6089

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

May 22, 1990

Mr. Carl T. Hayden
Ziff, Weiermiller & Hayden
Attorneys at Law
303 William Street
P.O. Box 1338
Elmira, New York 14902-1338

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

Dear Mr. Hayden:

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

According to the materials, you requested a variety of records pursuant to the Freedom of Information Law from the Five Lakes Development Corporation. In response to the request, you were informed hy the President of the Corporation that the entity in question is a not-for-profit corporation and that the Freedom of Information Law is inapplicable.

You have sought my opinion concerning that assertion. In this regard, I offer the following comments.

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."

Having reviewed the certificate of incorporation filed by the Corporation on your behalf, certain of its activities are carried out for a "public or quasi public purpose." However, the Corporation is not, in my view, a state or municipal or "other governmental entity." As such, I do not believe that it falls within the requirements of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6090

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

May 22, 1990

Mr. William Adams
80-A-4568
135 State Street
P.O. Box 618
Auburn, New York 13024

Dear Mr. Adams:

I have received your letter of May 16 and the materials attached to it.

You have "appealed" to the Committee on Open Government following a denial of your request for an "exact photographic copy of the line-up photo used at trial" by the Office of the New York County District Attorney. You also requested information concerning the court to which you may "appeal" if this office cannot obtain the photograph for 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. The Committee has no authority to compel an agency to grant or deny access to records, nor is it empowered to obtain records on behalf of an applicant.

Since the correspondence indicates that your request for a duplicate photograph was denied by the District Attorney's designated records access and appeals officers, I believe that you may seek judicial review in accordance with section 89(4)(b) of the Freedom of Information Law. That provision states in relevant part that:

> "a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law

> and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two."

An Article 78 proceeding may be initiated in Supreme Court.

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-6091

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

May 22, 1990

Mr. Ricardo A. DiRose
85-C-773
Wende Correctional Facility
P.O. Box 11187
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. DiRose:

I have received your letter of May 9 in which you requested an advisory opinion concerning a denial of access to records.

According to the materials attached to your letter, you submitted a request to Walter D. Ford, Chief of the Endicott Police Department, for a copy of an "Endicott Police Department Detective Division Supplementary Report." In response to the request, Chief Ford "determined that the information requested is specifically exempted from disclosure relative to Section 87-2 of the freedom of information law." Chief Ford did not refer to your right to appeal the denial. As such, you recently appealed the denial to him. In your appeal, you contended that the record should be disclosed because the investigation has ended and you "are aware of all parties involved therein," including complainants and witnesses.

In this regard, I offer the following comments.

First, I believe that Chief Ford should have informed you of the right to appeal the denial and the name and address of the person or body to whom an appeal could have been made. Section 1401.7(b) of the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law, states that:

> "Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

Second, the right to appeal a denial 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."

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.

While I agree with your contention that "not all police reports are necessarily exempt" from disclosure, I am unfamiliar with the nature of the records that might have been prepared in conjunction with the investigation, and I cannot offer specific guidance concerning rights of access. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example. Further, the records sought might pertain to persons other than yourself. If that is so, depending upon the nature of the records and the effects of disclosure, there may be privacy considerations involving persons identified in the records.

Perhaps the most relevant provision concerning access to 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 and 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.

Records prepared by agency employees or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the content of the records in question and the effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: W.D. Ford, Jr., Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6092

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

May 24, 1990

Mr. Carlos Davila
88-A-0096
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. Davila:

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

In brief, as I understand your comments, you are unaware of the reasons for rejection by the Department of Correctional Services of your request for a transfer.

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 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.

I point out that a decision rendered in 1989 appears to have dealt with the kinds of records in which you are interested. In that case, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see matter of Kheel v. Ravitch, 62 NY

2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; ___AD 2d ___ (1989)].

Assuming that the records sought are the equivalent to those described in Rowland D., it appears that they could be withheld.

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-6093

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

May 24, 1990

Ms. Alison S. Gendar
The Herald Statesman
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.

Dear Ms. Gendar:

I have received your letter of May 17 in which you requested an advisory opinion concerning the Freedom of Information Law.

Your question is "whether an agency is required to provide an approximate date by which a FOIL request will be granted or denied as part of the agency's written acknowledgement of a FOIL request." The question was apparently precipitated by comments made by Linda DiGangi, records access officer for the City of Yonkers. Ms. DiGangi, according to your letter, "maintains the city does not have to set a date by which a request will be acted on" and contends that "the only deadline the city must meet...is the five business days for acknowledgement of receipt."

In this regard, section 89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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..."

Based upon the language quoted above, it is clear in my view that an acknowledgement of the receipt of a request must be accompanied by "a statement of the approximate date when such request will be granted or denied."

Further, if neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

As you requested, enclosed is a copy of the Freedom of Information Law, and copies of the Law and this opinion will be forwarded to Ms. DiGangi.

I hope that 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

cc: Lindi DiGangi, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6094

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

May 24, 1990

Mr. Richard L. Papiernik
Executive Business Editor
Capital Newspapers
News Plaza, Box 15000
Albany, New York 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, unless otherwise indicated.

Dear Mr. Papiernik:

I have received your letter of May 11, as well as the correspondence attached to it.

By way of background, you wrote that you have engaged in ongoing discussions with representatives of the Department of Law concerning complaints involving the General Development Corporation (GDC), a Florida firm having offices in New York for the purpose of selling home sites. The correspondence indicates that Elizabeth Lesly of your staff originally requested all complaints received by the Department regarding GDC. The request for the complaints was granted. Thereafter, the request was amended to include the entire file on the matter, which is maintained at the Department's Syracuse office. In response to that request, Richard Rifkin, Counsel to the Attorney General and Records Access Officer, wrote that the "entire file, which is voluminous, [would] be made available to you with certain exceptions..." The exceptions, according to Mr. Rifkin, involve inter-agency and intra-agency materials, which include "notes, internal memoranda, inter-agency documents and internal case management documents."

It is your view that certain portions of materials described above should be disclosed and that the "blanket prohibition" cited by Mr. Rifkin is inappropriate.

You have requested an advisory opinion concerning the portion of the request that has been denied. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. I point out, too, that the introductory language of section 87(2) refers to the authority to withhold "record or portions thereof" that fall within the scope of one or more of the grounds for denial. The quoted language in my view represents a recognition on the part of the State Legislature that a single record or report may be both accessible and deniable in part. I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

Second, in my opinion, two of the grounds for denial are relevant.

As you are aware, section 87(2)(g) pertains to the authority to withhold "inter-agency or intra-agency materials." Records prepared by officers or employees of the Department of Law that are used internally, within the Department, or which are transmitted to other agencies fall within the scope of section 87(2)(g). However, due to its structure, that provision may require disclosure, depending upon the contents of the records.

Specifically, section 87(2)(g), the basis for the denial of portions of your request, 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 may properly 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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under section 87(2)(g).

I point out that it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or determinations, may available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, 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 principal may be exempt form 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" [65 NY 2d 131 at 133 (1985)].

In short, if section 87(2)(g) is the only basis for denial, the characterization of records as "inter-agency or intra-agency materials" without more is, in my view, not determinative of rights of access. To reiterate, the contents of those records would constitute the basis for determining the extent to which such records must be disclosed or may be withheld.

However, I believe that a different ground for denial is likely significant with respect to the records sought. That provision is section 87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is section 3101 of tbe Civil Practice Law and Rules. Subdivision (c) of that statute states that: "The work product of an attorney shall not be obtainable."

Based upon a conversation with Mr. Rifkin, the records denied involve internal memoranda, notes and related documentation prepared by Department attorneys. In my view, those records would constitute the work product of an attorney that would be exempted from disclosure under section 3101(c) of the Civil Practice Law and Rules and, therefore, section 87(2)(a) of the Freedom of Information Law. In a decision rendered by the Court of Appeals concerning a different issue, the facts involved records sought from an agency by a person involved in litigation against the agency. The Court held, in brief, that one's status as a litigant is irrelevant to that person's rights as a member of the public under the Freedom of Information Law [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75 (1984)]. However, the Court also referred statutory exemptions from disclosure that may be asserted, irrespective of an applicant's status or need for records, stating that:

> "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and neither enhanced (Matter of Fitzpatrick v. County of Nassau, Dept. of Public Works, 83 Misc. 2d 884, 887-888, aff'd 53 AD 2d 628) nor restricted (Matter of Burke v. Yudelson, 51 AD 2d 673, 674) because he is also a litigant or potential litigant. To be distinguished of course would be claimed exemptions from FOIL on the basis of privilege (CPLR 3101, subd [b]), attorney's work product (CPLR 3101, subd [c]), and material prepared for litigation (CPLR 3101, subd [d]), none of them tied to the particular status of the party making the request" (id., 82).

Baaed upon the foregoing, although certain information found within inter-agency or intra-agency materials might ordinarily be available under section 87(2)(g), that information, insofar aa it consists of attorney work product, could in my view be withheld, for I believe that it is exempted from disclosure by statute.

It is noted that Mr. Rifkin emphasized that, although the records in question have been withheld, other records that have been disclosed to you reflect the substance and the outcome of those that have been denied. For instance, a case management sheet prepared by a Department attorney might indicate that a letter was sent such an Department attorney to GDC. While that sheet might properly be withheld, the letter referenced in the sheet would be available and, as I understand the situation, has in fact been disclosed to you.

I hope that the foregoing serves 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:saw

cc: Richard Rifkin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6095

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

May 24, 1990

Ms. Doreen Banks
[redacted]

The staff of the Committee on 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. Banks:

I have received your note of May 11, which appears on correspondence involving a request made under the Freedom of Information Law.

According to the materials, a local newspaper reported in January that the Manhasset-Lakeville Fire Department was investigating the possibility of arson at the site of a former estate. On April 11, you requested copies of "the notes taken during the investigation, any reports in progress and any conclusions that were drawn." In addition, you offered to pay fees for photocopying in advance of receipt of the records. The request was denied on the ground that the records are "part of investigatory files," and you characterized that response "as a vague, unsatisfactory answer." As such, you appealed the denial.

You have asked whether you are "doing something wrong, or is there is some wrinkle in the law preventing you from seeing this report."

In this regard, I offer the following comments.

First, the phrase "part of investigatory files" appeared in the Freedom of Information Law as originally enacted in 1974. That language is no longer part of the Law, which was repealed and replaced with the current statute, which became effective in 1978.

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

I am unfamiliar with the nature of the records that might have been prepared in conjunction with the investigation, and I cannot offer specific guidance concerning rights of access. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example. Therefore, depending upon the nature of the records and the effects of disclosure, there may be privacy considerations involving persons identified in the records.

Perhaps the most relevant provision concerning access to 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 and 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 intta-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 agency employees or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, while I believe that your request was appropriately made, the content of the records in question and the effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld.

Lastly, in conjunction with your appeal, I point out that section 89(4)(a) of the Freedom of Information Law states in relevant part that:

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

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the persons identified in your correspondence. In addition, enclosed for your review is a copy of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosure

cc: Robert W. Schmidt, County Attorney
Joseph G. Boslet, Fire Marshall

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6096

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

May 29, 1990

Mr. George A. Franco
89-T-4846
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr. Franco:

I have received your letter of May 11.

You asked initially whether a "Prosecutors Training Manual" maintained by the Division of Criminal Justice Services is subject to disclosure 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, 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, instructions to staff that affect the public or an agency's policy. Therefore, I believe that those aspects of the manual would be available, unless a different basis for denial could 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 witb 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 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" 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.

In your second area of inquiry, you requested copies of advisory opinions rendered under the Freedom of Information Law for 1988 and 1989. Please be advised that nearly one thousand such opinions have been prepared. As such, enclosed is a copy of the Committee's most recent annual report, which includes an index to the opinions. The more recent opinions are those with the highest numbers. By reviewing the index, you can request opinions of particular interest.

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-6097

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

May 29, 1990

Mr. Michael McKeon
[redacted]

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

Dear Mr. McKeon:

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

You have requested an advisory opinion concerning rights of access to records kept by Spectacor Management, Inc. pertaining to its operation of the Knickerbocker Arena (herinafter "the facility"). You wrote that the facility is owned by Albany County, which hired Spectacor to manage it. Although you believe that records involving the operation of the facility should be public, the County has, according to your letter, contended that Spectacor is a private firm not subject to the Freedom of Information Law and that the records sought fall outside the scope of that statute.

In response to an appeal following a denial of access to records, Mr. Joseph J. Dolan, Jr., the County's records access appeals officer, wrote that the agreement between the County and Spectacor gives Spectacor "full authority for the operation of the facility," that "The County is not in possession of the records sought and therefore is not required to produce such records," and that "Spectacor is an independent contractor hired to run the Knickerbocker Arena..." You indicated, however, that "county officials concede they have access to contracts and other documents regarding management of the arena but do not keep copies in their offices." The records sought, according to the determination of your appeal, involve "all contracts for services at the Knickerbocker Arena greater than $7,500, including the ticketing company, guard company, cleaning company and others." You also requested "the bids from the successful and unsuccessful bidders for each service at the Arena."

You enclosed portions of the management contract between the County and Spectacor. Several provisions may be relevant to the issue of disclosure of records. For instance, section I-1.01 states that the County engaged Spectacor "to act as its managing agent to operate, manage and maintain" the facility;" section II-2.01 specifies that the County is the owner of the facility "and has responsibility to build, operate and maintain the facility;" section III-3.02 states that employees hired by Spectacor are its employees, not County employees; section III-3.03A authorizes Spectacor to employ, compensate and discharge employees and the general manager of the facility; section III-3.03B requires that Spectacor "Maintain and supervise detailed, accurate and complete financial statements and other books and records of all of its activities under this agreement, including without limitation, the books of account and accounting procedures of the facility;" section III-3.03D requires that Spectacor submit a written report to the County, "at least monthly," indicating bookings, receipts, expenditures and similar information; section III.3.03E refers to "Rent, lease, or purchase of all non-capital (and capital items less than $7,500 in value), event-related and ordinary maintenance supplies for, and as the property of, the County" and states that: "Said rentals, leases, and purchases of less than $7,500 shall be accomplished by Spectacor Management using the same procedures employed by the County for such rentals, leases and purchases. Rentals, leases and purchases greater than $7,500 shall be subject to the bidding procedures of Albany County Purchasing Department;" section III-3.03G provides that Spectacor may enter into service contracts, "[s]ubject to the approval and consent of the County;" section III-3.03I states that: "The County Attorney shall approve the form of all contracts and agreements;" section V-5.01(a) requires Spectacor to "maintain current, accurate and complete financial records...relative to its activities at the facility" which "shall delineate all activities of the facility;" section V-5.01(b) requires that Spectacor "provide the county with detailed management reports and records relating to all revenues and expenditures, direct and indirect, of the facility at least on a monthly basis;" and section IX-9.02 states that Spectacor "shall make available to the County such information as is reasonably required or requested concerning Spectacor Management's supervision, operation, management, and maintenance of the facility."

Based on the foregoing, I offer the following comments.

First, I agree with the County contention that Spectacor, a private corporation, is not subject to the Freedom of Information Law. That statute is applicable to agency records, and 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."

Based upon the foregoing, Albany County, for example, is clearly an agency; a private corporation, such as Spectacor, would not in my view constitute an agency required to comply with the Freedom of Information Law.

Second, the status of Spectacor is not, in my opinion, the determining factor with respect to rights of access to the records that you requested. As indicated previously, the statute pertains to agency records, and section 86(4) of the Freedom of Information Law defines "record" expansively to include:

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

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" subject to rights of access granted by the Law. 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 cross-over between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

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).

I am unaware of any judicial decisions that deal with facts analogous to those presented in this situation. However, the definition of "record" includes not only documents that are maintained by an agency; it refers to documents are that are "kept, held, filed, produced or reproduced by, with or for an agency." Under the circumstances, it appears that the records sought, although in the physical possession of Spectacor, are kept and produced for an agency, Albany County.

Third, determination of your appeal characterizes Spectacor as an "independent contractor." However, the agreement refers to Spectacor as the County's "managing agent."

Since I am not an expert with respect to the duties and functions of "agents" and "independent contractors," terms which in my opinion are relevant to the resolution of the matter and to the capacity to provide appropriate advice, I reviewed New York Jurisprudence, 2nd, for guidance. Under the subject entitled "Agency," section 1 states in relevant part:

> "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. The word 'agency' imports the contemporaneous existence of a principal; there is no agency unless one is acting for and in behalf of another.

> "An agent is a person authorized by another to act on his account or under his control. An agent is one who acts for or in the place of another by authority from him. He is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other. He is a substitute or deputy appointed by his prinicpal, with power to do the things which the principal may or can do, and primarily to bring about business relations between the principal and third persons. It is generally understood that a 'manager' is an agent."

Section 9 pertains to "independent contractors" and states that:

> "The theory usually adopted to differentiate between an agent and an independent contractor is that one is to be regarded as an agent or an independent contractor according to whether he is subject to, or free from, the control of the employer with respect to the details of the work. Thus, an independent contractor may be distinguished from an agent in that he is a person who contracts with another to do something for him, but who is not controlled or subject to the control of the other in the performance of such contract, but only as to the result."

Clearly, Spectacor performs its duties for and on behalf of the County. According to the agreement, Spectacor cannot enter into any contract without the consent and approval of the County. Further, the agreement specifies that rentals, leases and purchases by Spectacor must be accomplished "by the same procedures" as if carried out by the County and transactions of more than $7,500 "shall be subject to bidding procedures of Albany County Purchasing Department." As such, the functions carried out by Spectacor are not wholly "independent"; rather, they are subject to the spproval of the County, and their procedures in terms of purcbasing must be carried as if the purchases were made by the County itself. Therefore, based upon New York Jurisprudence, 2nd, it appears that Spectacor is not an independent contractor as that term is generally used, but rather is an agent.

The facility, like other county entities, such as a nursing home, jail or an airport, is wholly owned by the County. Certainly contracts, books of account, bids and other records concerning the activities of those other entities are subject to rights conferred by the Freedom of Information Law and are generally accessible to the public. If the County's denial is proper, the public would have lesser rights of access to records pertaining to the facility than with respect to other County entities due solely to the fact that the County has hired a firm to operate the facility on its behalf. Similarly, a distinction in terms of rights of access would be the result, even though the County has the right to approve and review contracts and other records involving the expenditure of public money solely because the County does not have physical possession of the records and has chosen not to make or maintain copies of those records. In my view, the absence of rights of access based upon the County's contentions would effectively defeat the purpose of the Freedom of Information Law.

Although different from the instant situation, an analogy might be made between this case and the judicial interpretation of the Freedom of Information Law concerning records prepared by outside consultants retained by agencies. When an agency lacks the resources, staff or expertise needed to develop opinions or obtain facts concerning a function to be carried out by government, it might retain a consultant to provide needed expertise. Even though consultants or consulting firms may be private entities rather than governmental entities, it has been found that the records prepared by those entities or firms should be treated as if they were prepared by an agency. As stated by the Court of Appeals:

> "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)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed in the same manner as a record prepared by the staff of an agency. I would contend that a consultant's report, information "produced for" an agency, would fall within the scope of the Freedom of Information Law even if it is in the physical possession of a consultant rather than the agency. Any other conclusion would, in my opinion, serve to negate the effect of the decision rendered by the Court of Appeals.

In the situation at hand, Albany county owns the facility. As indicated earlier, the definition of "agency" appearing in section 86(3) refers to governmental entities performing "a governmental or proprietary function." While I am unaware of any judicial decisions on the subject, it appears that the County performs a proprietary function with respect to the facility, and it has engaged Spectacor as its agent. Like the records prepared by consultants for agencies, the records sought are in my opinion kept by and prepared for the County by Spectacor, its agent. Further, it is reiterated that Spectacor cannot rent, lease or make purchases as it sees fit; on the contrary, those transactions, according to the agreement, must be accomplished through procedures that are applicable to the County when it engages in the same kinds of transactions. Moreover, any such transactions are subject to review and approval by the County. If those transactions were carried out by County employees, I believe that the records would without question fall within the scope of tbe Freedom of Information Law and would with rare exceptions [i.e., the possibility that some aspects of bids might constitute trade secrets deniable under section 87(2)(d) or would, if disclosed, constAtute an unwarranted invasion of personal privacy under section 87(2)(b)], be accessible to the public. Since the County "shall" approve all contracts and agreements into which Spectacor seeks to enter on behalf of the County, and since the County "shall cause to be conducted an audit ('Audit') of Spectacor Management's entire operation at the facility" (see agreement, section V-5.02), the County appears to enjoy substantial control over Spectacor's operation and full access to records maintained by Spectacor as the County's agent. I do not believe that a similar degree of control or review in the typical relationship between an agency of government and an "independent contractor."

In a decision cited earlier, the Court of Appeals discussed the scope and intent of the Freedom of Information Law and found that:

> "Key is the Legialature'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 in-

> crease 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).
>
> "...For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester-Rockland Newspapers, supra, at 579].

To be consistent with the intent of the Freedom of Information Law and its broad interpretation by the state's highest court, I believe that the County must give effect to the Law so as to "extend public accountability wherever and whenever feasible." The County, according to its agreement with Spectacor, has substantial control with respect to operation of the facility and enjoys complete rights of access to the records maintained by Spectacor that are the subject of your request. While I do not believe that the Freedom of Information law would generally extend to documentation maintained by firms that do business with government, the facts in this instance and the terms of the agreement describing the relationship between the County and Spectacor in my opinion indicate that the materials that you requested consist of information kept or produced for the County by Spectacor and, therefore, constitute "records" subject to rights conferred by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
cc: Joseph J. Dolan, Jr., Appeals Officer
William J. Conboy II, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6098

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

May 30, 1990

Mr. Daniel Sullivan
[redacted]

Dear Mr. Sullivan:

I have received your recent letter, which reached this office on May 17.

Based upon a review of your comments and the materials attached to it, I do not believe that I can add to the points offered in my letter of May 10 concerning rights of access to the records in question. From my perspective, whether the records related to one police officer or a dozen, which appears to have been the case, the analysis of rights of access to records would be the same.

However, as I understand your comments, while one problem involves access to records, other issues involve the policies and procedures of the Police Department and the Civilian Complaint Review Board relative to your efforts to reopen the case. I am unfamiliar with the procedures of the Department and the Board. However, if your intent is to reopen the case, it is suggested that you attempt to review and determine whether the Department or the Board complied with rules and procedures that they are required to follow.

In my opinion, it is likely that those rules and procedures should be available in great measure, if not in their entirety, under the Freedom of Information Law. As indicated in the earlier opinion, 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, two of the grounds for denial may be relevant to right of access to such rules and procedures. However, the contents of such records and the effect of disclosing them would determine the extent to which they may be withheld.

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 instructions to staff that affect the public or an agency's policy. Therefore, I believe that those aspects of the manual would be available, unless a different basis for denial could 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 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" 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.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6099

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

May 30, 1990

Mrs. Elmer Gayder
[redacted]

The staff of the Committee on 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. Gayder.

I have received your letter of May 17.

As I understand the situation, you submitted a request under the Freedom of Information Law to the City of Amsterdam some time ago. Having received no response to the request, it was advised that you could appeal on the ground that the request had been constructively denied pursuant to section 89(4)(a) of the Freedom of Information Law. Thereafter, on May 7, you wrote to the Deputy Mayor and requested a meeting with the Common Council for the purpose of determining your appeal. As of the date of your letter to this office, you had received no response.

In this regard, having reviewed earlier correspondence with you, it is reiterated that section 89(4)(a) of the Freedom of Information Law states in relevant part that:

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

Under the circumstances, it is suggested that you submit an appeal directly to the Common Council.

Further, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required by 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council
James Martuscello, Deputy Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6150

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

May 30, 1990

Ms. Diana B. Stern
Director
Woodstock Public Library District
5 Library Lane
Woodstock, NY 12498

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

Dear Ms. Stern:

As you are aware, I have received your letter of May 16 and the materials attached to it.

Your inquiry relates to problems arising in conjunction with a series of requests made by Mr. David Boyle.

The first problem involves what appears to be an expectation that requests be answered instantly when Mr. Boyle visits your office and seeks records. In this regard, section 89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based upon the foregoing, a agency may require that a request be made in writing. Further, while you may respond immediately to a request, the Law provides up to five business days from the receipt of a request to respond. The response can grant the request, deny access, or acknowledge the receipt of a request if additional time is needed to locate or review records to determine rights of access.

The second problem "is that Mr. Boyle seems to be appealing a request that was denied because the record does not exist". In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that an agency need not create or prepare a record in response to a request. Moreover, from my perspective, an agency can grant or deny access only with respect to those records that it maintains. Stated differently, if a record does not exist, an agency can neither provide nor withhold it. Therefore, a response indicating that a record sought does not exist is not, in my view, a denial of access that may be appealed.

Lastly, you wrote that Mr. Boyle s requests "are confusing". Again, I direct your attention to section 89(3) of the Freedom of Information Law, which requires that an applicant "reasonably describe" the records sought. Based upon that standard, while I do not believe that request must specify records with particularity, the request must in my view include sufficient detail and clarity 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

cc: David Boyle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6101

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

May 30, 1990

Mr. R. Milton Jeinnings
[redacted]

Dear Mr. Jeinnings:

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

Your inquiry concerns the application of the Freedom of Information Law with respect to "very old court records such as promissory notes, inventories of estates, judgements, etc. that are in dead storage in any certain County seats". You added that you are trying to establish the parentage of an ancestor who migrated to Otsego County from Vermont.

In this regard, I offer the following comments.

First, although the Freedom of Information Law generally applies to records maintained by entities of state and local government in New York, the courts and court records are not subject to that statute. While the Freedom of Information Law does not include court records within its coverage, various other provisions of law grant broad rights of access to those records. I point out, however, that some court records may be destroyed or transferred pursuant to section 89 of the Judiciary Law, a copy of which is enclosed.

Second, access to vital records (i.e., birth, death and marriage records) is governed by statutes other than the Freedom of Information Law, and the Department of Health has developed rules and procedures relating to those records, as well as genealogical searches. To obtain additional information on the subject, it is suggested that you call (518) 474-3055 or write to:

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

Lastly, I believe that most counties have county historians, and that some maintain archives. As such, it is suggested that you contact the appropriate county historian for the purpose of obtaining guidance concerning the source or location of the records in which you are interested.

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-6102

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

May 30, 1990

Ms. Arlene R. Popkin
Senior Counsel
Criminal Division
The Legal Aid Society of
Westchester County
Ninth Floor
One North Broadway
White Plains, NY 10601-2352

The staff of the Committee on 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. Popkin:

I have received your letter of May 17 in which you requested an advisory opinion concerning the Freedom of Information Law.

Attached to your letter are several items of correspondence, one of which is a request for records directed to the Mt. Vernon Police Department. The request involved:

> "a) all documents and correspondence pertaining, in whole or in part, to incidents taking place in Matamoras, Pennsylvania on or about March 9, 1990 (the day of the funeral of New York State Trooper Joseph Aversa), including, but not limited to: correspondence between Chief Stevens of the Matamoras Police and Commissioner Lucas, and correspondence between Chief Fuchila of the New Castle Police and Commissioner Lucas;

> b) a copy of the 'reasonably detailed current list by subject matter of all records in the possession of the' Mount Vernon Police required by Public Officers Law [section] 87(3)(c)."

In response to the request, the City's records access officer denied access, citing section 87(2)(g) of the Freedom of Information Law with respect to item a) of the request. With respect to item b), the records access officer wrote that "the material requested is voluminous and goes back many years", and she asked that you "be more specific in your request, signifying a particular period so that your request could be granted". You appealed the denial, and David Avstreih, the City s Corporation Counsel, affirmed, indicating that he "reviewed the matter and the appropriate law and based upon same hereby deny your appeal".

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 some of the documents described in item a) of your request could be characterized as "inter-agency materials" falling within the scope of section 87(2)(g) of the Freedom of Information Law, I do not believe that all such documents could be so characterized. The phrase "inter-agency materials" in my view pertains to communications made between or among agencies. 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."

Based upon the foregoing, in general, an entity of state or local government in New York could constitute an "agency".

While correspondence between the City of Mt. Vernon and the Town of New Castle, both of which are agencies, would constitute inter-agency material, Matamoras is located in the State of Pennsylvania and is not an "agency" as defined by section 86(3) of the Freedom of Information Law. Therefore, I do not

Vernon and officials of Matamoras consist of inter-agency materials. Further, since section 87(2)(g) would not, in my view, serve as a basis for withholding correspondence with Matamoras officials, such records would be available under the Freedom of Information Law, unless a different ground for denial could appropriately be asserted.

As suggested earlier, the remaining records sought under item a) would apparently fall within the scope of section 87(2)(g). While that provision serves as a basis for denial, 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, unless a different ground for denial may properly 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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under section 87(2)(g).

I point out that it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or final agency determinations, would be available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal may be exempt form 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" [65 NY 2d 131 at 133 (1985)].

In short, if section 87(2)(g) is the only basis for denial, the characterization of records as "inter-agency materials" without more is, in my view, not determinative of rights of access. To reiterate, the contents of those records would constitute the basis for determining the extent to which such records must be disclosed or may be withheld.

Third, with respect to item b) of your request, it appears that city officials have misunderstood the meaning of section 87(3)(c) of the Freedom of Information Law. By way of background, section 89(3) of the Freedom of Information Law states in part that an agency need not create or prepare a record, except as provided in section 87(3). The latter requires that agencies maintain certain records, one of which is the list that you requested. Section 87(3) states in relevant part that:

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

I do not believe that the record required to be maintained pursuant to the provision quoted above must identify each and every record kept by an agency; however, I believe that such a list must be prepared and include reference, by category and in reasonable detail, to all records maintained by an agency.

Lastly, in my opinion, the response to your appeal, which consisted of one sentence, was inadequate. Section 89(4)(a) of the Freedom of Information Law requires that the response to an appeal "shall...fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the City's Records Access Officer and the Corporation Counsel.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ingrid S. Albert, Records Access Officer
David Avstreih, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6103

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

May 30, 1990

Mr. Ronald L. Morris
88-T-2194
Collins Correctional Oacility
Helmuth, NY 14079-200

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

Dear Mr. Morris:

I have received your letter of May 15 addressed to Barbara Shack, the Chair of the Committee. As indicated above, the staff of the Committee is authorized to render advisory opinions on its behalf.

You asked whether you are entitled under the Freedom of Information Law to obtain information reflective of "the identities of the Buffalo Police Officers who according to the arresting officer had a 'face to face' conversation with said unidentified police officers 'prior' to your arrest".

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 states in part that an agency need not create or prepare a record in response to a request. Therefore, if, for example, no record exists that contains the information sought, the Freedom of Information Law would not require an agency to prepare such a record on your behalf. Further, in such a circumstance, I do not believe that the Freedom of Information Law would be applicable.

Second, assuming that a record exists containing the information in question, it would be subject to rights conferred by 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.

Third, I am unfamiliar with the nature of the records that might have been prepared in conjunction with the arrest, and I cannot offer specific guidance concerning rights of access. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a confidential source, for example.

Perhaps the most relevant provision concerning access to 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 and 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).

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-107
FOIL-AO-6104

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

May 31, 1990

Mr. Gerald C. Gaudette, Sr.
RR#1-Butler Road
Box 51
Plattsburgh, NY 12901-9706

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

Dear Mr. Gaudette:

I have received your letter of May 21 in which you wrote that you are interested in receiving information "pertaining to the Freedom of Information Laws and Privacy Act for New York State". You added that you have attempted without success to obtain the transcript of a city court proceeding in which you were a party.

In this regard, I offer the following comments.

First, both the Freedom of Information Law and the Personal Privacy Protection Law are applicable to agency records. For purposes of the Freedom of Information Law, section 86(3) of that statute 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."

For purposes of the Personal Privacy Protection Law, section 92(1) of that provision defines "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based upon the foregoing, neither the Freedom of Information Law nor the Personal Privacy Protection Law would apply to the courts or court records.

Second, while the statutes referenced in your letter are not applicable, other provisions of law often grant substantial rights of access to court records. For instance, section 255 of the Judiciary Law generally requires the clerk of a court to disclose records in his custody.

Enclosed for your review are copies of the Freedom of Information Law, the Personal Privacy Protection Law and section 255 of the Judiciary Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-107
FOIL-AO-6104

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

May 31, 1990

Mr. Gerald C. Gaudette, Sr.
[redacted]

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

Dear Mr. Gaudette:

I have received your letter of May 21 in which you wrote that you are interested in receiving information "pertaining to the Freedom of Information Laws and Privacy Act for New York State". You added that you have attempted without success to obtain the transcript of a city court proceeding in which you were a party.

In this regard, I offer the following comments.

First, both the Freedom of Information Law and the Personal Privacy Protection Law are applicable to agency records. For purposes of the Freedom of Information Law, section 86(3) of that statute 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."

For purposes of the Personal Privacy Protection Law, section 92(1) of that provision defines "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based upon the foregoing, neither the Freedom of Information Law nor the Personal Privacy Protection Law would apply to the courts or court records.

Second, while the statutes referenced in your letter are not applicable, other provisions of law often grant substantial rights of access to court records. For instance, section 255 of the Judiciary Law generally requires the clerk of a court to disclose records in his custody.

Enclosed for your review are copies of the Freedom of Information Law, the Personal Privacy Protection Law and section 255 of the Judiciary Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6185

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

May 31, 1990

Mr. Joseph Racanelli
Legal Assistant
The Legal Aid Society
Civil Division
11 Park Place, 5th Floor
New York, NY 10007

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

Dear Mr. Racanelli:

I have received your letter of May 18, as well as the correspondence attached to it.

As I understand the situation, you requested from the New York City Housing Authority copies of all documents, including "interview records" relating to an application by your client. Although a portion of the request was granted, the "interview records pertaining to the processing of an application" were characterized as "internal documents" and were withheld on that basis. It is your belief that "most, if not all, of these interview sheets contain information recorded from conversations between [y]our client and the interviewer for the authority".

You have requested an advisory opinion concerning the propriety of 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, one of the grounds for denial, section 87(2)(b), indicates that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". If it can be assumed, however, that the records in

question pertain solely to your client, I do not believe that disclosure to the client or to you as her legal representative would result in such an invasion of privacy. Moreover, section 89(2)(c) of the Freedom of Information Law states that, unless a different ground for denial may be asserted, disclosure shall not be construed to constitute an unwarranted invasion of personal:

> "ii. when the person to whom a record pertains consents in writing to disclosure;
>
> iii. when upon presenting reasonable proof of identity a person seeks access to records pertaining to him."

The other ground for denial of likely relevance is section 87(2)(g), which includes within its scope "internal documents". However, that provision due to its structure, 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, unless a different ground for denial may properly 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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under section 87(2)(g).

I point out that it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or final agency determinations, would be available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal may be exempt form 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" [65 NY 2d 131 at 133 (1985)].

In short, if section 87(2)(g) is the only basis for denial, the characterization of records as "inter-agency materials" without more is, in my view, not determinative of rights of access. To reiterate, the contents of those records would constitute the basis for determining the extent to which such records must be disclosed or may be withheld.

Lastly, I point out that section 159 of the Public Housing Law states in brief that information acquired by a public housing authority from applicants for dwellings in projects of an authority are confidential. Section 159 appears to be intended to protect privacy of applicants for or tenants in a public housing. Since the records access officer did not refer to that provision in his response, it is assumed that it would not be applicable with respect to the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Norman Parnass

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1770
FOIL-AO-6106

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

June 1, 1990

Mr. Michael Weber
New York Newsday
80-02 Kew Gardens Road
Kew Gardens, NY 11415

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

Dear Mr. Weber:

I have received your letter of May 18, as well as the materials attached to it.

Your inquiry pertains to the disclosure of records by the New York City Conflicts of Interest Board, which was created by Chapter 68 of the New York City Charter. By way of background, in conversations with the Board's staff concerning 1990 financial disclosure reports, you raised questions about changes made in this year's disclosure statements. Having learned "that the Board had actually discussed the disclosure statement changes", you requested copies of minutes of the meetings during which changes were considered and made. In response to the request, the executive director of the Board, Ms. Priscilla Lundin, denied access to the records sought, citing section 2603(k) of the City Charter. That provision states that:

> "Except as otherwise provided in this chapter, the records, reports, memoranda and files of the board shall be confidential and shall not be subject to public scrutiny".

You added that the Conflicts of Interest Board "does not have public meetings" and that "Board meetings are not publically [sic] announced and the minutes are not made available to the public".

It is your view that the Board has acted in violation of both the Freedom of Information Law and the Open Meetings Law, and you requested an advisory opinion concerning the issues that you raised. 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.

The initial ground for denial, section 87(2)(a), deals with records that may often be characterized as "confidential", for it enables an agency to withhold 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 a local enactment, such as an administrative code, charter 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 section 2603 of the New York City Charter was not enacted by the State Legislature, it would not, based upon judicial interpretations of the Freedom of Information Law, constitute a "statute" that exempts records from disclosure. Conversely, if it was enacted by the State Legislature, the records in question would, in my view, be specifically exempted from disclosure by statute.

Assuming that the section of the Charter at issue does not constitute a "statute", I believe that the records maintained by the Board would be subject to the provisions of the Freedom of Information Law. This is not to suggest that all records of the Board must be disclosed, for various records or portions thereof would likely fall within one or more of the grounds for denial appearing in the Freedom of Information Law; rather, I am suggesting that section 2603(k) of the Charter would not serve as a statutory exemption from disclosure that would serve as a basis for withholding records.

Second, with respect to the Open Meetings Law, that statute is applicable to public bodies. Section 102(2) of the Open Meetings 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."

The Board, according to section 2602 of the Charter, is an entity consisting of three members, two of whom constitute a quorum. Further, that section of the Charter in my opinion clearly indicates that the Board conducts public business and performs a governmental function for a public corporation, the City of New York. As such, I believe that the Board is a public body required to comply with the Open Meetings Law.

Although I could not locate any provision of the Charter specifying that meetings of the Board may be conducted in private, I do not believe that a rule or policy generally authorizing the Board to conduct meetings in private would serve to remove its meetings from the coverage of the Open Meetings Law. Further, section 110 of the Open Meetings Law, entitled "Construction with other laws", states in subdivision (1) that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

A statute enacted by the State Legislature authorizing closed meetings would, in my view, supersede the Open Meetings Law. However, a rule, a local law or a charter provision more restrictive with respect to public access than the Open Meetings Law would be superseded by the Open Meetings Law.

Again, in a manner analogous to the Freedom of Information Law, assuming that there is no statute that exempts the Board form the requirements of the Open Meetings Law or authorizes the Board to conduct its meetings in private, I believe that its meetings must be held in accordance with the Open Meetings Law.

While meetings held by public bodies subject to the Open Meetings Law must generally be conducted in public, I point out that the Law permits closed or executive sessions to be held to consider certain subjects [see section 105(1)(a) through (h)]. Moreover, one of the grounds for entry into an executive session could likely be properly asserted to exclude the public from those portions of meetings during which the activities of particular public employees are discussed. Specifically, section 105(1)(f) permits a public body to enter into an executive session to discuss:

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

However, in the context of the issue that you raised, a discussion of changes in the financial disclosure statement, the issue in my opinion should have been discussed in public, for none of the grounds for entry into executive session could properly have been asserted. The issue, from my perspective, involved a matter of policy. Although that policy might impact upon many public officers or employees, it would not apparently have focused on any "particular person".

It is also noted that every meeting must be preceded by notice of the time and place of a meeting. Subdivision (1) of section 104 of the Open Meetings Law pertains to meetings scheduled at least a week in advance and requires that notice of such meetings must be given to the news media and posted in one or more designated public locations not less than 72 hours prior to those meetings. Subdivision (2) of section 104 pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and posted in the same manner described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. The usual method of compliance with the notice requirements for meetings that must be convened quickly involves contacting the news media by phone and posting notice in one or more of the locations designated for posting.

Third, 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; pro-

> vided, 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.

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 rendered by a public body must be prepared and made available for inspection and copying to the extent required by the Freedom of Information Law.

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, a record, presumably minutes, must be prepared that indicates the manner in which each member cast his or her vote.

A copy of this opinion will be forwarded to the Board's executive director.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Priscilla Lundin, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6107

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

June 1, 1990

Mr. James A. Hill
83-A-5158 L-H-1-23
Clinton Correctional Facility
P.O. Box 367-B
Dannemora, NY 12929

Dear Mr. Hill:

I have received your letter of May 28 in which you requested various records from this office, including medical records maintained at your facility and various other records concerning your status as an inmate. In addition, you requested copies free of charge due to your status as a poor person.

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 does not maintain records generally, nor is it empowered to compel an agency to grant or deny access to records. In short, I cannot provide the records in which you are interested because the Committee does not maintain those records.

Second, a request for records should be directed to the agency that maintains the records. In this instance, it would appear that the records in question are maintained by the Department of Correctional Services, and I believe that a request should be made to the facility superintendent.

Third, 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.

Further, it appears that the governing statute concerning access to medical records 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

Lastly, there is nothing in the Freedom of Information Law that requires the waiver of fees due to one's status as a poor person. In a recent decision involving a request for records made by an inmate who asked that fees for copies be waived, it was held that an agency could charge a fee for copies of records made available under the Freedom of Information Law, notwithstanding the inmate's indigency [see Whitehead v. Morgenthau, 552 NY 2d 518 (1990)].

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-6108

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

June 4, 1990

Mr. Alan N. Sussman
Ricken, Goldman, Sussman & Blythe
185 Fair Street
P.O. Box 3510
Kingston, NY 12401

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

Dear Mr. Sussman:

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

Your inquiry concerns a request for records maintained by the Onteora Central School District concerning an incident involving a student and a teacher. According to a "Statement of Facts" with which you, acting as the attorney for the student's mother, and Ms. Rochelle Auslander, the attorney for the District, have agreed, you made requests pertaining to the incident on November 20, 1989, and January 5, 1990. The statement indicates that you "had learned that some administrative reprimand had been delivered to the teacher as a result of the incident" and that you sought, on behalf of your client, "copies of all investigations, decisions, reprimands, etc. (if any) in the employment or personnel file of the teacher concerning the incident". The statement indicates further that "[t]he teacher's file does contain an evaluation related to the incident but no other relevant documents", and that the District has denied your request. The materials specify that the record (or records) sought consist of intra-agency materials that need not be disclosed under the Freedom of Information Law.

In your cover letter and the statement of facts, it was asserted that, in an effort to avoid costly litigation and to resolve the dispute in a reasonable manner, you and Ms. Auslander agreed to "abide by" my opinion.

Before offering an opinion, I would like to confirm that the authority conferred upon the Committee on Open Government is advisory. While advisory opinions are intended to be educational and persuasive, nothing in the Freedom of Information Law empowers the Committee or its staff to compel an agency to grant or deny access to records. Therefore, while the parties may choose to abide by an advisory opinion, the Freedom of Information Law does not require that an opinion be considered as binding. Further, while the materials that you forwarded appear to include adequate information to prepare an advisory opinion, I have not viewed the record that is the subject of the opinion, nor do I have the authority to review the record prior to preparing an opinion.

With regard to the issue of rights of access, 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, is appears that two of the grounds for denial may be relevant to your inquiry. The capacity to assert those provisions appropriately would, in my view, be based upon the contents of the records, the effects of their disclosure and the effect of other statutes that may be applicable.

Of potential significance 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". 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); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Powhida v. City of Albany, 147 AD 2d 236 (1989); 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].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which the determinations indicating the imposition of some sort of disciplinary actions pertaining to particular public employees were found to be available. 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 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)."

In short, to the extent that the material in question is reflective of a reprimand or a finding of misconduct on the part of a teacher, that portion, at the very least, must, based upon judicial interpretations of the Freedom of Information Law, be disclosed.

The other ground for denial of possible significance, as suggested in the correspondence, is section 87(2)(g), which deals with inter-agency and intra-agency materials. While I believe that the documentation in question may be characterized as "intra-agency material" that falls within the scope of section 87(2)(g), that provision, due to its structure, may require 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, unless a different ground

for denial may properly 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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under section 87(2)(g).

I point out that it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or final agency determinations (i.e., reprimands or findings of misconduct), would be available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal may be exempt form 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" [65 NY 2d 131 at 133 (1985)].

In short, if section 87(2)(g) is the only basis for denial, the characterization of records as "intra-agency materials" without more is, in my view, not determinative of rights of access. To reiterate, the contents of those records would constitute the basis for determining the extent to which such records must be disclosed or may be withheld in conjunction with the commentary offered earlier.

Fourth, if the record in question contains personally identifiable information concerning the student involved in the incident, the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C., section 1232g, might affect the District's authority to withhold the records.

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 key issue in terms of FERPA is whether the materials sought constitute "education records". The regulations promulgated by the U.S. Department of Education pursuant to FERPA state in relevant part that:

> "'Education records' [a] the term means 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..."
> [3][i] Records relating to an individual who is employed by an educational agency or institution, that -
> [A] Are made and maintained in the normal course of business;
> [B] Relate exclusively to the individual in that individual's capacity as an employee; and
> [C] Are not available for use for any other purpose" [34 CFR 99.3].

In order to acquire information concerning the application of FERPA, I contacted the FERPA office at the U.S. Department of Education.

Based upon the statement of facts that you provided, it was advised that the documentation in question, if it is "directly related to a student", is an "education record" that should be disclosed to the parent of the student.

A factor in the discussion involved the portion in the statement of facts indicating that the teacher's file contains "an evaluation related to the incident". It was assumed that the preparation of an evaluation was precipitated by the incident. If the evaluation was "made and maintained in the normal course of business", as is likely the case with respect to routine evaluations of all teachers, it would not be an "education record" subject to the requirements of the FERPA. If that is so, rights of access would be determined solely on the basis of the Freedom of Information Law. However, if the evaluation was prepared as a result of the incident and if it relates directly to the student, I was advised that it would be an "education record" that must be disclosed to the parent of the student pursuant to the FERPA.

I point out that section 89(6) of the Freedom of Information Law provides that:

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

Therefore, if the record is accessible to the parent as of right under the FERPA, nothing in the Freedom of Information Law [i.e., section 87(2)(g)] could be asserted to withhold the record.

If the assumption described above is inaccurate, if the evaluation was routinely prepared in a manner unrelated to the incident, again, I do not believe that it would be an education record or, therefore, that the FERPA would apply.

In the discussion with the representative of the FERPA office, I was informed that, upon presentation of additional facts, that office would be willing to draft a written opinion. As such, if you feel that my analysis is based upon a misinterpretation of the facts or is otherwise inadequate, an additional opinion may be sought by writing to Ms. Ellen Campbell, FERPA Office, U.S. Department of Education, Room 1087, 400 Maryland Avenue, S.W., Washington, DC 20202. That office may be reached by phone at (202) 401-2057.

I hope that you found my opinion to have been complete, fair and accurate with respect to the facts and the application of the law. A copy of the opinion will be forwarded to Ms. Auslander. If either you or Ms. Auslander have questions or comments, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rochelle Auslander, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6109

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

June 4, 1990

Mr. Stephen Rigge
[redacted]

Dear Mr. Rigge:

I have received your letter of June 2 in which you requested information needed to use the "Freedom of Information Act".

In this regard, for purposes of clarification, the "Freedom of Information Act" is a federal statute that applies to records maintained by federal agencies. Separate from that statute is the New York "Freedom of Information Law", which generally pertains to records maintained by entities of state and local government in New York.

The Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, and I have enclosed copies of that statute and an explanatory brochure on the subject. Although I am familiar with the federal Act, this office does not maintain any printed information concerning the Act, which may be found in 5 U.S.C. section 552.

Under the Freedom of Information Law, in brief, a request should be directed to the "records access officer" at the agency that maintains the records sought. The records access officer has the duty of coordinating an agency's response to requests, and section 89(3) of the Law requires that a response be made within five business days of the receipt of a request that "reasonably describes" the record. As such, a request should include sufficient detail to enable agency officials to locate the record. The federal Act also requires that a request reasonably describe the record. Such a request should be made to the Freedom of Information Officer at the agency maintaining the record, who has ten days to respond.

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-1110

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

June 5, 1990

Ms. Alexandreena Dixon
[redacted]

The staff of the Committee on 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. Dixon:

I have received your letter of May 18. You have requested my views concerning rights of access to records of the Ramapo Central School District that are described in correspondence attached to your letter. In addition, you asked whether the Committee on Open Government "can compel the District to comply with a ruling that allows access or whether a court proceeding would be required".

In this regard, it is noted at the outset that the Committee on Open Government cannot issue what might be characterized as a "ruling"; rather, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. While an advisory opinion is not binding, it is intended to be educational, persuasive and to enhance compliance with the Freedom of Information Law. If an agency determines to deny access to records pursuant to an appeal, the applicant may seek judicial review of the denial pursuant to section 89(4)(b) of the Freedom of Information Law by commencing a proceeding under Article 78 of the Civil Practice Law and Rules.

One of the requests attached to your letter is dated May 17 and is addressed to the District's records access officer. The request involves the following:

> "1. All documentation setting forth instruction to staff pertaining to the criteria for placement in 01 level courses in English and History at the Suffern High School. This should in-

clude the actual point scores required for admission based upon standardized test scores. This request is for the years 1984 to present.

2. All manuals of instructions for examiners, teachers and administrators for all standardized test, i.e., Iowa Test of Basic Skills, Cognitive Abilities Test, Differential Aptitude Tests, etc.

3. Redacted copies of the teachers' marking book for the 1988-1989 enriched 8th grade Social Studies and English classes; the 1987-1988 8th grade acceleration classes in Social Studies and English; and 1988-1989 8th grade regular Social Studies and English classes of any teacher; any 1988 and 1989 regular Social Studies, English and Core classes of Mr. Hurd and Mrs. Depalma; all the 1989-1990 Social Studies and English and Core classes for the 7th grade; and all 7th grade Mathematics classes of Mrs. Thomas."

The other letter is an appeal that followed a request of April 24 that was denied either directly or "by omission" by the District's attorney. You wrote that the records denied include:

"1. The yellow sheet, that has been described as a worksheet by the School District Attorney, Mr. Reuben Ortenberg, showing the point scores assigned to the students who will comprise the upcoming enriched English and Social Studies classes. This sheet was presented to Mr. Kaufman by Mr. Miele on April 24, 1990. [Your] request asked that the names of the students be redacted.

2. The redacted profiles or point scores used for placement of the current 8th grade and the proposed upcoming enriched English and Social Studies classes.

3. All documentation outlining the criteria previously used for the acceleration programs in History and English which the school no longer offers."

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."

Based upon the foregoing, I believe that any materials that are kept, held, filed, produced or reproduced by, with or for the District constitute "records" subject to rights conferred by the Freedom of Information Law, irrespective of their function, use or origin.

Second, 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 or prepare a record in response to a request. Therefore, if, for example, the District does not maintain records involving criteria that are no longer used in certain programs that are no longer offered, I do not believe that the District would be obliged to prepare records on your behalf in response to a 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. I point out 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 contain both accessible information and information that need not be disclosed. In addition, that phrase, in my view, imposes an obligation upon agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

With respect to the records sought that do not include information identifiable to students, such as manuals and records pertaining to or containing "criteria" used in relation to placement or programs, I believe that one of the grounds for denial, section 87(2)(g), is relevant. Although that provision serves as a possible basis for withholding records, often, due to its structure, it 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, 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.

While the records in question could be characterized as "intra-agency materials", it appears that they would consist largely of "instructions to staff that affect the public" accessible under section 87(2)(g)(ii) or, insofar as they contain "criteria", they would likely be reflective of District policy accessible under section 87(2)(g)(iii).

The remaining records that you requested would apparently contain a variety of information identifiable to students. I believe that those records would also constitute intra-agency materials. However, they would appear to consist wholly of statistical or factual information that must be disclosed pursuant to section 87(2)(g)(i), unless a different ground for denial may be asserted.

Two grounds for denial that are applicable under the circumstances are section 87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute" and section 87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy".

A statute that exempts records from disclosure is the Family Educational Rights and Privacy Act (20 U.S.C. section 1232g). In brief, that statute 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, the Act 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.

From my perspective, to the extent that the records sought contain personally identifiable information pertaining to students (other than your children), they may be withheld. However, as suggested earlier, if the District can delete identifying details concerning students to protect their privacy under the Freedom of Information Law or as required by the Family Educational Rights and Privacy Act, I believe that it must do so and provide access to the remainder of the records. It is noted that in what may have been a similar request made in a neighboring district, the East Ramapo Central School District, the Appellate Division ordered that alphabetical lists of students and their test scores be disclosed after deleting students' names and "scrambling" the lists in order to preclude the identification of any particular student or students. Specifically, in Kryston v. East Ramapo School District, the court described the facts as follows:

> "The petitioner, a parent of a student in the respondent school district, seeks disclosure of certain standardized reading and mathematics test scores of children who attended grade 3 in the El Dorado School during the 1977-1978 school year. Specifically, the petitioner expressed an interest in the scores of six tests. Of these, the scores on four were tabulated and recorded alphabetically by student surname. The remaining test scores were not compiled in alphabetical order. When respondents refused to release any of the scores, the petitioner instituted a proceeding pursuant to CPLR article 78, inter alia, to compel disclosure. The court granted the petition in part by directing,

> inter alia, that the respondents release those scores not compiled in alphabetical order after first deleting the names of the students. The court declined, however, to order the release of scores listed in alphabetical order, holding that such disclosure would violate section 87 (subd 2, par [b]) of the Public Officers Law as well as relevant provisions of the Family Educational Rights and Privacy Act (US Code, tit 20, [section] 1232g). The court reasoned that those scores, even if released with the names of students deleted, would be identifiable to at least some of the students since their number was sufficiently small - 75 - to permit correlation to the alphabetical list. Recognizing that this danger could be obviated by directing the respondents to rearrange the scores in other than alphabetical order, the court nevertheless declined to do so holding that the respondents had no affirmative duty to prepare a new record in order to make information available for public inspection" [77 AD 2d 896, 897 (1980)].

Nevertheless, the court ordered disclosure, stating that:

> "Under the circumstances of this case, we conclude that the court's failure to order disclosure was error...We agree with Special Term that release of an alphabetical list of test scores would constitute disclosure of personally identifiable information since only 75 students are involved. We hold, however, that the court should have ordered the respondents to rearrange the scores so as to take them out of alphabetical order. As the court correctly held, an agency is not required to prepare a new record to accommodate public disclosure. Subdivision 3 of section 89 of the Public Officers Law provides in part that 'Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity . Subdivision 4 of section 86 of the same statute defines the term 'record' as 'any information kept, held, filed, produced or reproduced by, with or for an agency *** in any physical form whatsoever'. We are

> of the view, however, that, within the meaning of the foregoing statutes, rearranging or 'scrambling' the test scores so as to change the order in which they are listed would not constitute the preparation of a 'record not possessed or maintained' by the respondents. Were there any doubt on this question it would properly be resolved in favor of the petitioner since public disclosure statutes, both State and Federal, have been liberally construed to permit maximum access to documents. (See, e.g., Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181; Vaughn v Rosen, 484 F2d 820, 823.) Disclosure of the test scores here, in a 'scrambled' order and with names deleted, would protect the privacy of the students, provide the petitioner with the records she seeks, and impose no onerous burden upon the agency. It would therefore, be fully consistent with the policy considerations and objectives underlying the Freedom of Information Law as well as appropriate Federal statutes" (id. at 897).

In sum, to the extent that the records sought are analogous to those described in Kryston, I believe that they should be disclosed, after the deletion of identifying details, in the manner described by the Appellate Division.

In an effort to enhance compliance with 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: Thomas F. Bollatto, Jr., President, Board of Education
Sheila Nugent, Records Access Officer
Reuben Ortenberg, Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6111

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

June 5, 1990

Mr. Gene Russianoff
Senior Attorney
New York Public Interest
Research Group, Inc.
9 Murray Street
New York, NY 10007-2272

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

Dear Mr. Russianoff:

I have received your letter of May 24, as well as the correspondence attached to it.

Your inquiry involves a request to inspect financial disclosure forms filed with the New York City Conflicts of Interest Board. According to the correspondence, when the disclosure forms were maintained by the City Clerk, you were permitted to inspect the forms "free of charge". Since the responsibility to maintain the forms was transferred to the Board, you have been denied the opportunity to inspect the records in question, even though the Board reproduces the forms for three dollars per form. It is your view that a denial of a request to inspect the records "violates the New York State Freedom of Information Law". You have requested an advisory opinion on the matter.

In this regard, I offer the following comments.

First, section 87(2) of the Freedom of Information Law states at the outset that: "Each agency shall, in accordance with its published rules, make available for public inspection and copying all records", unless records may be withheld in accordance with the grounds for denial that follow. There appears to be no question but that the records are public, for the Board is willing to prepare copies for a fee. Nevertheless, the provision quoted above is, from my perspective, clear; it refers to an agency's obligation to permit public inspection and copying.

Second, section 89(1)(b) of the Freedom of Information Law requires the Committee on Open Government to promulgate general rules and regulations concerning the implementation of the section 87(1) of the Law. The Committee has done so, and its regulations appear in 21 NYCRR Part 1401. In turn, section 87(1) of the Law requires that uniform regulations for all agencies in a public corporation (i.e., the City of New York) be promulgated "pursuant to such general regulations as may be promulgated by the committee on open government in conformity with the provisions of this article...". As such, an agency's rules and regulations must be consistent with those adopted by the Committee on Open Government and the Freedom of Information Law.

Third, with respect to fees, section 87(1)(b)(iii) of the Freedom of Information Law requires that agencies' rules and regulations include reference to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

Nothing in the provision quoted above refers to the assessment of a fee for inspection of records, and it is my view that no such fee may be imposed unless it is "otherwise prescribed by statute". Consistent with the foregoing is section 1401.8 of the Committee's regulations, which states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
>
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part."

Similarly, the "Uniform Rules and Regulations Pertaining to the Administration of the Freedom of Information Law", which were promulgated by the Mayor of New York City and became effective on April 16, 1979, state in section 7(b) that: "No fee shall be charged for the search for records, the inspection of records or for any certification made pursuant to those rules and regulations".

In short, I believe that accessible records must be made available for inspection at no charge, and that the Freedom of Information Law, the regulations promulgated by the Committee on Open Government and those promulgated by New York City so require.

Lastly, I believe that a judicial decision involving fees serves to confirm that, unless a statute, an act of the State Legislature, so permits, an agency cannot charge for inspection of or search for records, nor can it charge in excess of twenty-five cents per photocopy when reproducing records up to nine by fourteen inches [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

In an effort to inform and to enhance compliance with law, a copy of this opinion will be sent to Ms. Priscilla Lundin, Counsel to the Conflicts of Interest 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: Priscilla Lundin, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-6112

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

June 5, 1990

Mr. Wayne Singleton
85-A-1925
Auburn Correctional Facility
P.O. Box 618 C-20-38
Auburn, NY 13201-9000

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. Singleton:

I have received your letter of May 24 in which you referred to my response to your earlier correspondence.

In brief, that opinion involved rights of access to records pertaining to an investigation that led to your conviction, and it was advised that the specific contents of the records and the effects of their disclosure would determine the extent to which they must be disclosed or may be withheld under the Freedom of Information Law. It is your contention that the wrong person was arrested and you want to bring the police reports in question before a judge, presumably to attempt to overturn your conviction. As such, you asked whether it is possible "to get an in camera inspection of these records" by using the Freedom of Information Law.

While a court may review records in camera in a proceeding brought under the Freedom of Information Law, the purpose of such a review, in my opinion, has no relationship to your goal.

When a request is made under the Freedom of Information Law, the records sought may be granted or denied, in whole or in part, in conjunction with section 87(2) of the Law. That provision states generally that all records are available, except those records or portions thereof that may properly be withheld in accordance with paragraphs (a) through (i) of the provision. If any portion of a request is denied, the denial may be appealed in accordance with section 89(4)(a) of the Law. When an agency denies access to records following an appeal, the applicant may

seek judicial review of the denial by commencing a proceeding under Article 78 of the Civil Practice Law and Rules. A court may inspect records in camera in such a proceeding. However, its review deals solely with rights of access conferred by the Freedom of Information Law; such an inspection is unrelated to the kind of evidentiary review that you seek. Further, rights granted by the Freedom of Information Law are conferred upon the public generally; your status as a defendant or litigant neither enhances nor diminishes your rights as a member of the public under the Freedom of Information Law, nor does that status affect an agency's ability to withhold records in accordance with the grounds for denial appearing in section 87(2) of the Freedom of Information Law [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

While the Freedom of Information Law is not likely the most appropriate vehicle for bringing the records before a court, there may be other provisions, such as those in the Criminal Procedure Law, that would serve your purpose. Since I lack expertise regarding the scope and application of those other provisions, it is suggested that you discuss the matter with your attorney.

I hope that the foregoing enhances your understanding of the Freedom of Information Law, and I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1772
FOIL-AO-6113

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

June 5, 1990

Patrick L. Evans, Esq.
Swartz, Evans, Dickinson, Parmeter,
Tinker & Timmerman, P.C.
240 Washington Street
Watertown, NY 13601

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

Dear Mr. Evans:

I have received your letter of May 22 in which you requested an advisory opinion.

Your inquiry concerns the status of Crime Stoppers of Jefferson County, Inc. under the Freedom of Information and the Open Meetings Laws. According to your letter, Crime Stoppers was incorporated under the Not-for-Profit Corporation Law, and the issue has apparently arisen due to the belief expressed by a newspaper reporter that it is obliged to comply with the Freedom of Information and Open Meetings Laws. The corporation has receive a grant from the County, but "a majority of [its] support will come from donations by private individuals and companies". You added that the corporation "expects to use a room in the county's office building to store its records", that local and state police serve on the corporation's board of directors, and that "Canadian police are answering [y]our hot line, but eventually local police will probably take over this role".

In this regard, I offer the following comments.

First, from my perspective, the application of the Freedom of Information Law and the Open Meetings Law is not necessarily determined on the basis of an entity's receipt of public money for its support; rather the issue is whether an entity is a "public body" or an "agency".

Second, the relationship between the corporation and the County and the role of police officers is, on the basis of your letter, unclear.

As a general matter, not-for-profit entities are separate and distinct from government, and although they may be established to perform duties in the public interest or carry out quasi-governmental functions, they are not governmental entities.

The Open Meetings Law pertains 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."

Assuming that the corporation is independent of government, it does not appear that it would conduct what, for purposes of the Open Meetings Law, would be characterized as public business. If my assumption is accurate, the board of directors of the corporation would not constitute a public body, and its meetings would not, in my view, fall within the scope of the Open Meetings Law.

I point out that recent decisions indicate that certain 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).

With respect to access to records, the Freedom of Information Law is applicable to agencies. Section 86(3) of that statute defines "agency" to include:

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

Since the entity in question is a not-for-profit corporation, I do not believe that the corporation would be a "governmental entity" or, therefore, that it would be required to comply with the Freedom of Information Law.

As indicated earlier, the relationship between the corporation and Jefferson County is unclear. While the corporation is apparently not an agency, it might be involved, contractually or otherwise, in acquiring or producing records for government. In this regard, it is noted that the application of the Freedom of Information Law is expansive, for it includes "agency records" within its scope. 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."

As such, the Freedom of Information Law encompasses materials "kept, held, filed, produced or reproduced by with or for an agency", such as a county. The location where the corporation's records are kept and the basis for which they are produced may be factors relevant in determining whether they are subject to the Freedom of Information Law. Whether police officers engaged by the corporation perform their duties for the corporation as private citizens or in the performance of their official duties as public employees might also have a bearing upon the status of the corporation's records under the Freedom of Information Law.

If additional information were known concerning the corporation, its functions and its relationship with government, perhaps I could offer more precise guidance. However, 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-6114

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

June 5, 1990

Mr. Erik B. Reed
89-A-0062 E-133-B
P.O. Box 436
Albion, NY 14411

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

Dear Mr. Reed:

I have received your letter of May 24.

You asked how you might obtain a copy of "the New York State correctional officers employee manual". You indicated that your facility does not maintain a copy.

In this regard, I offer the following comments.

First, the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that a request for records kept at a correctional facility should 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.

Second, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, three of the grounds for denial may be relevant to right of access to the manual. However, the contents of such records and the effect of disclosing them would determine the extent to which they may be withheld.

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 manual would consist, at least in part, of instructions to staff that affect the public or an agency's policy. Therefore, I believe that those aspects of the manual would be available, unless a different basis for denial could be asserted.

A second 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 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" and disclosure would enable people to evade law enforcement activities, they could in my view be withheld.

The remaining ground for denial of potential reliance is section 87(2)(f), which permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person".

In sum, to the extent that the grounds for denial described in the preceding commentary could appropriately be asserted, I believe that the manual could be withheld; the remainder, however, would in my opinion be available.

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-616

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

June 6, 1990

Mr. Phillip Russell
86-A-8459
Bare Hill Correctional Facility
P.O. Box 20
Malone, NY 12953

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

Dear Mr. Russell:

I have received your letter of May 25, as well as the correspondence attached to it.

In brief, according to the materials, you requested various records on March 27 from the Superintendent of the Bare Hill Correctional Facility. You enclosed a disbursement form with the request in the amount of one dollar to pay for copying fees. The Superintendent acknowledged the receipt of your request on the date that the request was received and indicated that he forwarded the request to the facility Freedom of Information Officer, Senior Counselor Fayette, for processing. Having received no further response, you wrote to Senior Counselor Fayette on April 17 and asked for an appointment to inspect and copy the records. You added that the Superintendent had "approved" the request. He responded on May 1, stating that the request had been processed on April 27, but that at that time, you "had insufficient funds to cover the cost of copying". He added that as of May 1, sufficient funds became available and that the request was being processed. On the basis of that response, you appealed on May 3 to Commissioner Coughlin.

You asked that I "investigate" the matter and you appealed to the Committee on Open Government. 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 is neither empowered to "investigate" nor render a determination following an appeal.

Second, there appears to be an inconsistency in your correspondence regarding your intent. In the first request, you sought copies; in the later letter to Senior Counselor Fayette, you asked for an appointment to inspect and copy the records. As such, from my perspective, it was unclear whether your sought copies of records, whether you want to inspect the records, or both. I point out for future reference that records accessible under the Freedom of Information Law may generally be inspected free of charge. When copies are requested, an agency may charge up to twenty-five cents per photocopy. It appears that the delay might have been caused in part due to the lack of clarity of your correspondence.

Third, although you wrote that the Superintendent approved your request, I found no such statement. Based upon the materials, the Superintendent merely acknowledged the receipt of your request and indicated that it had been forwarded to Senior Counselor Fayette "for processing".

Lastly, although you appealed to Commissioner Coughlin, for purposes of determining appeals made pursuant to section 89(4)(a) of the Freedom of Information Law, the regulations promulgated by the Department of Correctional Services indicate that such appeals should be directed to Counsel to the Department.

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 - 6116

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

June 6, 1990

Ms. Jane Barton, Chairman
Town of Charleston Planning Board
R.D. 1, Box 713
Esperance, NY 12066

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

Dear Ms. Barton:

I have received your recent correspondence, which reached this office on May 31.

According to your letter, the Charleston Planning Board, on which you serve as chairman, "recently sent out a questionnaire to resident property owners to try to determine the majority feeling of what the people would like their Town to be as [you] meet the challenges of sudden and rapid growth". You wrote that a resident "wants to prove that the Planning Board has 'loaded' the results of the questionnaire". Although you have offered to make the questionnaires available to him at the Town Hall, you indicated that he "wants to take the questionnaires away".

Based upon the foregoing, you asked whether the Law requires "an agency to allow records out of its place of business". In addition, if the Town copies the records, you asked whether you may "charge the cost to the person who makes the request". You added that there are "almost 100 questionnaires, two pages each, 11 x 14.)".

In this regard, I offer the following comments.

First, section 87(2) of the Freedom of Information Law permits any member of the public to inspect and copy records that are accessible under the Law. No fee may be assessed for the inspection of records at the location where they are kept, i.e., at the Town Hall. Similarly, a person may review records and copy their content by taking notes, for example, at no charge.

Second, while an agency must enable the public to inspect accessible records, I do not believe that there is any requirement that the agency loan or otherwise relinquish custody of records in response to a request made under the Freedom of Information Law. I point out, too, that section 30 of the Town Law states in part that the town clerk "Shall have the custody of all records, books and papers of the town". In addition, section 57.25(a) of the Arts and Cultural Affairs Law provides in part that:

> "It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records..."

In view of the statutes cited above, I believe that the Town is obliged "to retain and have custody" of the records in question and that it would be inappropriate to relinquish custody of those records. In short, I believe that the Town is obligated to permit the inspection of the records at the Town Hall, but that the Town need not permit the requester to "take the questionnaires away".

Third, section 89(3) of the Freedom of Information Law requires that an agency make copies of accessible records upon payment of the requisite fee. Further, section 87(1)(b)(iii) of the Law indicates that an agency's regulations must make reference to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is prescribed by statute."

As such, when an applicant requests copies of records, a fee may be assessed based upon the provision quoted above.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-611

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

June 7, 1990

Mr. Roger Dillenbeck
88-A-2113
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Dillenbeck:

I have received your letter of May 28.

You have inquired as to the procedure for using the Freedom of Information Law and expressed interest in obtaining copies of the Magna Carta, the Emancipation Proclamation and the Union Society Charter. You also would like to obtain a copy of the "registration charter" for the Moorish Science Temple, Inc., as well as the residence address of a relative.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains 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 applies to records maintained by state and local government in New York.

Second, a request for records should be directed to the "records access officer" at the agency that you believe would maintain records in which you are interested. Further, 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.

With respect to your specific areas of interest, to review or learn of the contents of the historical documents to which you referred, it is suggested that you consult an encyclopedia or the history books in your facility library, or, alternatively, that you seek assistance from the librarian. I point out that the Magna Carta consists of 38 chapters written in Old English in 1215. Therefore, a description of the contents of that document would likely be more useful that a review of the document itself.

On your behalf, I have viewed the certificate of incorporation of the Moorish Science Temple, Inc. It was incorporated in 1976, and, according to the documents I inspected, is located at 157 West 176th Street, Bronx, NY 10453. An uncertified copy of the incorporation papers can be made available by the Corporations and State Records Division at the Deaprtment of State, for a fee of five dollars made payable to the New York State Department of State, 162 Washington Avenue, Albany, NY 12231. A certified copy would cost ten dollars.

Lastly, I know of no legal method of obtaining the residence address of your relative unless additional information about that person is known. For instance, if you know the county of one's residence, public records, such as telephone directories or voter registration lists, could be used to attempt to learn of a residential address.

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-6118

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

June 7, 1990

Mr. Paul Pempeit
89-A-5599
P.O. Box 2500
Marcy, NY 13403

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

Dear Mr. Pempeit:

I have received your letter of May 27.

You wrote that you submitted a request under the Freedom of Information Law for various records concerning a proceeding in which you were involved to the chief clerk of the Supreme Court in New York County. Although the request was made in the middle of April, you had not received a reply as of the date of your letter to this office. You raised questions concerning access to the records and inquired as to whom an administrative appeal may be made.

In this regard, I offer the following comments.

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 upon the foregoing, the Freedom of Information Law does not apply to the courts or court records. Further, I am unaware of any statute that would enable you to engage in an administrative appeal following a constructive denial of a request for records.

Under the circumstances, it is suggested that you resubmit the request and/or discuss the matter with your attorney.

I regret that I cannot be of further assistance in the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6119

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

June 7, 1990

Mr. Ricardo A. DiRose
85-C-773
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004

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

Dear Mr. DiRose:

I have received your letter of May 29, as well as the correspondence attached to it. You have requested my opinion with respect to two requests for records directed to the New York City Police Department.

The first request involved a "list of approved 'carry' pistol licenses within the City of New York". In response to the request, you were advised by Sgt. John G. Sultana, the Department's records access officer, that "the records of the pistol license section are not maintained in the manner suggested, i.e., by license type". He added that "there is no record responsive to your request".

In this regard, 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 a record in response to a request. Under the circumstances, if there is no list identifying those who have "carry" pistol licenses, I do not believe that the Department would be obliged to prepare such a list on your behalf. As such, it appears that Sgt. Sultana's response was appropriate.

The second request involved "copies of the police blotter and complaint and any supporting depositions connected with the arrest of a" named individual "in the City of New York at any time between Jan. 1, 1971 and July 6, 1972". Sgt. Sultana responded by indicating that additional detail would be needed to locate the records. 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. If the Department is unable to locate the records based upon the sparse information that you provided, I believe that Sgt. Sultana's response would have been proper. Further, since the records relate to an event that occurred nearly twenty years ago, it is questionable whether they could be retrieved by means of the electronic information systems that are now in use.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Joseph G. Sultana, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6120

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

June 7, 1990

Hon. Carol F. Perry
Legislature Chairman
Franklin County Legislature
63 West Main Street
Malone, NY 12953

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

Dear Chairman Perry:

I have received your letter of May 30 in which you raised questions concerning the certification of records.

According to your letter, there has been a "difference of opinion" among County officials "as to whether or not Department and Agency heads must certify information if requested". You wrote that the disagreement emanates from a request that you had made to the Industrial Development Agency. The Director of the Agency "had previously given [you] a supposedly complete list of all loans and bonds issued for the last 10 years". Since you had "doubts as to whether this was complete", you requested "another list and that it be certified as to its completeness and correctness". Based upon the foregoing, you have sought an advisory opinion "as to whether Department Heads or Agencies are required to certify that the information requested is complete and correct if asked to do so."

In this regard, as you are likely aware, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. Although that statute and the regulations promulgated thereunder may serve to provide guidance concerning some aspects of the issue, other aspects of the issue may involve other provisions of law or may fall outside of any particular provisions of law. As the issue relates to the Freedom of Information Law, I offer the following comments.

First, 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. If your request to the director of the Industrial Development Agency involved a list prepared prior to the request, it would have involved an existing record, and the Agency would have had to perform the obligations imposed by the Freedom of Information Law. However, if no such list existed and the Director prepared a list on your behalf due to your position as Chairman of the Legislature, I do not believe that the Freedom of Information Law would have been applicable.

Second, section 89(3) also refers to the certification of records. When a request for a record is approved, that provision states that:

> "Upon payment of, or offer to pay, the fee prescribed therfor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

In my view, based upon the language quoted above, a certification made under the Freedom of Information Law does not pertain to the accuracy of the contents of a record, but rather would involve an assertion that a copy is a true copy. In other words, when a record containing is list is reproduced in response to a request made under the Freedom of Information Law, a certification prepared pursuant to section 89(3) would not indicate that the list is complete; it would merely indicate that the copy of the record is a true copy.

I am unaware of which law, if any, would require that an agency official certify that the contents of a record are factually accurate.

Third, in conjunction with an agency's regulations, its designated "records access officer" is responsible for preparing a certification. By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations that govern the procedural implementation of the Law. The Committee has done so by means of 21 NYCRR Part 1401. In turn, section 87(1) of the Law requires the governing body of a public corporation, i.e., a county legislature, to "promulgate uniform rules and regulations for all agencies in such public corporation" in a manner consistent with the Freedom of Information Law and the Committee's regulations. Further, the Committee's regulations require that the governing body "shall designate one or more persons as records access officers..." [section 1401.2(a)].

Section 1401.2(b)(6) of the regulations indicates that the records access officer is responsible for assuring that the following duties with respect to certification are carried out:

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

As such, I believe that a certification made in accordance with section 89(3) of the Freedom of Information Law should be prepared by the records access officer.

Lastly, although I am unaware of its relevance to your inquiry, a new provision, section 89(8) was recently added to the Freedom of Information Law. That provision 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."

Therefore, if, for example, a request is made under the Freedom of Information Law and the person responding to the request knows that such record exists but "conceals" its existence or destroys the record sought to avoid disclosure, such actions might result in a violation of the Freedom of Information Law and its companion provision in the Penal Law, section 240.65.

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-0121

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

June 8, 1990

Ms. Danamaria Martin
[redacted]

The staff of the Committee on 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. Martin:

I have received your letter of May 29 in which you requested materials concerning the Freedom of Information Law. I point out that your letter did not reach this office until June 7.

Specifically, you asked "what records within the CUNY schools are available upon request, i.e. departmental budgets, division within departmental budgets, grants, scholarships, inter and intra-departmental information, etc."

In this regard, I offer the following comments.

First, due to the structure of the Freedom of Information Law, it is impossible to identify which records will always be available or perhaps subject to denial. 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. Further, many of the grounds for denial are written in terms of the potential for harm should records be disclosed. As such, rights of access are often determined on the basis of the specific contents of records and the effects of their disclosure.

Second, with regard to records relating to budgets and "inter and intra-departmental information", one of the grounds for denial is particularly relevant. 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, except when a different ground for denial may properly 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. Based upon the foregoing, records involving budgets, for example, insofar as they consist of "statistical or factual tabulations or data", would be available under section 87(2)(g)(i), unless a different ground for denial could be asserted.

With regard to scholarships, it is assumed that you are referring to records that identify students. If that is so, a different ground for denial would likely be relevant. Section 87(2)(a) refers 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 statute generally confers rights of access to "education records" parents of students under the age of eighteen or students who attend institutions of higher education. Concurrently, the Act prohibits disclosure of those records to third parties without the consent of the parents or students, as the case may be. As such, records identifiable to students are, in most instances, exempted from disclosure by statute.

Enclosed for your review are copies of the Freedom of Information Law and an explanatory pamphlet on the subject.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1775
FOIL-AO-6122

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

June 12, 1990

Ms. Linda Dabulewicz
[redacted]

The staff of the Committee on 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. Dabulewicz:

I have received your recent letter, which reached this office on June 4, as well as the materials attached to it.

You have raised a variety of questions concerning the implementation of the Open Meetings Law and the Freedom of Information Law by the Harpursville Central School District. In brief, you contend that much of what occurs at meetings is not reported in minutes and that the Board "is going into executive session more often". In addition, you asked whether it is legal to charge one dollar for a copy of minutes and whether the contract between the Superintendent of Schools and the Board is a public record.

In this regard, I offer the following comments.

First, 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.

Further, 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.

Second, with regard to meetings generally, the Open Meetings Law is based upon a presumption of openness, and the term "meeting" has been construed broadly by the courts. In a landmark decision rendered soon after the enactment of the Open Meetings Law, the Court of Appeals confirmed 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, even if there is no intent to take action, and irrespective of the manner in which the gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh 60 AD 2d 409, 45 NYS 2d 947 (1978)].

Every meeting must be convened as an open meeting. 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. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

The ensuing provisions of section 105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Further, since the minutes attached to your letter refer to a number of executive sessions held to discuss "personnel", I point out that the term "personnel" appears nowhere in the Open Meetings Law. It is also noted that the so-called "personnel" exception for entry into executive session has been clarified since the initial 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.

Moreover, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session, or "personnel", for example, without more, fails to comply with the Law. For instance, in a decision containing a discussion of minutes that referred to various bases for entry into executive session, it was found 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].

In view of the foregoing, it has been advised that a motion to enter into executive session to discuss "personnel", or "personnel matters", without additional description, is inadequate. Where section 105(1)(f) may be asserted, I believe that a motion for entry into an executive session should contain two components, inclusion of the term "particular", and reference to one or more of the topics appearing in that provision. For instance, a motion to discuss "the employment history of a particular person" (without identifying the person) would be proper; a citation of "personnel" would not in my view be sufficient to comply with the statute.

Third, with regard to fees for copies, 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 judicial 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, absent an act of the State Legislature authorizing a fee of more than twenty-five cents per copy, the District cannot, in my opinion, charge in excess of that amount.

Lastly, I believe that a contract between the Superintendent and the District or the Board is accessible under 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.

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.

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, the Superintendent's contract, like a collective bargaining agreement between a public employer and a public employee union, must be disclosed, for it is clearly relevant to the duties, terms and conditions relating to the employment of public employees.

In an effort to enhance compliance with 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: Board of Education
Albert W. Oatman, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-
FOIL-AO-6123

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

June 13, 1990

Mr. Mike Grogan
The Post-Standard
Clinton Square
P.O. Box 4915
Syracuse, NY 13221-4915

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

Dear Mr. Grogan:

I have received your letter of May 31 in which you requested an advisory opinion.

According to your letter and the materials attached to it, you requested a variety of records from the Syracuse City School District pertaining to an employee of the District, Mr. Donald Moody. In your initial request, you sought records indicating Mr. Moody's employment history with the District, his title and salary "at the time of his firing", an arbitrator's report, transcripts of an arbitration proceeding, costs to the District relating to the arbitration and attorney's fees, the District's contract with a law firm and Mr. Moody's current salary, title and job description.

In response to that request, the District's Director of Personnel Services provided Mr. Moody's dates of employment and current position, the District's retainer agreement with a law firm, and minutes of the meeting during which Mr. Moody's hiring was approved. You were informed, however, that Mr. Moody was not fired, that no arbitration proceeding was ever conducted concerning his employment, and that no records involving that aspect of the request are maintained by the District. Further, the remainder of the request was denied.

As a result of that response, you submitted an amended request "regarding a fact-finding session as opposed to an arbitration", including records concerning the dates of such sessions, the circumstances leading to fact-finding, the fact-finder's identity, report or findings, transcripts of those proceedings and records indicating the costs to the District relating to the proceedings involving Mr. Moody. In response to that request, you were provided the date of the fact-finding session and the name of the fact-finder. The District denied access to any remaining records that fell within the scope of your request.

In this regard, it is emphasized at the outset that I am unfamiliar with the records that fall within the scope of your request. Similarly, I am unaware of the outcome of the fact-finding session concerning Mr. Moody. Nevertheless, based upon the information provided in the correspondence, 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 also noted that the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states in part that, unless otherwise specified, an agency need not create a record in response to a request. Therefore, if, for example, there is no transcript of a fact-finding session, the District would not be obliged to prepare a transcript on your behalf.

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, it appears that two of the grounds for denial may be relevant to your inquiry. However, the capacity to assert those provisions appropriately would, in my view, be based upon the contents of the records and the effects of their disclosure.

Of potential significance 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". 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); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Powhida v. City of Albany, 147 AD 2d 236 (1989); 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].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. 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 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)."

From my perspective, if the fact-finding session led to the imposition of disciplinary action against Mr. Moody, a record reflective of such a determination would be accessible under the Freedom of Information Law. 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 may, in my view, be withheld, for disclosure would 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 or allegations are found to be without merit, I believe that they may be withheld.

If there is a transcript of the session, again, I believe that the provision of greatest import would involve personal privacy. Even if disciplinary action was imposed or a finding of misconduct was reached, persons other than Mr. Moody might have been identified, such as witnesses, students, complainants and the like. In my opinion, it is likely that references to those other persons could be withheld from records that might otherwise be available.

Other records pertaining to Mr. Moody, irrespective of the outcome of the fact-finding session must, in my view, be disclosed. For example, a job description or similar record indicating the responsibilities of a public employee would clearly be relevant to the performance of the employee's official duties. Consequently, I believe that such a record is accessible

under the Law. Further, section 87(3)(b) of the Freedom of Information Law requires that each agency maintain a record indicating the name, public office address, title and salary of every officer or employee of the agency. As such, records indicating Mr. Moody's salary must be disclosed.

The other ground for denial of possible significance is section 87(2)(g), which deals with inter-agency and intra-agency materials. While I believe that records prepared by District officials and communicated to officers and employees of the District may be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g), that provision, due to its structure, 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, unless a different ground for denial may properly 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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under section 87(2)(g).

I point out that it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or final agency determinations (i.e., reprimands or findings of misconduct), would be available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal may be exempt form 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" [65 NY 2d 131 at 133 (1985)].

Lastly, with respect to expenses incurred by the District in conjunction with the fact-finding session or related to matters involving Mr. Moody, I believe that bills, vouchers, contracts, receipts and similar records reflective of expenses incurred by an agency are 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 kinds of records described above regarding legal fees 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 an agency 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.'"

Records indicating payments made to a fact-finder would in my opinion be public, for I do not believe that any basis for denial could properly be asserted.

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: Dr. Henry Williams, Superintendent
Ntsoaki Robinson-Gyder, Director of Personnel Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1776
FOIL-AO-6124

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

June 13, 1990

Mr. Don Kaake
[redacted]

The staff of the Committee 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. Kaake:

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

According to the materials, on May 11, you requested a variety of records from the Low-Level Radioactive Waste Siting Commission, including:

> "* Transcripts, minutes, journal records from meetings beginning with number 1 thru 7.
> * Transcripts, minutes, journal records from meetings beginning with number 7 thru 21.
> * Transcripts, minutes, journal records from 'work sessions' held day previous to regular Commission meeting.
> * Listing of the LLRWS Commission expenditures since its inception.
> * Materials showing organization of siting commission.
> * Payroll record of commission."

Mr. John Thomas contacted you by phone to acknowledge the receipt of your request. However, as of the date of your letter to this office, you apparently received no further response.

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

First, I contacted Mr. Thomas on your behalf. I learned that he is not an employee of the Commission, rather is an employee of a contractor that apparently performs certain duties for the Commission. Mr. Thomas indicated that he will respond to your request insofar as it pertains to minutes of meetings, and that Ms. Sue Baranski, the Commission's public information officer, would respond to the remainder of the request.

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the 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. Having discussed your request with Ms. Baranski, transcripts of meetings have not been prepared and there is no "listing" of Commission expenditures "since its inception". If that is so, the Commission would not be required to create such records on your behalf. This is not to suggest that records reflective of Commission expenditures do not exist or that they would not be public; I merely seek to indicate to you that there is no single record or "listing" of such expenditures.

Third, in view of the delay in response to your request, I point out that section 89(3) of the Freedom of Information Law states that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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, with regard to minutes of meetings, I point out that the term "meeting" has been construed expansively to include any gathering of a quorum of a public body for the purpose of conducting public business, even if there is no intent to take action and regardless of the manner in which the gathering is characterized (i.e., as a "work session", for example) [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Further, 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); if no action is taken during an executive session, minutes need not be prepared. 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.

In addition, 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 public body 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.

Fifth, if there are materials indicating the "organization" of the Commission, I believe that it would be accessible under the Freedom of Information Law, for it would consist of factual information [see Freedom of Information Law, section 87(2)(g)(i)], and because no ground for denial could in my opinion be appropriately asserted.

Lastly, with regard to your request for a payroll record, section 87(3) of the Freedom of Information Law states in relevant part that:

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

In an effort to enhance compliance with law, copies of this opinion will be forwarded to Mr. Thomas and Ms. Baranski.

I hope that I have 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 Thomas
Sue Baranski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6125

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

June 13, 1990

Mr. D. Duamutef
84-A-1026
Box 2000
Pine City, NY 14871

Dear Mr. Duamutef:

I have received your letter of June 11, in which you requested assistance in "procuring some data on the Freedom of Information Law". You indicated that you "have written to a few places but have yet to receive an answer".

In this regard, it is unclear whether you want information about the Freedom of Information Law, or whether you have requested records and have received no response to your requests. In either case, 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 or "procure" records on behalf of an applicant.

Second, in brief, a request for records should be directed to the "records access officer" at the agency that you believe maintains records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests. Further, 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.

Third, with respect to the time within which an agency must respond to a request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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, enclosed for your review is a copy 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-6126

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

June 15, 1990

Mr. Timothy J. Gilchrist
Executive Assistant to the
Commissioner
NYS Department of Transportation
State Campus
Albany, NY 12232

Dear Mr. Gilchrist:

I have received a copy of your letter of June 13 addressed to Mr. Joseph Cotazino in which you responded to an appeal made under the Freedom of Information Law.

In your letter, you wrote that:

> "Section 89, subdivision 5, of the Public Officers Law provides for a written appeal from a determination of an agency denying access to records. Section 89, subdivision 5(d) provides that upon an adverse determination on appeal, the remedy is a proceeding to review such determination pursuant to Article 78 of the Civil Practice Law and Rules. Such proceeding must be commenced within fifteen days of the service of the written notice containing the adverse determination on appeal.
>
> "You have previously appealed from the denial of certain records, and more than fifteen days have passed since such determination was made."

In my opinion, section 89(5) of the Freedom of Information Law was, as I understand the circumstances, inapplicable. That provision deals with situations in which persons or entities are required to submit records to state agencies and where the sub-

mitter requests that the agency keep the records confidential in accordance with section 87(2)(d) of the Freedom of Information Law. The latter provision authorizes 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..."

If an agency determines that records are not exempted from disclosure under section 87(2)(d), the submitter of the records, at the end of the procedure set forth in section 89(5), may seek to preclude the agency from disclosing the records by initiating an Article 78 proceeding "within fifteen days of the service of the written notice containing the adverse determination...". The adverse determination is the decision by the agency that the records submitted by a person or firm are not exempted from disclosure under section 87(2)(d).

Again, as I understand the situation, Mr. Cotazino is not the submitter of records that he seeks to protect on the ground that they constitute trade secrets; on the contrary, he requested records from the Department as a citizen. If my understanding of the matter is accurate, section 89(5) is irrelevant and inapplicable.

I believe that the relevant provisions concerning an appeal and the potential judicial review of a determination made pursuant to an appeal would be paragraphs (a) and (b) of section 89(4) of the Freedom of Information Law. Paragraph (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."

As such, an applicant whose initial request has been denied may appeal within thirty days of the denial. Paragraph (b) states in relevant part that:

> "a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two."

Under the provision quoted above, following a determination of an appeal sustaining a denial of access to records, an applicant may initiate an Article 78 proceeding within four months of the determination (see Civil Practice Law and Rules, section 217).

I hope that the foregoing serves to clarify the provisions of the Freedom of Information Law. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph M. Cotazino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-612?

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

June 15, 1990

Mr. Felix Herrera
#89-T-4932
#5947992M
Clinton Correctional Facility
Hospital 2, F-06
P.O. Box 3673
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. Herrera:

I have received your letter of June 4 in which you asked that the Committee on Open Government "intervene" on your behalf to obtain records.

By way of background, while being transported from Rikers Island to an upstate correctional facility, your bus was involved in an accident and you apparently sustained injuries. You are attempting to obtain accident reports prepared by a state trooper and a correction officer, as well as medical 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. The Committee cannot compel an agency to disclose records or "intervene" by obtaining records on behalf of an applicant.

Second, 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

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)].

A report prepared by a correction officer would not, in my opinion, fall within the scope of section 66-a of the Public Officers Law; rather, I believe that rights of access would be governed by the Freedom of Information Law. It is likely, in my view, that two grounds for denial in the Freedom of Information Law might be relevant with respect to such a report.

Section 87(2)(b) permits an agency to withhold records or portions of records the disclosure of which would result in "an unwarranted invasion of personal privacy." To the extent that the report describes the medical condition or injuries sustained by persons other than yourself, those portions of the report could likely be with- held as an unwarranted invasion of personal privacy.

The report would also fall within 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

> 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 Division of State Police and the New York City Department of Correction, for example, are "agencies" required to comply with the Freedom of Information Law. Since you referred to the Montefore Medical Center, I point out that if that is a private hospital, the Freedom of Information Law would not be applicable as a basis for seeking records from that hospital.

Third, a request made under the Freedom of Information Law should be directed to the records access officer at the agency or agencies that might maintain the records in which you are interested. The records access officer has the duty of coordinating an agency's response to a request. Further, section 89(3) of the Freedom of Information Law requires that an applicant "reasonable describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate the records.

Fourth, except in unusual circumstances, accident reports prepared by police agencies 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."

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, with respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records maintained by an agency may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by personnel employed by the Department of Correctional Services could be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law. Again, 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.

However, it appears that the governing statute concerning medical records 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6128

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

June 15, 1990

Mr. Dennis J. Nolan
[redacted]

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

Dear Mr. Nolan:

I have received your letter of June 2 in which you requested materials and raised questions concerning the Freedom of Information Law.

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, with respect to the procedure for seeking records, a request should be directed to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests. The records access officer at the local government level is usually the municipality's clerk. Further, 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 and identify the records. While an agency may accept an oral request, it may require that a request be made in writing. There is no particular form that must be used and it has been advised that any request made in writing that reasonably describes the records sought should suffice.

If a record is accessible under the Law, it must be made available for inspection and copying. Records may be inspected at no charge. If an applicant seeks copies of records, section 89(3) of the Law requires that an agency reproduce the records upon payment of the appropriate fee. Further, section

87(1)(b)(iii) of the Law states that an agency may 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 authorizes a different fee.

Lastly, 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 includes entities of state and local government within its coverage. Not-for-profit corporations, despite their relationship with or receipt of funding from government, are not "governmental entities". Therefore, they are not subject to the Freedom of Information Law. An exception involves volunteer fire companies, which have been found by the courts to be "agencies" required to comply with the Freedom of Information law.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee on Open Government that govern the procedural implementation of the Law, and the Open Meetings Law, which deals with meetings of public bodies.

I hope that I 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-6129

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

June 15, 1990

Mr. Vincent Oliver
[redacted]

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

Dear Mr. Oliver:

I have received your letter of May 29, as well as the correspondence attached to it.

As I understand the correspondence, the initial issue relates to your allegation that you were assaulted by a neighbor. It appears that you were not permitted to sign a complaint and that you were arrested. You wrote that the trial was "taped" and that your request for the tapes directed to the court and the District Attorney have been ignored. A second issue involves your application for a pistol permit, and a third involves an allegation that a series of felonies were committed against you. In a letter to the State Police, you wrote: "Under the Freedom of Information Law: Are you going to deny me access to have my complaint filed?" In addition, you referred to a recent amendment to the Freedom of Information Law and indicated that the Law makes "it a crime for any person to willfully lose, misplace, or destroy public records, or prevent access to them."

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

First, it is emphasized that the Freedom of Information Law is a vehicle under which any person may request records from an agency. The Law pertains to existing records, and section 89(3) states in part that an agency need not create a record in response to a request. In my opinion, the term "access" involves making records available for inspection and copying; I do not believe that involves the ability to file a complaint or an

agency's refusal to accept a complaint. Further, I do not believe that the Freedom of Information Law is relevant to the process of applying for a pistol permit, for the Penal Law, section 400.00, deals with that issue.

Second, the Freedom of Information Law is applicable to records of an "agency." 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."

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 9891 (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., July 24, 1982; Hawkins v. Kurlander. 98 AS 2d 12 (1983)]. Therefore, I believe that the Office of the District Attorney is required to respond to your request in accordance with the requirements if the Freedom of Information Law.

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."

As such, the Freedom of Information Law does not apply to the courts or court records. There are, however, other provisions of law that may grant rights of access to court records. For example, in the case of a justice court, section 2019-e of the Uniform Justice Court Act provides significant rights of access to records maintained by such a court.

Assuming that the District Attorney maintains a records of a proceeding in which you were involved, it appears that such a record should be available to you. 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, in a recent decision in which an inmate requested records maintained by a district attorney that were disclosed in a criminal proceeding, the court noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see, Matter of Knight v. Gold, 53 A.D. 2d 694, 385 N.Y.S.2d 123, app dsmd 43 N.Y.2d 841, 402 N.Y.S.2d 811, 373 N.E.2d 991), 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" [Moore v. Santucci, 543 NYS 2d 103, 107, ___AD 2d___ (1989)].

As such, the records reflective of information introduced or stated during a public proceeding must generally be made public.

Next, the recent amendment to the Freedom of Information Law to which you referred, 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."

In my view, the provision quoted above may be applicable when a request is made for a record and the person in receipt of the record knowingly conceals the existence of the record or destroys the record in order to prevent public inspection of the record.

Lastly, when a request for an agency record is submitted, the agency must comply with the time limits for response imposed by the Freedom of Information Law. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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:saw

cc: Joseph Purcell, County Clerk
Steven Lungen, District Attorney
Richard Schrumpf, Town Justice, Town of Callicoon
Lt. Horan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0130

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

June 15, 1990

Mr. Gregory L. Ridgeway
[redacted]

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

Dear Mr. Ridgeway:

I have received your letter of June 3 in which you requested advice concerning the use of the Freedom of Information Law.

You questioned how the Freedom of Information Law "applies to villages and other local communities within New York State." Specifically, you wrote that you "filed a formal complaint with the Village of Johnson City, New York Police Department about a police officer who entered [your] home and violated your civil rights by hitting [you]." You indicated that you "can't get a copy of the complaint or get anybody to answer [your] phone calls." You asked how you can obtain a copy of the complaint through the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law (see attached) 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 is generally applicable to entities of state and local government, including villages and other municipal governments.

Second, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Law (see attached, 21 NYCRR Part 1401). In turn, section 87(1)(a) of the Law requires 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 [the Freedom of Information Law], pertaining to the administration of this article."

The Village of Johnson City is a public corporation and its governing body is the Board of Trustees, which has the responsibility to adopt rules and regulations under the Freedom of Information Law.

One aspect of the rules and regulations involves the designation of one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests. Therefore, it is suggested that a request be directed to the records access officer.

It is noted that section 89(3) requires that an applicant must "reasonably describe" the records sought. As such, a request should be made in writing and include sufficient detail to enable agency officials to locate records. When a request is received by an agency, it must respond in accordance with section 89(3) of the Freedom of Information Law, which states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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, 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, the Village would be obliged to disclose a complaint to you that you had filed, for I do not believe that any of the grounds for denial 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:saw
Encl.

cc: Board of Trustees, Village of Johnson City

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6131

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

June 18, 1990

Ms. Deanna L. Dauber
[redacted]

The staff of the Committee on 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. Dauber:

I have received your letter of June 4 in which you complained that the New York City Board of Education has failed to respond to your requests for records and appeals as required by the Freedom of Information Law.

Your request involves information contained in what you characterized as the "Ahera Management Plan", and it is assumed that the information is the subject of a memorandum included in your correspondence. The memorandum was transmitted to all principals by Robert Pardi, Manager of the Board's Asbestos Task Force, on the subject of "Management Plans". The memorandum states in relevant part that:

> "The enclosed constitutes the Management Plan that was submitted to the Governor of the State of New York on May 9, 1989. Please be advised that by law this Management Plan shall be available, during normal business hours without cost or restriction for inspection by representatives of the Environmental Protection Agency, and the state, the public, including teachers, other school personnel and their representatives and parents."

Based upon the foregoing, it is clear that the management plans referenced in the memorandum are intended to be disclosed to the public.

You wrote that the Board "failed to send [you] an answer" in response to your first request. Although Board officials apparently indicated that a response was given, you never received it. You appealed but never received a response. Consequently, a second request was made, but its receipt was not acknowledged. Although you appealed again, you had not, as of the date of the letter addressed to this office, received a response.

In this regard, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests and appeals. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

As you requested, copies of this opinion will be forwarded to officials at the State Education Department. Further, in an effort to enhance compliance with the Freedom of Information Law, copies will be sent to the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Thomas Sobol, Commissioner
Dr. Mae Timer, Asbestos Supervisor
John Nolan, Secretary
Ruth Bernstein, Deputy Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0132

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

June 18, 1990

Diane Sank, Ph.D.
[redacted]

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

Dear Dr. Sank:

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

In brief, over the course of months, you have attempted to obtain records from the City College of the City University of New York (CCNY) relating to your removal as Chair of the Anthropology Department, the rejection of your requests for leave, and the loss of your anthropology research laboratory. You allege that the contents of the laboratory were removed without your knowledge sometime in the summer of 1989. On the basis of your correspondence, you have requested an advisory opinion "concerning the failure of the CCNY Administration to provide [you] with the records or even to respond to [your] request; as well as the failure of the CUNY Appeals Officer (Dr. Sowande) to obtain these records or to respond to [your[December 7 request for them". In addition, although you expressed the view that the Freedom of Information Law "does not require that one list specific documents requested", you wrote that Dr. Sowande did not process your December 7, 1989 appeal "because she claimed orally on the telephone, not in writing", that you omitted certain specific records from the requests (emphasis yours).

In this regard, I offer the following comments.

It is emphasized at the outset that the Freedom of Information Law pertains to existing records. As a general matter, that statute does not require that an agency create or prepare a record in response to a request. However, the application of the Freedom of Information Law is expansive, for it pertains 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."

Based upon the foregoing, any documentation or information "in any physical form whatsoever" that is "kept, held, filed, produced or reproduced by, with or for" an agency, such as CCNY or CUNY, would constitute a "record" subject to rights conferred by the Law. I point out, too, that the definition of "record" has been construed by the State's highest court as broadly 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)].

It is also noted that a request need not specify the records sought with particularity. In the Freedom of Information Law as originally enacted, an applicant was required to seek "identifiable" records. That standard resulted in a series of difficulties, for members of the public often were unfamiliar with the exact nature or name of a record. When the original statute was repealed and replaced with the current law, the standard for requesting records was altered. Section 89(3) of the Freedom of Information Law now requires that an applicant must "reasonably describe" the records sought. Moreover, it has been held by the Court of Appeals that a request reasonably describes the records when the agency can locate the records based upon the terms of a request, and that to deny a request on the basis that it is overbroad, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [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)].

When an agency receives a request or an appeal, the Freedom of Information Law provides direction concerning the time within which an agency must respond and the nature of the response. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, or when a request is denied in writing, I believe that the denial 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, 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, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

With respect 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. Further, 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. That phrase, in my view, also imposes an obligation upon agencies to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

From my perspective, it is likely that one of the grounds for denial may be particularly relevant. I emphasize, however, that while that provision represents a basis for withholding, due to its structure, it often requires 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, unless a different ground for denial may properly 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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under section 87(2)(g).

I point out that it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or final agency determinations would be available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal may be exempt form 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" [65 NY 2d 131 at 133 (1985)].

In short, although records might be characterized as "intra-agency materials", their contents determine the extent to which they must be disclosed or may be withheld.

For example, your correspondence refers to a "movers' log". Assuming that such a log was prepared by a public employee and consists of factual information, i.e., dates of a move or a description of items that were moved, I believe that it would be accessible under section 87(2)(g)(i). If it was prepared by a person other than a public employee, such as a private contractor, it would not consist of inter-agency or intra-agency material. In such a case, I believe that it would be available under the Freedom of Information Law, for no ground for denial could appropriately be asserted.

Lastly, if a request is made, and it is asserted that a record does not exist or cannot be found, an applicant may seek a certification to that effect. Section 89(3) states in part that, upon request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". Further, while I am unaware of its relevance under the circumstances, new provisions were recently added to the Freedom of Information Law and the Penal Law concerning unlawful prevention of public access to records. Section 89(8) of the Freedom of Information Law 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."

I hope that I have 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. Beverly Sowande, Freedom of Information Appeals Officer
Bernard W. Harleston, President, CCNY
Morris Silberberg, Dean, Faculty Relations

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6133

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

June 19, 1990

Ms. Rosaria Peplow
Town Clerk, Town of Lloyd
Town Hall
12 Church Street., P.O. Box 897
Highland, New York 12528

The staff of the Committee on 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. Peplow:

As you are aware, I have received your letter of June 4, which was mistakenly addressed to Mr. Kevin Crawford. Mr. Crawford is Counsel to the Association of Towns. Following our discussion of the matter, you confirmed that your correspondence should have been addressed to me.

You have requested guidance concerning the Freedom of Information Law in view of the recent increase in the number of requests received by the Town.

In your initial area of inquiry, you asked to be apprised of the status of legislation dealing with fees that may be imposed under the Freedom of Information Law. Enclosed is a copy of the bill to which you referred. Although interest in the bill has been expressed in both houses of the State Legislature, it is doubtful, in my view, that it will be approved before the Legislature recesses at the end of this month or perhaps in early July. A different bill would permit the assessment of an hourly fee for searching for records. Based upon conversations with legislative staff, that bill, which has not been introduced in the Senate, will not likely be enacted.

Currently, an agency may charge fees in accordance with section 87(1)(b)(iii) of the Freedom of Information Law, which permits an agency to charge up to twenty-five cents per photocopy up to nine by fourteen inches or the actual cost of reproducing

other records (i.e., tape recordings, computer tapes, etc.), unless a statute (an act of the State Legislature) authorizes a different fee. No fee may be assessed for search or for personnel or administrative costs.

You indicated that requests are made to the records access officer, who then forwards the request to the appropriate department. From there, you wrote that:

> "Within five business days, the department must respond to the request and inform the Records Access Officer as to the time by which information would be available. The RAO will so inform the applicant. One month is considered a reasonable amount of time."

In this regard, I point out that the Freedom of Information Law specifies that an agency must respond within five business days of the receipt of the request. Specifically, section 89(3) states that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If a request is denied in writing, if neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been denied. In such circumstances, I believe that the denial 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, who shall

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

Further, from my perspective, unless a request is unusually voluminous or complex, one month is unnecessarily long to grant or deny a request. While five business days may in some instances be an inadequate time in which to grant or deny access to records, far less than thirty additional days may be needed to do so. In short, I believe that it would be inappropriate to indicate that, as a matter of policy, one month is needed to grant or deny access to records.

You also wrote that the records access officer "would be responsible if the response was challenged by the applicant, and could be summoned to a court hearing, if such were required." In my view, if the records access officer denied a request or failed to respond within the appropriate time, the applicant would have the right to appeal pursuant to section 89(4)(a) of the Law, which was quoted earlier. As such, following a denial by the records access officer, the next step by an applicant would involve an appeal rather than the commencement of a judicial proceeding.

If an applicant brings a lawsuit, you wrote that "the town is no longer required to supply records..." If the suit is brought under the Freedom of Information Law, records could be disclosed as means of settling the suit. If your statement is intended to suggest that a person who has brought a lawsuit against the Town cannot use the Freedom of Information Law to request records, I disagree. As a general matter, if a record is accessible under the Freedom of Information Law, it should be made equally available to any person, regardless of the applicant's status (as a litigant, for example) or interest. Further, in a case which a person involved in litigation against an agency requested records from that agency pursuant to the Freedom of Information Law, the Court of Appeals, the State's highest court, held that a litigant is accorded the same rights under the Freedom of Information Law as any member of the public; that person's status as a litigant neither enhances nor diminishes his or her rights as a member of the public when seeking records under the Freedom of Information Law [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976); and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Lastly, you asked whether the records access officer must be reappointed each year, whether the appointee should be the town clerk and whether there is a state law that deals with the issue. In this regard, although the Freedom of Information Law does not specifically refer to the records access officer, the regulations promulgated by the Committee on Open Government require that the governing body of a municipality designate one or more persons as records access officer. By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural implementation of the Law. In turn, section 87(1) requires the governing body of a public corporation (i.e., a town board) to adopt its own regulations consistent with the Freedom of Information Law and the Committee's regulations. The regulations describe the duties of the records access officer.

In my opinion, the town clerk is the most appropriate person to serve as records access officer, for the clerk is the legal custodian of records pursuant to the Town Law and is the records management officer under the Arts and Cultural Affairs Law. Further, I am unaware of any requirement that the records access officer be reappointed annually, and I believe that it would be proper and efficient to designate the records access officer by position (i.e., town clerk) rather than by name in order to ensure the continuity of the function.

In addition to the legislation referenced earlier, enclosed are copies of the Freedom of Information Law, the Committee's regulations and model regulations designed to enable agencies to readily adopt appropriate procedures.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0634

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

June 20, 1990

Mr. Cesar Villanueva
Marcy Correctional Facility
Post Office Box 3600
Marcy, New York 13403

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

Dear Mr. Villanueva:

I have received your letter of June 4 in which you requested assistance.

You wrote that several requests for records have been made to the senior correctional counselor at your facility but that none of the requests have been answered.

In this regard, I offer the following comments.

First, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that requests for records maintained at a correctional facility may be made to the facility superintendent or his designee. If the senior correctional counselor is not the person designated by the superintendent to respond to requests, it is suggested that you resubmit your request to the appropriate person.

Second, the Freedom of Information Law requires that an agency respond to a request as required by section 89(3) of the Law, which states that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals under the Freedom of Information Law 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-6135

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

July 6, 1990

Mr. Joseph Morales
#89-N-6426, B-22-S.H.U.
Cape Vincent Correctional Facility
Route 12E, PO Box 739
Cape Vincent, New York 131618

Dear Mr. Morales:

I have received your recent letter in which you requested information concerning the services provided by this office and the address of the person to whom you may direct a request for your medical records.

In this regard, as a general matter, the Committee on Open Government offers advice concerning access to government information maintained by units of state and local government in New York. Most often, the advice involves the major statute concerning access to government records, the Freedom of Information Law.

With respect to medical records, there is no central source or office that maintains those records, and requests should be made to the physician or hospital, for example, that provided treatment.

As inferred earlier, the Freedom of Information Law pertains to government records and that statute is applicable to agencies. The term "agency" for purposes of the Freedom of Information Law is 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."

Therefore, although the Freedom of Information law applies to records maintained by the Department of Correctional Services, for instance, it would not apply to records maintained by a private hospital or physician.

Moreover, to the extent that medical records are maintained by agencies, 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 personnel at the Department of Correctional Services 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.

However, 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, whether records are maintained by an agency, a physician or a hospital.

Further, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6136

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

June 20, 1990

Mr. Edward Godwin
Enlarged City School District
of Middletown
223 Wisner Avenue
Middletown, New York 10940

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

Dear Mr. Godwin:

I have received your letter of June 11.

In your capacity as President of the Board of Education of the Enlarged City School District of Middletown, you wrote that you were informed "that several documents allegedly disappeared from the School Board Office in January 1990." You related the allegation to the Superintendent, who indicated "no documents that were destroyed or removed violated any laws." When the Superintendent resigned in May, you "heard rumors that the phone logs and appointment books were missing." Subsequently, a member of the Board requested those documents, citing Records Retention and Disposal Schedule ED-1, which refers specifically to the records. You wrote that a different Board member stated that he contacted me and that I advised that "the logs could not be viewed and need not be kept."

Based upon the foregoing, you raised the following questions:

> "(1) Do the logs and appointment books have to be kept for one year?
>
> (2) May a Board Member request at least to see if they exist?

> (3) If the documents have been altered, destroyed, or have left Board property, what actions would be required by the Acting Superintendent of Schools or the Board President?"

In this regard, I offer the following comments.

First, while I might have spoken with a Board member concerning the issues in question, I do not believe that I would have responded as he suggested.

Although I am somewhat familiar with the provisions dealing with the retention and disposal of records, I do not have a schedule pertaining specifically to school district records. Further, those provisions are part of the Arts and Cultural Affairs Law, which is separate and distinct from the Freedom of Information Law. In short, I would not have advised that the records in question need not be kept, for I am unaware of the minimum periods of retention concerning those records. To obtain information concerning retention periods, it is suggested that you review the appropriate schedule or contact the State Archives and Records Administration at the State Education Department. That office can be reached at (518)474-6926.

Second, with respect to access to those records, it has been advised that, with certain exceptions, they must be disclosed.

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 addition, it is noted that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of one or more of the exceptions to rights of access. Therefore, the statute envisions situations in which a single record might be both available or deniable in part. Further, in my opinion, the quoted phrase requires that requested records be reviewed in their entirety to determine which portions, if any, may justifiably be withheld.

I believe that two of the grounds for denial are likely relevant to rights of access to appointment books and telephone logs. However, the extent to which those provisions may be asserted would be dependent upon the specific contents of the records.

In my opinion, both kinds of records could be characterized as "intra-agency" materials subject to 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 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.

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 Re-

> cords') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2 [b].) Additionally, pages 7-11 (ambulance records, list of interviews, and reports of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181, mot for lv to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

In short, even though factual information may be "intertwined" with opinions, for instance, the factual portions, if any, should in my opinion be available, unless different grounds for denial apply. Further, it would appear that schedules and logs would consist largely of "factual" information.

The other ground for denial of potential significance in my opinion 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." Although the standard 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 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, Sup. Ct. Suffolk Cty. NYLJ, October 30, 1980; Capi-

tal 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, 1989]. 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].

In my opinion, schedules indicating appointments, meetings and the like in which the a public employee has engaged, as well as telephone logs, are relevant to the performance of his or her official duties. Therefore, to the extent that the records in question pertain to the performance of a public employee's official duties, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy with respect to the public employee who maintains or is the subject of the logs or appointment books. I direct your attention to a decision that described the intent and utility of the Freedom of Information Law. Specifically, in Capital Newspapers v. Burns, the Court of Appeals, in considering the routine functioning of government 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 sec-

> tion 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 562, 564-566).

Perhaps a more direct precedent is Kerr v. Koch (Supreme Court, New York County, NYLJ, February 1, 1988). A newspaper reporter was granted access to the "public schedules" of New York City's Mayor, Edward Koch. However, other more detailed "private" schedules were withheld. In that decision, the court posed the following question: "Will granting access to the Mayor's appointment calendars without redaction urged by respondents as proper, result in an unwarranted invasion of personal privacy?" In response to the question, it was stated that:

> "Avoidance of disclosure under FOIL cannot be had by simply placing in documents the unilateral description, 'private' as this would '*** thwart the entire objective of FOIL by creating an easy means of avoiding compliance.'"

Further, in granting access to the records, the Court found that:

> "It appears that some private appointment calendar material has been produced for petitioner, with redactions that reduce the worthiness of those documents.
>
> "There is no suggestion of scandal attached to those who are associates of the Mayor, whether they be servants of the public or private individuals. Accordingly there is nothing unwarranted, excessive or unjustifiable in revealing the names of those with whom the Mayor had appointments from time to time. As a public person invested with a public trust, he should be accountable for his associations."

> "The passion for secrecy found in the redaction of names from private schedules of the respondents, where luncheon meetings have been billed to the Mayor's expense account, is not justified under the circumstances described here. Mixed, as they appear to be with public documents and records, all kept by the agency of the Mayor's Office, the private schedules are vulnerable under the Freedom of Information Law. Otherwise, liberal construction of FOIL is forfeited and the exemptions in the law are at the mercy of a narrow interpretation."

Although the decision described above dealt with appointment calendars, I believe that a similar analysis would be applicable to phone logs, with certain qualifications. If an entry in an appointment book or phone log is unrelated to the performance of one's official duties or the expenditure of public money, for example, as in the cases of a reference to an appointment with a doctor or a call from a spouse, I believe that those portions of the records could be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Further, if reference is made to a student or the parent of a student, I believe that privacy considerations arise not with respect to the public employee acting in the performance of his or her duties, but rather with respect to the parent or the student. As such, to the extent that the records include references to students or their parents, for example, I believe that those references could be deleted prior to public disclosure.

In short, it is my view that, under the Freedom of Information Law, a Board member or a member of the public could not only "see that [such records] exist," but that they likely enjoy rights of access to substantial portions of the records.

Lastly, if documents have been altered, destroyed or have left Board property, you asked what actions could be taken. In this regard, the Freedom of Information Law generally deals with existing records maintained by an agency. However, a recent amendment to the Freedom of Information Law, 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."

Whether that provision may be relevant is unknown to me. In addition, provisions of the Penal Law dealing with tampering with public records, sections 175.20 and 175.25, may be relevant. It is suggested that your attorney review those provisions to ascertain whether the matter might be brought to the attention of the district 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:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1778
FOIL-AO-6137

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

June 21, 1990

Mr. Patrick W. Cleveland
[redacted]

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

Dear Mr. Cleveland:

I have received your letter of June 6, as well as the materials attached to it. You have requested assistance in gaining access to records of the Salamanca Indian Lease Authority.

In a letter dated May 23 addressed to the Mayor of the City of Salamanca, the City Council, the City Attorney and the members of the Salamanca Indian Lease Authority, you requested "Minutes of all meetings of the Salamanca Indian Lease Authority, to include, but not limited to, meetings with the Seneca Nation", and "Copies of all vouchers for expenditures of the Salamanca Indian Lease Authority". In addition, you asked that any fees for copies of the records be waived.

In a lengthy response by Mr. David M. Franz, the City Attorney, the request was denied in its entirety. Mr. Franz offered the following reasons for the denial:

> "(a) The request for information was made to persons and governmental units not involved as an 'agency' within the contemplation of the Freedom of Information Law.
>
> (b) The lessee's negotiators have not made a determination and have no authority to make a determination.

> (c) The information produced by the lessee's negotiators are reflective of advice, opinions and recommendations between agencies, if at all, and is primarily private, not public information generated out of the relationship which exists between individual lessee's and the negotiators for such lessees.
>
> (d) The material requested is attorney work product material and materials prepared for litigation.
>
> (e) The lessee's negotiators are not acting in satisfaction of a government function and the requested materials are therefore not of a nature discoverable."

I disagree with the reason offered in item (a) of the denial, and the other reasons offered by Mr. Franz in my opinion have questionable bearing upon rights of access to the records sought.

In this regard, I offer the following comments.

First, the Salamanca Indian Lease Authority was created by Title 7-A of the Public Authorities Law (sections 1790-1799). Section 1793 specifies that the board of the Authority "shall be a body corporate and politic, constituting a public-benefit corporation". That section also indicates that the board consists of seven members, that a majority of the members constitutes a quorum for the transaction of business, and that the board "shall keep a record of its proceedings".

Although the City Attorney's denial was based in part upon a finding that your request was made "to persons and governmental units not involved as an 'agency' within the contemplation of the Freedom of Information Law", it is clear in my view that the Authority is an agency as contemplated by the Freedom of Information Law. The Freedom of Information Law pertains 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."

The provision quoted above includes entities of state and local government and makes specific reference to public authorities. As such, I believe that both the City of Salamanca and the Salamanca Indian Lease Authority are "agencies" required to comply with the Freedom of Information Law.

Similarly, since a portion of your request involves minutes of meetings of the Authority, I point out that the Open Meetings Law is applicable to public bodies. 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."

As indicated earlier, the board of the Authority consists of seven members and is required to carry out its duties by means of a quorum. Further, various provisions of the Public Authorities Law indicate that the Authority conducts public business, and section 1795 specifies that the Authority carries out its duties "for the benefit of the people of the city of Salamanca", for a "public purpose", and that the Authority "shall be regarded as performing a governmental function in the exercise of the powers conferred upon it...". It is noted, too, that section 66(1) of the General Construction Law states that a public benefit corporation is a "public corporation". Based upon the foregoing, I believe that the board of the Authority meets each of the conditions required to conclude that it is a "public body" subject to the requirements of the Open Meetings Law.

Second, with regard to rights of access to records, the Freedom of Information Law, in brief, is based upon a presumption of access. Stated differently, all records 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, books of account, vouchers and other records relating to expenditures by agencies are generally available, for none of the grounds for denial could appropriately be asserted. While internal records reflective of expenditures might be characterized as "intra-agency materials" falling within the scope of section 87(2)(g), subparagraph (i) of that provision

requires that "statistical or factual tabulations or data" found within such materials must be disclosed, unless a different basis for denial may be invoked. Vouchers, bills, ledgers and similar documentation would likely consist in great measure, if not in their entirety, of statistical or factual information.

Moreover, in a discussion of its intent, scope and utility, the Court of Appeals, the State's highest court, 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 exemp-

> tion 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..." (Capital Newspapers v. Burns, 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 by agencies are generally available under the Freedom of Information Law.

Third, with respect to minutes of meetings, I point out that the term "meeting" has been construed expansively to include any gathering of a quorum of a public body for the purpose of conducting public business, even if there is no intent to take action and regardless of the manner in which the gathering is characterized (i.e., as a "work session", for example) [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In brief, the Law requires that meetings be conducted open to the public, unless there is a basis for entry into a closed or executive session. Paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may be discussed behind closed doors. Further, 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. 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); if no action is taken during an executive session, minutes need not be prepared. 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.

In addition, 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 public body takes action, such as the board of the Authority, 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.

Fourth, the City Attorney contended that the records that you requested consist of "attorney work product material and materials prepared for litigation". If his contention is accurate, the records would be exempted from disclosure. Section 3101 of the Civil Practice Law and Rules makes confidential the work product of an attorney and material prepared for litigation. When that provision applies, the first ground for denial in the Freedom of Information Law, section 87(2)(a), may be asserted, for it authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute".

Nevertheless, it does not appear that records of the Authority's expenditures or minutes of meetings of its board could be characterized as attorney work product or material prepared for litigation. In my view, to be considered attorney work product or otherwise subject to a privilege accorded by section 3101, records must be prepared by an attorney acting in his or her capacity as an attorney, i.e., for the purpose of providing legal advice, developing legal strategy, preparing for litigation and the like. The preparation of minutes and records of expenditures are not functions that can be carried out solely by an attorney, and I do not believe that minutes of meetings of a public body, required to be prepared pursuant to section 106 of the Open Meetings Law, could be characterized as confidential on the ground that they consist of the work product of an attorney. Similarly, it has been held that materials prepared for multiple purposes, one of which might include eventual use in litigation, cannot be found to constitute material prepared for litigation that is exempted from disclosure; rather, it was determined that materials must have been prepared solely for litigation to be exempt [see Westchester Rockland Newspapers v. Moscydlowski, 58 AD 2d 234 (1977)]. From my perspective, it is doubtful that minutes of meetings or records of the Authority's expenditures were prepared solely for litigation. On the contrary, minutes are generally prepared to maintain a record or history of proceedings of an entity, often for the purpose of public disclosure. Records of expenses are generally maintained to ensure the fiscal accountability and status of an entity.

It is also noted that section 1793 of the Public Authorities Law states in part that:

> "The authority shall grant to the Seneca Nation of Indians the option of having seated at each meeting of the board up to three members of the nation, who may participate in such meetings but without vote, and who shall be designated by the council of the nation for such term or terms as the council may determine. Such members shall have access to all records of the authority."

To the extent that the records sought have been or could be made available to members of the Seneca nation, I do not believe that any privilege contemplated by section 3101 of the Civil Practice Law and Rules could be asserted. In brief, if records that might otherwise be confidential are disclosed to a party other than a client, any privilege or confidentiality would, in my view, be waived by such disclosure.

In short, I believe that the records sought are subject to rights conferred by the Freedom of Information Law.

Lastly, in your request, you asked that fees be waived. While the federal Freedom of Information Act, which applies to records maintained by federal agencies, contain provisions concerning fee waivers, no such provision appears in the New York Freedom of Information Law. In brief, pursuant to section 87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy when reproducing records. However, accessible records may be inspected free of charge.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Salamanca City Council
Salamanca Indian Lease Authority
David Franz, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6138

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

June 21, 1990

Mr. Clifford J. Collins
82-A-0316
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. Collins:

I have received your letter of June 5.

By way of background, you wrote that you have unsuccessfully engaged in efforts to obtain copies of transcripts from the Kings County Criminal and Supreme Courts concerning arraignment proceedings and your indictment. In addition, you referred to a copy of an appeal directed to Matthew Crosson of the Office of Court Administration in which you appealed the denial of your request under the Freedom of Information Law. Although you did not indicate whether your appeal was answered, you have not yet received the records.

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

First, as you are aware, Mr. Crosson is Chief Administrator of the Office of Court Administration. That agency, as its title suggests, is responsible for overseeing the administration of the court system. In carrying out its functions, I do not believe that the Office of Court Administration generally maintains custody of court records, including those in which you are interested. If my assumption is accurate, that the Office of Court Administration does not maintain the records, it can neither grant nor deny access to the records in question. Rather, I believe that the records would be maintained by the court or courts in which the proceedings were conducted.

Second, the Freedom of Information Law is applicable to agency records, and 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."

Based upon the foregoing, the Freedom of Information Law does not apply to the courts or court records. Further, while section 89(4)(a) of the Freedom of Information Law permits an applicant to make an administrative appeal following a denial of access to records by an agency, I know of no comparable appeal that may be made following a denial of a request for court records.

As you suggested in your letter, section 255 of the Judiciary Law, which is separate and distinct from the Freedom of Information Law, provides substantial rights of access to records maintained by clerks of courts. Therefore, if you have not already done so, it is suggested that you resubmit your request to the clerk of the appropriate court. In the alternative, 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6139

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

June 21, 1990

Mr. Daniel Sullivan
[redacted]

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

Dear Mr. Sullivan:

I have received your recent letter. Having requested records from the Yonkers Police Department, you asked whether "three weeks is sufficient time to wait for this information."

In this regard, section 89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

As such, if more than five business days is needed by an agency to grant or deny access to records, it may extend the time for responding by acknowledging the receipt of the request in writing and providing an estimated date of its determination. In my view, the volume of a request, the time needed to search for and locate the records, and the need to review the records to determine the extent to which they must be disclosed would be some of

the factors used in ascertaining whether three weeks is a "sufficient" amount of time for an agency to grant or deny access to records. In ordinary circumstances, I believe that three weeks would represent more than an adequate period of time for an agency to grant or deny access to records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6140

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

June 22, 1990

Mr. Edward Morley
[redacted]

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

Dear Mr. Morley:

I have received your letter of June 7 in which you requested assistance.

As I understand the situation, you requested records under the Freedom of Information Law regarding the Village of Alexandria Bay's enforcement of its zoning laws and your contention that "parking lots are being built without permits, special permits or public hearings being held". In response to the request, you wrote that the Mayor stated that "the Village did not have the manpower or the time to find and copy the documents that [you] requested...".

In this regard, I offer the following comments.

First, it is noted at the outset that section 89(3) of the Freedom of Information Law requires that an applicant for records must "reasonably describe" the records sought. Therefore, if agency officials can locate requested records based upon the terms of a request, even though the records may be numerous, the applicant would have met the responsibility of reasonably describing the records.

Second, 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, which involved a request for some 1,500 records, 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)].

Therefore, I do not believe that an agency can reject a request based upon the kind of claim made by the Mayor.

Third, the Freedom of Information Law requires that an agency respond to request a in accordance with section 89(3) of the Law, which states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 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:jm

cc: Mayor, Village of Alexandria Bay
Board of Trustees, Village of Alexandria Bay

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-614

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

June 22, 1990

Mr. Brian Wilkes
#87-T-1457
Elmira Correctional Facility
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. Wilkes:

I have received your letter of June 6 concerning a request made under the Freedom of Information Law.

According to your letter, on May 16 you requested certain records from Ms. Donna Taylor, an administrative aide at your correctional facility. As of the date of your letter to this office, the request had not been answered.

In this regard, I offer the following comments.

First, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that requests for records maintained at a correctional facility may be made to the facility superintendent or his designee. If Ms. Taylor is not the person designated by the superintendent to respond to requests, it is suggested that you resubmit your request to the appropriate person.

Second, the Freedom of Information Law states that an agency must respond to a request as required by section 89(3) of the Law, which states that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals under the Freedom of Information Law 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
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6142

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

June 22, 1990

Ms. Mary Ann Barnes
Town Clerk
Town of Highland
2 Proctor Road
P.O. Box 138
Eldred, NY 12732

The staff of the Committee on 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. Barnes:

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

Your inquiry concerns verbal complaints made to the Town's zoning code enforcement officer and whether a disclosure must be made under the Freedom of Information Law if there is no record of the complaint.

In this regard, I offer the following comments.

First, the title of the Freedom of Information Law may be somewhat misleading, for that statute is a vehicle under which the public may seek and agencies must provide access to records to the extent required by the Law. It does not, however, require that agency officials respond to questions or prepare records in response to a request for information. Further, section 89(3) of the Freedom of Information Law states that, as a general rule, an agency need not create a record to comply with the Law.

In the context of your question, if a complaint was made verbally, and the Town maintains no record pertaining to the complaint, I do not believe that the Freedom of Information Law would be applicable, for no record would exist.

Second, as it applies 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.

Assuming that a written complaint has been forwarded to the Town or that a town employee prepared a record concerning the complaint, I believe that section 87(2)(b) of the Freedom of Information Law would be relevant. That provision 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.

I hope that I 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-1643

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

June 22, 1990

Mr. Sigurd C. Rahmas
President
Story House Corporation
Bindery Lane
Charlotteville, New York 12036

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

Dear Mr. Rahmas:

I have received your letter of June 11 in which you seek a "ruling" concerning a denial of your request by Thomas F. Hartnett, Commissioner of Labor.

The correspondence attached to your letter indicates that you or perhaps your firm were the subject of a complaint made to the Department of Labor. In response to your request for the name of the complainant, the Commissioner denied access on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

In this regard, I offer the following comments.

First, it is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee cannot compel an agency to grant or deny access to records, nor is it empowered to render a "ruling" or issue a binding determination.

Second, with regard to the substance of the issue, 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 indicated by the Commissioner, 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.

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 an "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.

Based upon the foregoing, it is my view that the identity of a complainant may be withheld as an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Thomas F. Hartnett, Commissioner
Jerome A. Tracy, Senior Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6144

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

June 25, 1990

Mr. Albert Rielly
89-T-4182 E-7-37
P.O. Box 51
Comstock, NY 12821-0051

Dear Mr. Rielly:

I have received your letter of June 8, as well as copies of requests and appeals made under the Freedom of Information Law concerning records maintained by the Office of the Chief Medical Examiner of the City of New York, the District Attorney of Queens County, various other agencies and several courts. The requests involve records that you seek to obtain in conjunction with your appeal of a conviction.

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 does not have the capacity to compel an agency to grant or deny access to records.

Second, several of your requests do not, in my opinion, fall within the scope of the Freedom of Information Law. 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 upon the foregoing, the offices of a medical examiner or district attorney, for example, are "agencies" subject to the requirements of the Freedom of Information Law; the courts and court records, however, are expressly excluded from the coverage of the Freedom of Information Law.

This is not to suggest that all court records are confidential, for various statutes deal with access to court records (see e.g, Judiciary Law, section 255; Family Court Act, section 166; Surrogate's Court Procedure Act, sections 2501 et seq.).

Insofar as it applies to your requests for agency records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unfamiliar with the nature of the records that you have requested and I cannot offer specific guidance concerning rights of access. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies persons other than yourself, for example.

Perhaps the most relevant provision concerning access to 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 and 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.

Records prepared by agency employees or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the content of the records in question and the effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld under the Freedom of Information Law.

Assuming that the District Attorney or other agencies maintain records of public judicial proceedings in which you or others have been involved, it appears that such records would be available. In a recent decision in which an inmate requested records maintained by a district attorney that were disclosed in a criminal proceeding, the court noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see, Matter of Knight v. Gold, 53 A.D. 2d 694, 385 N.Y.S.2d 123, app dsmd 43 N.Y.2d 841, 402 N.Y.S.2d 811, 373 N.E.2d 991), 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" [Moore v. Santucci, 543 NYS 2d 103, 107, ___AD 2d___ (1989)].

As such, the records reflective of information introduced or stated during a public proceeding must generally be made public.

If you could provide more specific information concerning the nature of agency records in which you are interested, perhaps I could provide more specific guidance.

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-6145

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

June 25, 1990

Mr. Gary Colas
85-A-0499
135 State Street, Box 618
Auburn, New York 13024

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

Dear Mr. Colas:

I have received your letter of June 13, as well as a copy of a request for records of the District Attorney of New York County.

In brief, you requested "one complete xerrox [sic] copy of any and all 'Documents/Records' pertaining to [you] and a criminal action" occurring in New York City. You included indictment numbers, the charges and the date that the crime occurred. You also contended that the Office of the District Attorney is subject to the federal Freedom of Information and Privacy Acts and requested a "Vaughn" index concerning any records that might be withheld. In response, you were informed that the request was "too broad" and that you should specify which item or items you are requesting." You asked whether, in my view, the request is too broad and you added that: "What [you] want is any information [you] don't have."

In this regard, I offer the following comments.

First, with respect to the breadth of a request, I point out that a request need not specify the records sought with particularity. In the Freedom of Information Law as originally enacted, an applicant was required to seek "identifiable" records. That standard resulted in a series of difficulties, for members of the public often were unfamiliar with the exact nature or name of a record and, therefore, could not identify the record. When the original statute was repealed and replaced with the current law, the standard for requesting records was altered. Section 89(3) of the Freedom of Information Law now requires that

an applicant must "reasonably describe" the records sought. Moreover, it has been held by the Court of Appeals that a request reasonably describes the records when the agency can locate the records based upon the terms of a request, and that to deny a request on the basis that it is overbroad, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [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)]. Nevertheless, without knowledge of the nature of records that might be maintained by the Office of the District Attorney or its recordkeeping systems, I cannot advise with certainty that your request reasonably described the records sought.

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. I am unfamiliar with the nature of the records that are maintained concerning the incident, and I cannot offer specific guidance concerning rights of access. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies persons other than yourself, for example.

Perhaps the most relevant provision concerning access to 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 and 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.

Records prepared by agency employees or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the content of the records in question and the effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld.

Third, since you contended that the Office of the District Attorney is required to disclose under the federal Freedom of Information and Privacy Acts, I point that those provisions apply only to records maintained by federal agencies. While the Office of the District Attorney is required to comply with the New York Freedom of Information Law, I do not believe that the federal statutes that you cited are relevant to records maintained by the District Attorney.

Lastly, since you referred to a "Vaughn" index, it is noted 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. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring 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, one 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 mateirals exempted under Public Offices 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 and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 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)].

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

6146

FOIL-AO-6146

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

June 25, 1990

Ms. Jane Barton
Chairman
Charleston Planning Board
R.D. 1
Box 713
Esperance, NY 12066

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

Dear Ms. Barton:

I have received your letter of June 18 in which you requested a clarification of an opinion addressed to you on June 6.

Your earlier inquiry involved the custody of Town records. In your latest letter, you asked "which records must be maintained by the Town Clerk and which by an agency". You also questioned whether the "Town Clerk handle[s] only papers related to Town government...and would the Town Planning Board maintain and keep custody of its own papers, such as correspondence, study sheets, minutes, etc?"

In this regard, as you may be aware, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. While that statute has some bearing upon your inquiry, it does not deal directly with the maintenance of records. The Freedom of Information Law applies to agency records and describes the extent to which agency records must be disclosed or may be withheld. The Town and each of its components would in my view constitute an agency. The Planning Board, for example, is designated by the Town Board and the records produced, obtained or maintained by the Planning Board are Town records. Further, 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."

As such, any records kept, held, filed, produced or reproduced by, with or for a town are subject to rights conferred by the Freedom of Information Law.

Second, as indicated in the earlier correspondence, other provisions of law likely have greater significance than the Freedom of Information Law with respect to the custody of records. To reiterate, section 30 of the Town Law states in part that the town clerk "Shall have the custody of records, books and papers of the town". In my opinion, section 30 indicates that the town clerk maintains legal custody of town records, even though records might not be physically kept in the office of the clerk. For example, records maintained by the highway superintendent or perhaps the Planning Board, although outside the physical possession of the clerk, are, in my view, nonetheless in the clerk's legal custody. In addition, section 57.19 of the Arts and Cultural Affairs Law requires that the governing body of a municipality, such as a town board, "shall promote and support a program for the orderly and efficient management of records, including the identification and appropriate administration of records with enduring value for historical or other research". The same provision requires the designation of a "records management officer" who "shall coordinate the development of and oversee such program and shall coordinate legal disposition, including destruction of obsolete records". Section 57.19 specifies that in towns, "the town clerk shall be the records management officer".

I hope that the foregoing serves to clarify the matter. If questions continue to exist concerning the issue, it is suggested that they be raised with the town clerk, the town attorney or with representatives of the State Archives and Records Administration at the State Education Department.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

6147

FOIL-AO-6147

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

June 26, 1990

Mr. John J. Sheehan
J.J. Sheehan Adjusters, Inc.
P.O. Box 604
Binghamton, New York 13902

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

Dear Mr. Sheehan:

I have received your correspondence of June 15 in which you raised questions concerning the Freedom of Information Law.

In the first item correspondence, you asked whether "anyone ever sued a governmental body because of the fact that their requests were continually delayed and other similar requests were answered promptly." In short, I am unaware of any litigation that has dealt with the specific issue that you raised. However, it has been found that records available under the Freedom of Information Law should be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976); also M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

The second item of correspondence pertains to a request for records of the Division of State Police involving a case in which "turkey hunter Lyon shot and killed another hunter." You wrote that the grand jury "failed to indict Mr. Lyon," that the case is closed and that you represent the insurance carrier for Mr. Lyon. In response to the request, you were advised that "Section 160.50 of the Criminal Justice Procedure Law prohibits the disclosure of the report."

You have asked whether you are entitled to the records falling within the scope of your request. In this regard, I offer the following comments.

First, under section 160.60 of the Criminal Procedure Law, "upon the termination of a criminal action or proceeding against a person in favor of such person," the records pertaining to such action or proceeding generally become sealed. The grand jury failed to indict Mr. Lyon, and if there were no charges against him to be dismissed, I do not believe that section 160.50 would be relevant or that it would serve as a basis for denial of access to records. Further, upon the termination of such an action or proceeding, some of the records prepared in conjunction to the action or proceeding generally become available to the person accused.

Second, assuming that section 160.50 of the Criminal Procedure Law does not apply, I believe that rights of access would be governed by the Freedom of Information Law. In brief, 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. I am unfamiliar with the nature of the records that are maintained concerning the incident, and I cannot offer specific guidance concerning rights of access. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies persons other than Mr. Lyon, for example, such as witnesses.

Perhaps the most relevant provision concerning access to 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 and 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). Under the circumstances, it does not appear that section 87(2)(e) would serve as a basis for denial.

The remaining 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.

Records prepared by agency employees or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the content of the records in question and the effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the Division of State Police.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Thomas S. Murphy, Technical Sergeant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

6148

FOIL-AO-6148

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

June 26, 1990

Mr. Abdul Mustafa
83-A-6349
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. Mustafa:

I have received your letter of June 15.

According to your letter, you are an inmate at the Eastern Correctional Facility and allege that you "have been placed in administration segregation for [your] political beliefs and avocation of principals [sic]". You wrote that you "wish to seek justification or reasons why DOCS placed [you] in such a situation".

In this regard, I offer the following comments.

First, it is questionable in my view whether the Department has taken action in conjunction with your allegation.

Second, assuming that the Department maintains records concerning your placement, such records would be 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.

Second, of likely 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.

I point out that a decision rendered in 1989 appears to have dealt with the records similar to those in which you are interested. In that case, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison

(see matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; ___AD 2d ___ (1989)].

Assuming that the records sought are the equivalent to those described in Rowland D., it appears that they could be withheld.

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-6149

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

June 26, 1990

Ms. Gale Cortelyou
Reporter
The Smithtown News
1 Brooksite Drive
P.O. Box 805
Smithtown, NY 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.

Dear Ms. Cortelyou:

I have received your letter of June 18 in which you requested assistance.

Attached to your letter is a request made on March 22 to the Suffolk County Department of Civil Service for "a complete list of all part-time and full-time police officers that have been certified (by Civil Service) for employment in the Village of Nissequogue as of March 15, 1990". You indicated that, in your efforts to obtain the information, you have contacted the Department's classification officer many times "to no avail" and that you have received no response to your request.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time in which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 believe that the person designated to determine appeals is Ms. Joyce Long, Assistant County Attorney.

Second, it is noted that, as a general rule, the Freedom of Information Law pertains to existing records. Section 89(3) states that, unless specific direction to the contrary is provided, an agency need not create a record in response to a request. Therefore, if there is no list that contains the information sought, the Department would not, in my opinion, be obligated to prepare such a list on your behalf.

Third, it appears that the record in which you are interested may be what is characterized as an "eligible list". An eligible list identifies those who have passed a civil service examination and are eligible for appointment. Further, section 71.3 of the regulations promulgated by the State Department of Civil Service state that eligible lists may be disclosed to the public. As such, if the record in question is an eligible list, I believe that it must be disclosed.

Fourth, if the information sought pertains to persons currently employed by the Village of Nissequogue, I believe that it would be available from the Village. One of the exceptions to the general rule that an agency need not create records pertains to payroll information. Section 87(3)(b) of the Freedom of Information Law states in relevant part that:

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

A review of the record required to be maintained pursuant to section 87(3)(b) of the Freedom of Information Law would enable you to identify all employees of the Village by title and salary, including police officers.

Lastly, if section 87(3)(b) is inapplicable and if neither the Department of Civil Service nor the Village maintain a "list" containing the information sought, it is suggested that you submit a new request. Rather than seeking a list that does not exist, it is suggested that you request records containing the information in question, i.e., records identifying all part-time and full-time police officers that have been certified by the County Department of Civil Service for employment in the Village of Nissequogue as of March 15, 1990.

I hope that I have 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 Greenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6150

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

June 26, 1990

Barry Ziman, Director
Government Affairs
Association of the Graphic Arts
5 Penn Plaza
New York, New York 10001

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

Dear Mr. Ziman:

I have received your letter of June 18, as well as transcripts of "taped telephone conversations" made on June 14 between yourself and a purchasing agent for Queens College and an attorney for the City University of New York.

The materials pertain to your efforts in obtaining "information on the prior printing of the Queens College Graduate Bulletin", and you added that the 1990-1992 edition "is being solicited for printing". In brief, you were informed by the attorney for the City University that "information relating to contracts for prior printing jobs will not be made available while current printing are pending". The denial of access to the information in question appears to have been made pursuant to a long-standing policy based upon a contention that disclosure would "impede" the bidding process.

Also attached to your letter is a copy of a request made under the Freedom of Information Law and directed to the chief purchasing agent at Queens College for "The dollar award and the vendor on the contract for the 1988-1990 Graduate Bulletin".

It is your view that the policy described earlier is inconsistent with the Freedom of Information Law, and you requested an advisory opinion on the matter. 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 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, as in this case. 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 of the bids 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, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (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, and I believe that a contract or equivalent document indicating the identity of the parties, the terms of the agreement and the amount paid by an agency to a person or firm with whom the agency has established a contractual relationship 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. As in Doolan, in which records based upon contractual agreements were found to be available, I believe that the record that you requested must be disclosed.

In sum, based upon the language of the Freedom of Information Law and its judicial interpretation, it is my opinion that the contract between Queens College and the firm that printed the 1989-90 Graduate Bulletin, as well as records related to it, such as the successful bid, the "dollar award" and the identity of the vendor must be disclosed. Moreover, since the College is seeking bids to print a new bulletin, release of the records sought would likely encourage competitive bidding. Therefore, disclosure would not "impede" the process; rather it appears that disclosure would enhance the process.

Lastly, since you directed your requested to the chief purchasing agent, I point out that requests should ordinarily be made to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests. I believe that the records access officer at Queens College is Ms. Lola Locker, Special Assistant to the President.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to officials at Queens College and the City University of 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Diaz, Counsel
Gerald Maslon, Senior Commercial Counsel
Lola Locker, Special Assistant to the President
Jeff Baicher, Chief Purchasing Agent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-615

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

June 27, 1990

Ms. Danamaria Martin
[redacted]

The staff of the Committee on 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. Martin:

I have received your letter of June 16 in which you requested further advice concerning the Freedom of Information Law.

In your initial area of inquiry, you wrote that:

> "[You] understand that due to the structure of the Freedom of Information Law, it is impossible to identify which records will always be available or perhaps subject to denial. Many of the grounds for denial are written in terms of the potential harm should records be disclosed. If the potential harm in disclosure of records is that they will prove certain departments of an institution are using funds they are not supposed to have access to, can these records be denied?"

The second area of inquiry concerns budget information and you asked:

> "If an institution allocates a certain department a specific amount of money per year, how does one go about finding out how much that is."

The third question involves scholarships, and you described the following hypothetical situation:

> "...let's say a department has a yearly benefit fundraiser in order to raise money for a scholarship fund. This scholarship fund has X amount of money put in it each year. Also, each year Y amount of money is allocated in scholarships to eligible students. Now, let's assume that 1/3 of the money raised each year is given as scholarships to eligible students. So this fund has 2/3 of the money raised left in it. After 10 years there should be 2/3 the amount of money raised each year x 10 in the scholarship fund."

You want to know how much money is in the fund. Lastly, you asked whether the City University of New York or a college within the University is considered an "agency" for purposes 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. Most of the grounds for denial include verbs that describe potential harm that could arise as a result of disclosure. For example, section 87(2)(c) refers to disclosures that would "impair" present or imminent contract awards; section 87(2)(d) refers to disclosure that "would cause substantial injury" to the competitive position of a commercial enterprise; section 87(2)(e) refers to disclosures that would "interfere" with an investigation.

However, with respect to each of the three areas of inquiry involving particular records, I believe that a different provision is most relevant. That provision, section 87(2)(g), does not specifically describe harm that might arise by means of disclosure; rather it indicates that a class of records must be disclosed or may be withheld based upon their contents. 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.

Records reflective of the use or the allocation of funds to a department, or figures indicating the amount of money in a scholarship fund, for example, would constitute factual information accessible under section 87(2)(g)(i). In my view, the Freedom of Information Law is intended to ensure accountability and to require that agencies disclose the kinds of records that you described. In a discussion of its intent, scope and utility, the Court of Appeals, the State's highest court, 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..." (Capital Newspapers v. Burns, 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 of expenditures or budget allocations by agencies, as well as books of account, ledgers and similar documents, are generally available.

Second, to seek records under the Freedom of Information Law, a request should generally be made to an agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and I believe that there is a records access officer at each college of the City University. I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, although a request need not identify the records with particularity, it should include sufficient detail to enable agency officials to locate the records.

Lastly, 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 my opinion, it is clear that the City University of New York and its component units fall within the scope of the definition of "agency" and that the University and its colleges are required to comply with the Freedom of Information Law. Moreover, several judicial decisions have dealt with those entities, and I do not believe that there is any question concerning their coverage by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1780
FOIL-AO-6152

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

June 27, 1990

Mr. Alexander J. Rogers
[redacted]

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

Dear Mr. Rogers:

I have received your letter of June 19, which pertains to a request made under the Freedom of Information Law to the Town of Deerfield.

The request, a copy of which was previously sent to this office, was made on May 30 for minutes of an executive session held by the Town Board in August of 1989. In that request, you expressed the belief that a vote was taken at the meeting. The request was directed to the Town Supervisor, who appears to be the records access officer, and to date, you have received no response.

You have requested my views on the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time in which agency officials must respond to requests. Specifically, section 89(3) of the Law states that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknow-

> ledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 the request involves minutes, I direct your attention to the Open Meetings Law, which 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. 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); if no action is taken during an executive session, minutes need not be prepared. 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.

In addition, 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 public body, such as a town 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.

In an effort to enhance compliance with law, copies of this opinion will be sent to town 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: Town Board
Hon. Donald S. Youlen, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6152

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

June 27, 1990

Ms. Roseanne M. Rousseau
[redacted]

The staff of the Committee on 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. Rousseau:

I have received your letter of June 18, as well as the materials attached to it.

The attachments consist of a series of requests directed to the Town of Babylon for records pertaining to Oak Beach Inn and/or Robert Matherson, the proprietor of the Oak Beach Inn. The records sought involve a subject matter list of records kept concerning the Oak Beach Inn and correspondence between present and former Town officials or between those officials and those of other agencies. Several of the requests specified that you seek records involving matters that have been adjudicated or which relate to litigation that has ended. The responses to the requests, with one exception, were made on forms in which a box entitled "confidential disclosure" was marked. In some instances, that box was marked with others entitled "investigatory file" or "record exempt by law".

You have requested advice concerning the requests and the responses by the Town.

First, with respect to the subject matter list, direction is provided in section 87(3) of the Freedom of Information Law, which states in relevant part that:

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

Based upon the foregoing, the record described above need not identify each and every record of an agency. Similarly, I do not believe that section 87(3)(c) requires that a subject matter list be maintained with specific reference to records pertaining to the Oak Beach Inn or its owner. However, I believe that a list must be prepared, in reasonable detail, by subject matter that pertains to all records maintained by the Town. Further, the regulations promulgated by the Committee on Open Government pursuant to section 89(1)(b)(iii) of the Freedom of Information Law states that: "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [21 NYCRR section 1401.6(c)].

Second, with respect to the breadth of your requests, section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Further, it has been held that a request reasonably describes the records when the agency can locate the records based upon the terms of a request, and that to deny a request on the ground that it is overbroad, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)]. I point out that, 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 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. To the extent that the Town can locate the records in conjunction with the terms of your requests, I believe that those requests were appropriate and that the Town is obliged to review the records to determine the extent, if any, to which the records may properly be withheld.

Third, the reasons for denial marked on the forms by the Town are inconsistent with the Freedom of Information Law. The phrases "confidential disclosure" and "record exempt by law", 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". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access 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)]. Similarly, the phrase "investigatory file" appeared in the Freedom of Information Law as originally enacted, but it appears nowhere in the current statute.

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. Although I am unfamiliar with the records sought, it appears that two of the grounds for denial may be particularly relevant. However, the extent to which those provisions may properly be asserted would be dependent upon a variety of factors.

As suggested earlier, one of the grounds for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". Since the requests in some instances allude to litigation, I point out that 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. Further, the fact that litigation has ended would not in my view require records falling with the scope of those exemptions to be made available. However, numerous records relating to or used in litigation, 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. Moreover, 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.

The other ground for denial of likely significance is section 87(2)(g). I emphasize, however, that while that provision represents a basis for withholding, due to its structure, it often requires 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, unless a different ground for denial may properly 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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under section 87(2)(g).

I point out that it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or final agency determinations would be available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal may be exempt form 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" [65 NY 2d 131 at 133 (1985)].

In short, although records may be characterized as "inter-agency or intra-agency materials", their contents would determine the extent to which they must be disclosed or may be withheld. It appears that many of the records sought fall within the scope of section 87(2)(g). I would conjecture, however, that portions of those records consist of statistical or factual information accessible under section 87(2)(g)(i) or, since you referred in your request to matters that have been adjudicated, portions would be available under section 87(2)(g)(iii) as final agency determinations.

In an effort to enhance compliance with the Freedom of Information Law, copies of the opinion will be forwarded to the Office of the Town Attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas F. Whelan, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6154

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

June 28, 1990

Mr. Michael G. Kessler
[redacted]

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

Dear Mr. Kessler:

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

The correspondence relates to your efforts to obtain records relating to "the clearing of State owned land in Mount Sinai". According to an article published in the New York Times, a three and a half acre parcel was "bulldozed last summer", and it was assumed by many that the land was cleared for development. However, the article states that, upon inquiry, "no one seemed to know why the land had been cleared". The matter was investigated by the Suffolk County Police Department and its report has been determined to be public. However, the State Department of Transportation is also investigating in an effort to determine responsibility for the incident. In addition, there apparently will be an attempt to restore the property.

The correspondence indicates that you requested records on the matter from the Department's regional office in April. In the initial response to that request, the regional administrative officer wrote that:

> "We have received your request for information from NYSDOT records. A Freedom of Information Application form has been filled out and is enclosed for verification of its accuracy. You must initial and return the original application to the office before we can proceed."

Following your verification of the accuracy of the request, you were informed that the request would be denied on the ground that the records "are part of an ongoing investigation". It was added that: "During any investigation, records are sealed". You appealed the denial, and certain records were found to be available, including the police report mentioned earlier, and various other documentation. Other records, however, were withheld by Timothy J. Gilchrist, Executive Assistant to the Commissioner, who concurred with the original denial and wrote that:

> "The balance of the documents consist of inter-agency or intra-agency materials which are not statistical or factual tabulations or data; instructions to staff that affect the public or final agency policy or determinations. Additionally, disclosure of such information at this time might affect present or imminent contract awards with respect to restoration of the property involved. Further, the investigation by the State Inspector General with respect to possible criminal or civil liability has not yet been issued. Disclosure may affect the formulation of such report and its proper completion. Still further, such documents consist only of opinions, evaluations, proposals or recommendations."

Soon thereafter, you wrote to Mr. Gilchrist to ask to see the records that he indicated would be disclosed, as well as "documents pertaining to Specifications, Invitations for Bids, Requests for Proposals and contract files applicable to that present or imminent contract" mentioned in his response to your appeal. You added that you contacted the Department's contracts section and were informed that "no such specifications or contracts exist within that department". You also wrote that the Inspector General's Office has informed a local resident "that no investigation by their office was underway concerning this matter."

You have requested advice concerning rights of access to the records under the Freedom of Information Law. In this regard, I offer the following comments.

First, I am unfamiliar with the records maintained by the Department of Transportation that fall within the scope of your requests. Nevertheless, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, 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, for example, might contain both accessible and deniable information. That phrase also imposes an obligation upon agency officials to review records sought to determine which portions, if any, may justifiably be withheld.

Second, on the basis of the correspondence, it appears that three of the grounds for denial may be relevant. However, the extent to which those provisions could appropriately be asserted to withhold records would be dependent upon the effects of disclosure and the specific contents of the records.

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.

In 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 of the bids 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, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

If the Department has not solicited bids or proposals concerning the restoration of the property, section 87(2)(c) would not in my opinion serve as a basis for denial. If the process seeking bids or proposals has begun, the authority to withhold would be dependent upon the facts and in conjunction with the commentary appearing in the preceding paragraph.

Since the denials refer to an "investigation", of possible significance 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..."

Based upon the foregoing, the authority to withhold records under section 87(2)(e) involves the extent to which the harm described in subparagraphs (i) through (iv) of that provision would arise as a result of disclosure. While the Department may be "investigating" the matter, in view of its functions, it is questionable whether the records it prepares could be characterized as having been "compiled for law enforcement purposes". If they could not be so characterized, section 87(2)(e) could not be asserted to withhold the records. Moreover, since the police report of the matter is public and if the Inspector General is not investigating, again, the application of section 87(2)(e) would, in my opinion, be tenuous. On the basis of the article in the Times, it appears that the inquiry by the Department is of a fact-finding nature; while that might be considered an investigation, it might not involve records compiled for law enforcement purposes as envisioned by section 87(2)(e).

The remaining ground for denial of likely significance is section 87(2)(g). I emphasize, however, that while that provision represents a basis for withholding, due to its structure, it often requires 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, unless a different ground for denial may properly 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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under section 87(2)(g).

I point out that it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or final agency determinations would be available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal may be exempt form 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1781
FOIL-AO- 6158
6155

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

June 28, 1990

Mr. Jeffrey Chamberlain
Attorney and Counselor at Law
R.D. 2 Box 57
Rohloff Road
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 Mr. Chamberlain:

I have received your letter of June 21, as well as the correspondence attached to it.

By way of background, you requested a variety of records from the State University. Although some of the records were disclosed, others were withheld. Among the records withheld were performance evaluations relating to certain professors, records relating to allegations of impropriety by professors, reports involving the identification of the handwriting of professors, minutes of meetings of the faculty of a certain department, and others. The denials were based largely upon claims that the records constituted "intra-agency materials". In the case of some records, it was contended that disclosure would result in an unwarranted invasion of personal privacy or that the records were "investigatory". In one instance, although you indicated that you had seen the record, the request for that record was denied on the ground that "No official correspondence of this nature exists".

You have questioned the propriety of the denials and requested an advisory opinion on the matter. In this regard, I offer the following comments.

First, the application of the Freedom of Information Law is expansive, for it pertains 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."

Based upon the foregoing, any documentation or information "in any physical form whatsoever" that is "kept, held, filed, produced or reproduced by, with or for" an agency, such as the State University, would constitute a "record" subject to rights conferred by the Law. I point out, too, that the definition of "record" has been construed by the State's highest court as broadly 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)]. Therefore, even though a document might not be characterized as "official", if it is maintained by an agency, I believe that it is a "record" that falls within the coverage of the Freedom of Information Law. Further, although it may be irrelevant to the matter, I point out that a recent amendment to the Freedom of Information Law, 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."

A companion provision added a new section 240.65 to the Penal 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. 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. The phrase quoted in the preceding sentence indicates that a single record might contain both accessible and deniable information. That phrase, in my view, imposes an obligation upon agency officials to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

As indicated earlier, one of the grounds for denial offered in response to the request 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". 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); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Powhida v. City of Albany, 147 AD 2d 236 (1989); 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].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. 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 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)."

From my perspective, if there has been a finding of misconduct or the imposition of disciplinary action regarding the professors in question, such determinations would be accessible under the Freedom of Information Law. 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 may, in my view, be withheld, for disclosure would 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 or allegations are found to be without merit, I believe that they may be withheld.

Since some of the records sought might pertain to the activities of faculty members as they related to students, the federal Family Educational Rights and Privacy Act (20 U.S.C. 1232g), which concerns education records identifiable to students, may be relevant. In brief, the Act generally prohibits the disclosure of "education records" (a phrase that is broadly defined in 34 C.F.R. section 99.3) which identify or could identify a particular student or students, except with respect to the parents of students under the age of eighteen or "eligible students", persons who attend or who have attended colleges or universities subject to the Act. To the extent that the records sought identify students, it appears that they would be confidential under the Family Educational Rights and Privacy Act and, therefore, specifically exempted from disclosure by statute pursuant to section 87(2)(a) of the Freedom of Information Law.

Many of the records that were denied could be characterized as "intra-agency materials" falling with the scope of section 87(2)(g). Nevertheless, due to the structure of that provision, the contents of those materials determine the extent to which they must be disclosed or may be withheld.

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 ground for denial may properly 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.

I point out that it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or final agency determinations (i.e., reprimands or findings of misconduct), would be available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal may be exempt form 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" [65 NY 2d 131 at 133 (1985)].

With regard to evaluations of public employees, typically, I believe that they include three categories of information. One category involves a description or list of the duties that must be carried out by an employee by virtue of that person's title or position. That portion of the record would, in my view, be available, for it is factual. Further, such a description would clearly be relevant to the performance of one's official duties. A second category usually consists of a supervisor's comments concerning how well or poorly the subject of the evaluation has performed his or her duties. Aside from the issue of privacy, that portion of the record would likely be reflective of the supervisor's subjective opinion. Accordingly, that aspect of an evaluation could in my view be withheld pursuant to section 87(2)(g). The remaining portion of an evaluation often is a performance rating (i.e., "outstanding", "effective" or "needs improvement"). Assuming that those ratings are final, that any appeals have been exhausted, I believe that they must be disclosed, for they would represent final agency determinations accessible under section 87(2)(g)(iii). Moreover, those determinations would clearly be relevant to the performance of employees' official duties. Therefore, disclosure would in my opinion result in a permissible rather than an unwarranted invasion of personal privacy.

Other intra-agency materials not specifically referenced above would be available or deniable based upon the considerations and principles described in the preceding commentary.

With respect to the reports concerning the identification of handwriting, rights of access might be dependent in part upon the nature of the relationship between the State University and the persons or firms that prepared the reports. If those persons or firms are consultants retained by the University, the records, according to the Court of Appeals, would be treated as "intra-agency materials" falling within the scope of section 87(2)(g) (see Xerox Corporation, supra). If those persons or firms were not retained as consultants, section 87(2)(g) would not apply. Irrespective of whether section 87(2)(g) is relevant, it appears that there may be considerations of personal privacy that would bear upon the extent to which the records would be accessible.

With respect to minutes of meetings of the faculty of the Department of Hispanic and Italian Studies, the inference in your appeal is that the minutes must be prepared and made available in accordance with the Open Meetings Law. That statute is applicable to public bodies, and section 102(2) 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."

If my understanding of the matter is accurate, a gathering of the faculty of a department would not constitute a meeting of a "public body". While the University Board of Trustees or a college council would, in my view, be public bodies required to comply with the Open Meetings Law, the faculty of a department, in my opinion, would not. If my assumption is accurate, the Open Meetings Law would have no application. Any such records would, however, be subject to rights conferred by the Freedom of Information Law, and sections 87(2)(b) and (g) would likely be relevant to a determination of rights of access to those records.

Lastly, as indicated earlier, certain aspects of the records were denied on the ground that they are "investigatory in nature". Although the Freedom of Information Law as originally enacted made reference to "investigatory files", the current statute contains no such provision. The provision that may be viewed as the successor to the language involving investigatory files is section 87(2)(e). That provision permits an agency to withhold records that are "compiled for law enforcement purposes" under certain narrowly defined circumstances. From my perspective, in view of the functions of the State University, it is unlikely that section 87(2)(e) would be relevant or could be asserted to withhold the records sought.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the State University's appeals officer.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Herbert Gordon, Vice Chancellor for Government and University Relations

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6156

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

June 29, 1990

Hon. David J. Gamache
County Legislator
County of Dutchess
22 Market Street
Poughkeepsie, NY 12601

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

Dear Mr. Gamache:

I have received your letter of June 22 which concerns your unsuccessful efforts in obtaining information from the Catskill Regional Off-Track Betting Corporation ("Catskill OTB"). You added that you have been told that "the Catskill OTB Board of Directors has directed the President and C.E.O. of Catskill OTB to not respond to any of [your] requests."

You have sought assistance in the matter and, in this regard, I offer the following comments.

First, section 519(1) of the Racing and Wagering Law indicates that several counties, one of which is Dutchess County, have been designated as the "Catskill region" for purposes of off-track betting. Second, section 501(3) defines "corporation" to mean "Each regional off-track betting corporation as created by section five hundred two of this article." Third, section 502 (1) of the Racing and Wagering Law states in relevant part that:

> "A regional off-track betting corporation is hereby established for each region...Each regional corporation shall be a body corporate and politic constituting a public benefit corpor-

Fourth, section 66(1) of the General Construction Law defines "public corporation" to include "a public benefit corporation". Therefore, Catskill OTB is a "public corporation". And fifth, the Freedom of Information Law is applicable to records of an "agency", a term defined in section 86(3) of that statute to mean:

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

Since the term "agency" includes a "public corporation", Catskill OTB is, in my view, clearly an agency obliged to comply with the Freedom of Information Law.

With respect to the scope of the Freedom of Information Law, the Law pertains to records of an agency and section 86(4) defines "record" broadly to include:

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

Therefore, all records of Catskill OTB are subject to rights of access granted by the Freedom of Information Law, irrespective of their origin or the function to which they relate [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575; Washington Post v. Insurance Department, 61 NY 2d 557; Capital Newspapers v. Whalen, 69 NY 2d 246 (1987)].

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

Further, it has been held that records accessible under the Freedom of Information Law must be made equally available to any person without regard to status or interest [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378, NYS 2d 165 (1976)].

Pursuant to the regulations promulgated by the Committee on Open Government, the governing body of a public corporation (i.e., Catskill OTB's Board of Directors) is responsible for ensuring compliance with the Freedom of Information Law and for designating one or more "records access officers" (21 NYCRR section 1401.2). The records access officer has the duty of coordinating an agency's response to requests for records, and requests generally should be directed to the records access officer.

Lastly, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 officials at Catskill OTB.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chairman, Board of Directors
Executive Director

6167

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6156

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

June 29, 1990

Ms. Veronica A. Piselli
[redacted]

The staff of the Committee on 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. Piselli:

I have received your letter of June 22 in which you requested advice concerning the fee assessed by the Village of Rockville Centre for a copy of a police accident report.

By way of background, on June 8 "a motorist skidded and ended up on your lawn". A police officer prepared a report and indicated that you or your insurance agent could obtain a copy. When you requested a copy, you were required to pay $20. You protested the fee to the Mayor, "who passed it off to the Police Department". On behalf of the Mayor, the Commissioner of Police responded as follows:

> "At the outset, I would like to explain that the charging of a fee is not a newly adopted practice. A fee has been charged for many years; however, it is not merely a copy fee but is a search fee as well.
>
> "It is also a fact that the fee is increased when the date of the accident is more than five days in the past. Recently, as part of the revenue package necessary to support the new Village budget, these fees were increased in order to reflect the true cost of the services rendered."

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-fice 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 Village, in my opinion, cannot charge more than twenty-five cents per photocopy.

Similarly, absent statutory authorization, no fee may be assessed for searching for records or administrative costs. It is also noted that the regulations promulgated by the Committee on Open Government, which have the force of law, specify that search fees cannot be imposed (21 NYCRR section 1401.8).

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the Mayor and the Commissioner of Police.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Eugene J. Murray, Mayor
Alfred L. Shull, Commissioner of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6158

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

June 29, 1990

Ms. Elizabeth O'Dell
[redacted]

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

Dear Ms. O'Dell:

I have received your letter of June 22, as well as a variety of related materials.

Your inquiry focuses upon a report prepared for the Berlin Central School District by Environmental Technical Services, Inc. ("Entek"). Entek was retained to assist the District in complying with applicable regulations concerning asbestos and its removal. The report, as I understand the correspondence, has been denied on the ground that it consists of "intra-agency material". In addition, you raised the following questions:

> "1. Did a health hazard exist to our children when the asbestos was being removed at the Stephentown Elementary School?
>
> 2. Was Entek able to complete its investigation?
>
> 3. Dr. Wayne Jones never to my knowledge, made all reports available for public review. Is is because they have never been completed? Or does it have something to do with the Entek report?
>
> 4. Did Berlin Central School District obtain insurance coverage for the removal of asbestos?"

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, I cannot answer the questions enumerated above. Further, I point out that the Freedom of Information Law is a vehicle under which the public may seek existing records and that requires an agency to disclose existing records to the extent required by the Law. The Freedom of Information Law, however, does not require that agency officials answer questions or create records in response to a request for information [see section 89(3)]. It is suggested that requests for records containing the information sought in those four questions be directed to the District. For example, rather than asking whether the District obtained insurance for the removal of asbestos, you could request records reflective of payments for insurance coverage pertaining to asbestos removal.

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. I emphasize that 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 of the Entek report.

Third, based upon the judicial interpretation of the Freedom of Information Law, records prepared for an agency by a consultant may be treated as "intra-agency" materials that fall within the scope of section 87(2)(g). Nevertheless, due to the structure of section 87(2)(g), it often requires the disclosure of significant portions of intra-agency materials. 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.

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 protec-

> tion 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.

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 (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.

In sum, even though a report prepared for the District by a consultant may be characterized as "intra-agency material", that characterization alone is not determinative of rights of access to the report. Again, to the extent that it consists of information described in subparagraphs (i) through (iv) of section 87(2)(g), I believe that it must be disclosed.

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: Board of Education
Dr. Wayne Jones, Superintendent
Frances C. Zuke, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6159

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

June 28, 1990

Ms Beverly Sears
[redacted]

The staff of the Committee on 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. Sears:

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

Your inquiry concerns a request made to the Northeastern Clinton Central School District for records indicating the criteria used to determine merit pay increases for administrators employed by the District. You specified in your request that you do not want the written evaluations concerning administrators' performance in meeting those criteria. The District Superintendent denied access to the records and the ground that disclosure "would likely" constitute "an unwarranted invasion of personal privacy." His determination appears to have been based in great measure upon an opinion offered by the District's attorney. The attorney wrote that the basis for his opinion:

> "is merely that the documents sought are personally identifiable to each employee and are entered in their respective personal records, reflect individual evaluations of each employee s performance, either directly or indirectly, and in my opinion, could result, in certain circumstances, in either individual embarrassment or inappropriate use."

He also referred to Article 6-A of the Public Officers Law, which, in his view, offers protection "for the privacy of an employee's record."

You enclosed a document that describes "sample criteria" and includes examples of the goals and objectives to be met by administrators which would be used to determine a "salary adjustment" or "merit pay" increase. Rather than listing each of those sample criteria, by means of example, the first five listed on that document are as follows:

> "1. Complete five (5) activities during the 1989-90 school year which contribute to the development of positive public relations within your area of responsibility and the School District.
>
> 2. Attend 75% of the regularly scheduled monthly meetings of the Board of Education. Absences for illness or other professional responsibilities may be agreed to between Superintendent and Professional Staff Member.
>
> 3. Utilize the five (5) faculty meetings available to the principal fully: Submit a list of the dates and topics for these meetings in your annual report to the Superintendent.
>
> 4. Prepare a complete listing of the renovations needed within your area of responsibility by January 1990, these to be considered in the next capital project.
>
> 5. Review the current curriculum in science K-6 and update to be consistent with New York State syllabi by June 1990. A written interim report on progress toward the accomplishment of this goal will be submitted to the Superintendent by June 1989..."

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

First, although it is unclear whether the District's attorney has relied upon Article 6-A of the Public Officers Law, I point out that the provisions of that statute do not apply to a school district. Article 6-A, which is known as the Personal Privacy Protection Law, pertains only to state agencies. For the purposes of that statute, section 92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office of any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

As such, units of local government, such as school districts, fall outside the coverage of the Personal Privacy Protection 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.

It is noted that there 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.

The basis for denial offered by the District 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". 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); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Powhida v. City of Albany, 147 AD 2d 236 (1989); 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].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which the determinations indicating the imposition of some sort of disciplinary actions pertaining to particular public employees were found to be available. 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)."

By means of analogy, it is clear in my view that the identities of those who receive merit pay increases would be public, even though, by implication, disclosure would effectively identify those who did not receive the increases. While disclosure of a reprimand or disciplinary action taken against a public employee might result in embarrassment to that employee, the possibility of embarrassment to the employee is of no moment; since such a determination is relevant to the performance of a public employee's official duties, the public, according to the courts, have the right know. Further, if a record is accessible

under the Freedom of Information Law, it should be made available to any person, irrespective of the status or interest of an applicant [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984); also Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS NYS 2d 165 (1976)]. Therefore, the intended use of a public record is irrelevant to rights of access.

Moreover, in a discussion of its intent, scope and utility, the Court of Appeals, the State's highest court, 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 NY 2d 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..." (Capital Newspapers v. Burns, 67 NY 2d 564-566)."

The criteria used to determine whether an administrator merits a salary adjustment in my opinion clearly relate to the performance of the administrators' duties. Further, if the criteria actually used are at all similar those described in the samples prepared by the District, I do not believe that there is anything "personal" about them, for they appear to relate to the duties inherent in a position, irrespective of who might hold the position. As such, privacy considerations regarding the disclosure of the criteria are, from my perspective, minimal.

The foregoing is not intended to suggest that an evaluation pertaining to an administrator must be disclosed in its entirety, and your request does not involve those records in their entirety. Those portions of the evaluations reflective of subjective opinions of how well or poorly administrators have met the criteria could in my view be withheld, perhaps in consideration of personal privacy and because opinions found within "intra-agency materials" may be withheld under section 87(2)(g) of the Freedom of Information Law. Nevertheless, for the reasons discussed in the preceding paragraphs, I believe that the criteria that you seek must be disclosed under the Freedom of Information Law.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the Board of Education, the Superintendent and the attorney for 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:saw

cc: Board of Education
Christopher B. deGrandpre', Superintendent
D. Andrew Edwards, Jr., Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6160

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

July 2, 1990

Mr. Bradshaw Samuels
#81-A-2835
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. Samuels:

I have received your letter of June 23.

According to your letter, you were involved in hearings at a correctional facility and sought copies of the tape recordings of those proceedings. After being given information indicating the fee for copies, checks were sent to the facility to cover the cost of reproduction. Nevertheless, you wrote that you were informed that "they have not received the tapes nor [have] the checks been cashed."

You have requested assistance in gaining access to the tapes. In this regard, I offer the following comments.

First, as a general matter, if it is determined that records are available under the Freedom of Information Law, an agency is obliged to reproduce the records upon payment of the appropriate fee. Since the records are apparently available to you under the Law and since you have paid the fee, under the circumstances, I believe that you may consider the request to have been constructively denied. If my assessment of the matter is accurate, you may appeal the denial in accordance with 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 records sought."

For your information, the person designated to determine apeals at the Department of Correctional Services is Counsel to the Department in Albany.

Second, having discussed similar matters with Department officials in the past, although certain tape recordings may be available to inmates, for reasons of security, I do not believe that tape recordings may be kept by inmates in their cells. Rather, they are kept by facility officials who will permit an inmate to listen to the tapes as many times as an inmate wishes.

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-6161

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

July 2, 1990

Mr. Samuel B. Letcher
Star Route Windfall
Killbuck, New York 14748

Dear Mr. Letcher:

I have received your letter of June 20 addressed to Barbara Shack, Chair of the Committee on Open Government, in which you "appeal the false information of access" regarding a request directed to Mary Haley, Carrolton Town Clerk.

It is noted at the outset that the staff of the Committee is authorized to respond on its behalf. Moreover, 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 render determinations following an appeal. The provision dealing with an appeal of 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 record the reasons for further denial, or provide access to the record sought."

As such, in the event of a denial of access to records by the Town Clerk, an appeal may be made to the governing body, the Town Board, or the person designated by the Town Board to determine appeals. In addition, the regulations promulgated by the Committee pursuant to section 89(1)(b)(iii) of the Freedom of Information Law require the Town Board to adopt rules and procedures that include the designation of an appeals person or body.

With respect to your request to the Town, part of your letter includes a series of questions. In this regard, I point out that the Freedom of Information Law pertains to existing records and requires that agencies disclose records to the extent required by law. The Freedom of Information Law, however, does not require that an agency answer questions or create new records in response to a request. As I understand the matter, although you wrote that certain "records" were "false," the clerk, in responding to your request, apparently attempted to answer your questions, notwithstanding the absence of existing records on the subject.

I hope that the foregoing serves to enhance your understanding of 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:saw

cc: Mary C. Haley, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6162

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

July 2, 1990

Ms. Deanna L. Dauber
[redacted]

The staff of the Committee 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. Dauber:

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

Once again, your inquiry deals with your efforts in obtaining "AHERA documentation" from Community School District 13 in Brooklyn, and/or the New York City Board of Education. You were particularly upset by a letter from the Community Superintendent in which she wrote that "You will be responsible for producing any document you deem appropriate. You must use your own equipment and materials for duplication".

In this regard, I have contacted Dr. Mae Timer of the State Education Department to obtain additional information on the subject. Dr. Timer informed me that "AHERA" is the acronym used to refer to the Asbestos Hazard Emergency Response Act, which was enacted by Congress and which requires schools to inspect for asbestos and develop management plans concerning its removal. Management plans, which must include sketches or diagrams indicating the location of asbestos, were required to have been completed last year. Dr. Timer also informed me that federal law requires the management plans to be kept in two places, the central office of each school building and at a

central administrative location in a school district. As such, there appears to be no question that the records in which you are interested must be made available and kept in a school building and by or for the Board of Education at a different location. Since you referred to the Board's Asbestos Task Force, I learned that the leader of the Task Force is Robert Pardi, who can be reached at (718) 706-3473. In his absence, his assistant, Ms. Geraldine Granda, may be contacted at the same number. The central location for maintenance of the plans is 28-11 Queens Plaza North in Long Island City.

With respect to the comments made by the Superintendent, I believe that they are inconsistent with law. The Freedom of Information Law is broad in terms of its scope, for it pertains to all agency records. Section 86(4) of that statute 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 upon the foregoing, any documentation prepared or received concerning AHERA would constitute "records" subject to rights conferred by the Freedom of Information Law.

Further, section 87(2) of the Freedom of Information Law requires that accessible records must be made available for inspection and copying, and section 89(3) specifies that upon payment of the appropriate fee, "the entity shall provide a copy of such record". Under section 89(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy when reproducing records.

In short, I believe that, if you choose to do so, you may inspect the records in question at no charge. If, however, you seek copies of the records, the District or the Board, as the case may be, would be obliged by law to prepare photocopies upon payment of the requisite fees.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Sobol, Commissioner
Dr. Mae Timer
Argie K. Johnson, Community Superintendent
Robert Pardi, Asbestos Task Force

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-108
FOIL-AO-6163

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

July 2, 1990

Mr. Thomas G. Menary
[redacted]

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

Dear Mr. Menary:

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

The correspondence consists of requests addressed to the "privacy compliance officer" at the New York City Police Department pursuant to the Personal Privacy Protection Law. The requests involve copies of your "record" with the Department, including "copies of each and every reference from [your] former employers," and "each and every disclosure of [your] record to all units of the state and local government in New York State..." Since you have apparently not received responses to your requests, you have sought advice on the matter.

In this regard, I offer the following comments.

First, I do not believe that the Personal Privacy Protection Law is applicable to the New York City Police Department. The Personal Privacy Protection Law generally applies to certain records maintained by state agencies. For purposes of that statute, the term "agency" is defined in section 92(1) to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office of any other governmental entity performing a governmental or

> proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Since New York City is a unit of local government, neither the City nor its Police Department would fall within the coverage of the Personal Privacy Protection Law. Further, since the Personal Privacy Protection Law is inapplicable, I do not believe that the Police Department would be required to maintain a record of disclosures of its records pertaining to you.

Second, although the Personal Privacy Protection Law does not apply, the Freedom of Information Law is likely relevant. For purposes of that Law, the term "agency" is defined expansively in section 86(3) to include:

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

As 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 you referred to references from former employers, 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 result in "an unwarranted invasion of personal privacy." Further, section 89(2)(b) provides examples of unwarranted invasions of personal privacy, the first of which pertains to:

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

The references that you seek, therefore, might be deniable.

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

records. I would conjecture that a request as broad as that found in your letter to the Department would not "reasonably describe" the records and that additional detail, such as dates, descriptions of events and the like would be needed to locate records.

Lastly, requests made under the Freedom of Information Law 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. For your information, the records access officer for the New York City Police Department is Sgt. John G. Sultana, whose office is located in room 110C at 1 Police Plaza.

Enclosed for your review is a copy of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6164

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

July 2, 1990

Mr. Raphael L. Leach
#88-A-3345
Attica Correctional Facility
P.O. Box 149
Attica, New York 14011-0149

Dear Mr. Leach:

I have received your recent letter in which you asked, under the Freedom of Information Law, what shift particular corrections officers at the Attica Correctional Facility worked on May 6.

In this regard, the Committee on Open Government is authorized to provide advice with respect to the Freedom of Information Law. The Committee does not maintain the kind of records that you seek and has no power to compel an agency to grant or deny access to records. In short, I cannot provide the information that you requested because the Committee does not have that information. However, for your information, I offer the following comments and suggestions.

As a general matter, a request for records should be directed to the agency that maintains the records. I point out that the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that a request for records kept at a correctional facility should be directed to the facility superintendent or his designee.

It is noted, too, that the Freedom of Information Law requires agencies to respond to requests for records and to disclose records to the extent required by law. In your letter, you requested information rather than records. For future reference, it is suggested that you request records, i.e. those records indicating the shifts worked by particular officers on a certain date.

Lastly, assuming that records exist containing the information in which you are interested, I believe that such records would likely be available based upon the decision rendered in Capital Newspapers v. Burns [109 AD 2d 292, aff'd 67 NY 2d 562 (1986)].

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-6165

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

July 3, 1990

Mr. Samuel O'Dell
#89-A-1138 H5-5
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. O'Dell:

I have received your letter of June 21, as well as the correspondence attached to it.

Your inquiry concerns the propriety of a response to a request for records directed to the Westchester County Clerk. Specifically, citing the Freedom of Information Law, you requested all court documents maintained by the County Clerk concerning a criminal proceeding in which you were involved. You asked to be notified "before filling the request" if there are fees for copying. In response, you received a note stating that: "In order for us to comply with your request, you must first be declared indigent."

In this regard, I offer the following comments.

First, although your request was made pursuant to the Freedom of Information Law, I do not believe that statute would be applicable. The Freedom of Information Law pertains to agency records, and 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."

Based upon the foregoing, if your request involves court records maintained by the County Clerk in his capacity as a clerk of the court, I do not believe that the Freedom of Information Law would apply. This is not to suggest that court records are not available, for other provisions of law provide significant rights of access to those records (see e.g., Judiciary Law, section 255).

Second, whether the Freedom of Information Law applies or otherwise, the response to the request appears to be inappropriate. If you had asked that fees be waived due to indigency, I would agree that you would likely have to be declared indigent. However, since no waiver of fees was requested, the response appears to bear little relationship to your request.

I regret that I cannot be of greater 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-6166

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

July 5, 1990

Mr. Martin Gordon
85-A-4621
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. Gordon:

I have received your letter of June 28, which pertains to a request made under the Freedom of Information Law to the Division of Parole.

According to the correspondence, in a request dated May 17, you sought the "names and middle initials (if any) of Parole Commissioners Leak, Rose and Callender". Since you have not received a response to the request, you asked for assistance "in having the...Division of Parole comply with...the Freedom of Information Law and answer [your] request...".

In this regard, I offer the following comments.

First, as a general matter, 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 provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, I believe that the person designated to determine appeals at the Division of Parole is Counsel to the Division.

Lastly, while I am unaware of whether the three individuals have or use middle initials, I believe that their names are Barbara Leak, Julian Rose and Eugene Callender.

Perhaps the foregoing information will negate the necessity of appealing a constructive denial of your request. Nevertheless, a copy of this opinion will be forwarded to the Division of Parole.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Altschuller, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6167

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

July 9, 1990

Mr. Walter Hang
[redacted]

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

Dear Mr. Hang:

I have received your letter of June 29, which relates to your request for computerized Industrial Chemical Survey (ICS) data from the Department of Environmental Conservation.

Attached to your letter is what appears to be an internal memorandum transmitted between Department staff concerning your request. According to the memorandum:

> "the ICS database is resident on on General Electric Information Service Company (GEISCO) timesharing computers located in Brooks Park, Ohio. The GEISCO timesharing computers have a database software called DMS, which is the software used to develop and store the ICS. The actual storage of date is in HISAM (Hierarchical Indexed Sequential Access) files. The use of DMS and HISAM allows the ICS to be structured in multi tier relational databases...
>
> "To produce a tape as requested by Mr. Hang requires the development of a program to access to ICS database, retrieve only the records associated with Long Island, and then create an ASCII punch file which then may be spooled to a tape. Other problems exist that do not make

> this a simple task. The database being hierarchical means that the structure is not uniform. Even though a header record is needed for each ICS entry, any number (or none) of secondary files may exist. It is for this reason, that each record type must be sent to a separate output file, or a record descriptor must be added to each line of data."

The author of the memorandum added that:

> "The New York City Department of Environmental Protection (NYC DEP) did receive a tape of the ICS information (for New York City) in August of 1985. The reason for providing NYC DEP with a tape was 2 fold. First, the NYC DEP is a governmental organization. Second, the large amount of data, and the large amount of desired reports, tabulations, sorts, etc., made it cost effective for us to produce a tape (5 tapes actually), then [sic] to do all the reports required. Also, the cooperation between BWFD and NYC DEP was such that updates and information corrections were provided back to BWFD.
>
> "The position of BWFD on Mr. Hang's FOIL request is one of two options.
>
> 1. The hard copy files are here available for public inspection. He can have all the copies he wants at $0.25 per page.
>
> 2. A retrieval of ICS information for the GEISCO database on paper for the cost of Computer Resource Units."

In conjunction with the foregoing, you made two points: The first is that the Department "actually undertook the programming necessary to dump some of the ICS information to tape for the City of New York Department of Environmental Protection." You stressed that "This was the same kind of reprogramming they refused to undertake for [you]." The second is that "the memo seems to support the position that another government agency can be granted access to public information denied to citizens." You asked whether the Freedom of Information Law provides for such actions on the part of the Department.

In this regard, as a general matter, the Freedom of Information Law is the vehicle by which citizens may request and obtain existing records to the extent required by law from agencies. As we have discussed, the Freedom of Information Law does not require an agency to create a record in response to a request [see section 89(3)]. Further, in the context of information maintained electronically, it has been advised that when retrieval of such information requires reprogramming, reprogramming represents the creation of a new record, and that an agency is not obligated to do so to comply with the Law. As I understand the memorandum, to reproduce the data that you requested on an electronic medium of utility to you would require significant and extensive reprogramming. As such, although hard copy records can be printed and made available, it appears that the steps needed to generate or reproduce the data in question on an electronic storage medium would involve procedures that go beyond the requirements of the Freedom of Information Law.

I would conjecture that the programming and disclosures made to New York City were not carried out in response to a request made under the Freedom of Information Law. Rather, the request appears to have been made by a governmental entity seeking to perform its governmental duties. If my assumptions are accurate, the Freedom of Information Law, in my view, would neither have been applicable nor relevant. While the Freedom of Information Law generally requires that accessible records be made equally available to any person, with regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976); also M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)], there is nothing in that statute that would preclude the Department from engaging in efforts that exceed the requirements of the Freedom of Information Law in an attempt to assist a governmental entity in the performance of its duties. Stated differently, I do not believe that the efforts undertaken by the Department in its relationship with the New York City Department of Environmental Protection necessarily have a bearing upon its responsibilities imposed by the Freedom of Information Law regarding requests by citizens.

If you would like to discuss the matter, please do not hesitate to call.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0168

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

July 10, 1990

Mr. Marvin Datz
[redacted]

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

Dear Mr. Datz:

I have received your letter of June 30 and the correspondence attached to it.

You have alleged that four agencies, the New York City Police Department and its Departments of Transportation and Investigation, and the State Department of Motor Vehicles, have failed to comply with the Freedom of Information Law. In addition, you asked that I contact the Police Department to inquire as to its intention to respond to your twelve requests to that agency, that I ascertain the dates of responses that have been made, as well as those for which no response has been given.

In this regard, I am unfamiliar with the requests to which you referred, and certainly you are in the best position to determine which of the requests have been answered and which have not. As such, I see no need to contact the Department to acquire the kinds of information that you described.

As I understand the matter, you have appealed various denials of your requests, and some of those denials appear to be based upon failures to respond to requests. In either case, agencies are required to respond to appeals in accordance with 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 to such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, when an agency withholds records following an appeal or fails to respnd to an appeal within the requisite time, the applicant has exhaused his or her administrative remedies [see Floyd, Matter of v. McGuire, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)] and may bring a proceeding for review of such denials under section 89(4)(b) of the Freedom of Information Law pursuant to Article 78 of the Civil Practice Law and Rules.

Lastly, as indicated in previous correspondence, I have been led to believe that the agencies from which you requested records have complied with the Freedom of Information Law or in some instances do not maintain records falling within the scope of your requests.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6169

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

July 10, 1990

Mr. Ben Weller
Capital Newspapers
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, unless otherwise indicated.

Dear Mr. Weller:

I have received your letter of June 28.

Attached to the letter is correspondence sent to you by Russell C. Yewdall, Director of the Office of Records Management at the State Department of Motor Vehicles, who indicated that Capital Newspapers requested "a computer tape or printout of all New York State drivers convicted of driving under the influence of alcohol or first degree unlicensed operation". Mr. Yewdall wrote that the Department maintains records of convictions for driving under the influence of alcohol or drugs for a statutory period of ten years, and that you could "purchase the records of the 550,508 drivers convicted of these offenses for the ten-year" period preceding the request. He also indicated that you could purchase other records falling within the scope of the request, which involve more than 10,000 additional convictions.

At the conclusion of his letter, Mr. Yewdall wrote that:

> "You have submitted your request pursuant to the Freedom of Information Law, which provides for a fee of 25 cents per page, 'except when a different fee is otherwise prescribed by statute.' (Public Officers Law, Section 87(1)(b)(iii)) As you know, Section 202(2) of the Vehicle and Traffic Law prescribes a fee of $2.00 for license

> records such as those you have requested. Moreover, we have no discretion to reduce this fee since neither the Freedom of Information Law nor the Vehicle and Traffic Law permit us to make distinctions between requests by the press and those of other members of the public."

You have requested an advisory opinion "on whether the prescribed fee cited by DMV...applies to [your] request for a list of drivers convicted of DWI".

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. An initial issue, however, in my opinion, is whether that statute or section 202 of the Vehicle and Traffic Law governs with respect to assessment of fees. Under the circumstances, while the authority of this office to advise is limited, I believe that a review and interpretation of section 202 is necessary to offer an opinion. Stated differently, if section 202 of the Vehicle and Traffic Law is applicable, one conclusion might be reached; on the other hand, if that statute is inapplicable, a different conclusion would be reached. In either case, consideration of both statutes is needed to prepare an appropriate analysis.

Second, by way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Law and fees (see 21 NYCRR Part 1401). In turn, section 87(1) of the Freedom of Information Law requires agencies to promulgate rules and regulations:

> "pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the 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."

Based upon the foregoing, in the context of your inquiry, the Department may assess a fee of up to twenty-five cents per photocopies, or in the case of records that cannot be photocopied (i.e., computerized information reproduced onto an electronic storage medium), the fee would be based upon the actual cost of reproduction when it duplicates records, unless a different statute, i.e., section 202 of the Vehicle and Traffic Law, applies. Further, the regulations promulgated by the Committee on Open Government state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charge for the following:
>
> (1) Inspection of records;
> (2) Search for records..."

Third, section 202 of the Vehicle and Traffic Law, entitled "Fees for searches and copies of documents", states in relevant part that:

> "1. Except in those cases in which it is provided by law that no fee shall be charged, the fees for searching the records of the department of motor vehicles kept pursuant to the provisions of this chapter and for furnishing copies of documents in said department kept pursuant to the provisions of this chapter shall be as provided in this section. Provided, however, that no fee shall be charged any public officer, board or body, for searches or copies of documents to be used for a public purpose.
>
> 2. Fees for searches of records.
>
> (a) The fee for a search which is made manually by the department shall be five dollars.
> (b) The fee for a search which is made by direct entry by a requester who has been approved for such entry by the commissioner shall be three dollars.
> (c) The fee for a search which is made by means of an electronic medium which has been prepared by a requester who has been approved for such service by the commissioner and which is processed by the department shall be two dollars.
> (d) The commissioner may condition approval for direct entry of a request

> or use of an electronic medium by a requester upon the establishment and maintenance of an account with the department with a minimum balance established by the commissioner from which fees chargeable to the requester shall be deducted. In addition, the commissioner shall prescribe the specifications and procedures for use of electronic media and may establish a minimum and/or a maximum number of searches which may be contained on any one such electronic medium submission."
>
> (e) For the purposes of this section, a search shall consist of a single entry of an acceptable identifier for the purpose of obtaining a specific category of information relating to a person, vehicle or number plate. The commissioner shall by regulation define such categories and identifiers acceptable for such categories. Except as provided in subdivision three of this section, a search of the record of the department shall include the furnishing of the information disclosed by such search, and with respect to searches made manually by the department, shall include a certification of such record.
>
> 3. Fees for copies of documents. The fees for copies of documents, other than accident reports, shall be one dollar per page. A page shall consist of either a single or double side of any document. The fee for a copy of an accident report shall be eight dollars. All copies of documents shall be certified at no additional fee. Whenever search of records of the department is required in conjunction with a request for a copy of a document, the fee for such search shall be the fee provided in paragraph (a) of subdivision two of this section. The result of such search will be the locating of the document to be copied, or if no document can be located, a certification to that effect will be the result of a search."

As I understand the provisions quoted above, there is nothing in those provisions that deals directly with your request.

The search required to retrieve the information you seek would not be performed manually, but rather electronically. As such, paragraphs (a) of subdivision (2) of section 202 does not apply.

Paragraphs (b), (c), (d) of subdivision (2) of section 202 deal with searches made by "direct entry". I believe that information acquired by requesters by means of "direct entry" involves situations in which users of information contract with the Department and acquire the information by means of a modem or terminal. The requesters who partake in that arrangement pay fees on a per search or use basis. The request in this instance does not involve information that would be made available on the basis of "direct entry" searches for or retrievals of data.

Perhaps more importantly, paragraph (e) subdivision (2) states that: "For the purposes of this section, a search shall consist of a single entry of an acceptable identifier for the purpose of obtaining a specific category of information relating to a person, vehicle or number plate", and that regulations promulgated by the Commissioner must "define such categories and identifiers acceptable for such categories". Having contacted the Office of Counsel at the Department, I learned that, to date, no such regulations have been adopted. Further, it appears that the language quoted above is intended to deal with searches made in response to requests where an applicant for a record uses a name, vehicle or plate number as the basis for seeking a record. Your request, however, does not involve the kinds of identifiers described in section 202(2)(e). Therefore, it does not appear that your request involves a "search" as that term is used for the purposes of section 202, for such a search fee may be imposed when the search "consist[s] of a single entry of an acceptable identifier", such as a name or license plate number. The language of section 202 does not appear to contemplate or apply to the kind of request that you made, which is not based upon a name or plate number, for example. Due to the narrowness of the term "search" in section 202, the conditions under which a search fee may be imposed appear to be limited to those requests involving "a single entry of an acceptable identifier", and that such an identifier ordinarily would be a name, or a vehicle or plate number.

If my interpretation of section 202 is accurate, again, your request, which concerns all licensees convicted of certain crimes or offenses within a given period, which would not be answered on the basis of your submission of a name or a vehicle or plate number, would not involve a "search" as that term is used in section 202. While section 202 clearly prescribes fees different from those that may be assessed under the Freedom of Information Law regarding a variety of requests made to the Department, your request appears to fall outside the scope of the specific circumstances described in section 202.

While I do not believe that the provisions involving search fees imposed by section 202 of the Vehicle and Traffic Law apply to your request, based upon discussion with Department staff, it does not appear that the Freedom of Information Law would apply either. As you are aware, the Freedom of Information Law applies to all agency records. However, section 89(3) of the Law states in part that an agency need not create a record in response to a request. In the context of information maintained electronically, it has been advised that when an agency can retrieve information from a database by using its existing programs, the agency is obliged to do so. In such cases, the agency would not be involved in creating a new record; it would merely be extracting information that it can obtain from the database. On the other hand, if an agency must modify its existing computer programs or create new programs to obtain the data, those steps, in my view, represent the equivalent of creating a new record.

The figures presented by Mr. Yewdall, as I understand the process, were derived by "passing" an indicator, i.e., DWI convictions, over its tapes. By so doing, the Department was able to determine the number of licensees who were so convicted. The ensuing steps would involve the preparation of new programs designed to extract identification numbers and the names of persons who were convicted. In essence, several programming steps would be needed to locate the names of those persons, which eventually would be used to produce a list of persons convicted for the offenses in which you are interested. While the Department could, in my view, as a matter of policy, choose to engage in reprogramming to provide access to the data sought, I do not believe that the Freedom of Information Law would require that those efforts be undertaken to comply with the Law.

In sum, for the reasons presented in the preceding paragraphs, it is unlikely in my opinion that the search fee envisioned by section 202 of the Vehicle and Traffic Law would apply. Concurrently, however, it does not appear that the Freedom of Information Law would require that the Department produce the data that you are seeking.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward Sheridan, Deputy Commissioner and Counsel
Russell C. Yewdall, Director, Office of Records Management
Peter Poleto, Director, Office of Information Systems

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6170

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

July 10, 1990

Mr. Nicholas Fedorka
[redacted]

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

Dear Mr. Fedorka:

As you are aware, your letter of June 12 addressed to Attorney General Abrams was recently forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Freedom of Information Law.

According to your letter, you visited the Gowanda Psychiatric Center in April and verbally requested the salary of one of its employees. In response, you were informed that you could have "the schedule for each department of the facility", that "nothing as personal as someone's salary could ever be given out to the public", and that the staff in the business office informed you that "this was the policy of the Director".

You requested a clarification of the "sunshine law as it applies to specific salaries of State employees...". In this regard, I offer the following comments.

First, the statute that generally governs public access to government records is the Freedom of Information Law, which is sometimes characterized as the "sunshine law".

Second, although an agency may accept requests made orally, agencies may require that requests be made in writing pursuant to section 89(3) of the Freedom of Information Law. Further, a request should generally be made to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests.

Third, the policy as you described it, under which records indicating salaries of public employees can be withheld, is in my opinion inconsistent 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.

With certain exceptions, the Freedom of Information Law does not require an agency, such as the Office of Mental Health or the Gowanda Psychiatric Center, 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..."

As such, the payroll record as described in paragraph (b) of section 87(3) is among the few records that an agency must maintain to comply with the Freedom of Information Law.

With respect to the payroll record and the protection of privacy, 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 a record indicating the salary of a particular employee. Moreover, based on the language of the Freedom of Information Law and its judicial interpretation, I believe that the record sought must be disclosed.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the Director of the Psychiatric Center and the Director of Public Information at the Office of Mental Health.

I hope that I have 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 R. Collier, Director
Robert M. Spoor, Director of Public Information

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6171

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

July 11, 1990

Mr. Raymond A. Clifford
[redacted]

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

Dear Mr. Clifford:

I have received your letter of June 18, which pertains to requests directed to the New York City Police Department, the Department of Employment and the Board of Education. You have asked that I contact officials at those agencies to ascertain the status of those requests.

Rather than contacting those officials, copies of this opinion will be sent to them to inform them of their responsibilities under the Freedom of Information Law. In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time limits within which agencies must respond to requests and appeals. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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: Eileen D. Millet, Appeals Officer, NYC Police Department
John Nolan, Secretary, NYC Board of Education
Josephine Nieves, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6172

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

July 11, 1990

Mr. Roberto Merlino
#85-A-7998 (29-20)
P.O. 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 July 9.

According to the letter, you sent a series of requests to Sgt. John G. Sultana, records access officer for the New York City Police Department, between February and June of this year. As of the date of your letter to this office, you received no response to the requests. You have requested assistance in the matter.

In this regard, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

For your information, the person designated to determine appeals at the Department is Ms. Eileen Millet, Assistant Deputy Commissioner.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Sgt. John G. Sultana, Records Access Officer
Eileen D. Millet, Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6173

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

July 12, 1990

Ms. Julie Mix
Research Department
Blue Grass Mailing Services
1052 Nandino Boulevard
Lexington, KY 40511

The staff of the Committee on 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. Mix:

I have received your letter of July 6 in which you requested assistance in obtaining information "about elevators in New York City and the surrounding area". You specified that you are interested in records indicating the owners of elevators, their "location, speed, type, number of landings or capacity".

In this regard, I offer the following comments.

First, the statute that generally deals with access to government records is the Freedom of Information Law. That statute applies to records maintained by entities of state and local government in New York. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, the Committee on Open Government, a unit of the Department of State, is authorized to advise with respect to the Freedom of Information Law. The Committee does not maintain the records in which you are interested and it is not empowered to compel an agency to grant or deny access to records.

Third, I have contacted the New York City Department of Buildings on your behalf in an attempt to ascertain whether that agency maintains the information in question. I was informed that the Department has information regarding approximately

57,000 elevators in New York City. Further, the information would include the owners of the elevators, their location, capacity and other details. I do not know whether there is a list that contains the information, and the agency's process of computerizing the data is apparently incomplete.

Fourth, to seek records, a request should be made to the Department's "records access officer". The records access officer has the duty of coordinating an agency's response to requests. Although he is currently on vacation, it is suggested that you direct your request to:

Mr. Charles Sturcken, Records Access Officer
New York City Department of Buildings
60 Hudson Street
New York, NY 10013

Mr. Sturcken can be reached by phone upon his return at (212) 312-8130.

Since you referred to New York City and the "surrounding area", I point out that New York City includes five counties or "boroughs". They are Manhattan, Brooklyn, Queens, Staten Island and the Bronx. The surrounding area would include cities and towns in several counties, such as Westchester, Rockland, Nassau and Suffolk, as well as northern New Jersey. Requests for records maintained by those entities should be directed to the appropriate municipalities.

Enclosed for your review 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-6174

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

July 12, 1990

Mr. Ricardo A. DiRose
85-C-773
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004

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

Dear Mr. DiRose:

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

Although you did not forward a copy of your original request, the correspondence indicates that you sought records concerning approved firearms permits filed with the Division of State Police. In response to the request, Lieutenant Colonel Dunne wrote that, from 1936 to the end of 1989, more than 950,000 pistol licenses were issued throughout the state and that they are filed alphabetically by county. Since the Freedom of Information Law permits agencies to charge up to twenty-five cents per photocopy, Lieutenant Colonel Dunne wrote that reproduction of the front page of each approved application would result in a fee of almost $284,000. Following the receipt of Lieutenant Colonel Dunne's letter, you wrote to him again and suggested that " a better vehicle of providing the records sought" would involve the preparation of a computer printout or the reproduction of a tape, for example. You also suggested that the Division might charge a "set fee" in view of the volume of the materials requested rather than a per page photocopying fee, and that it could waive the fee based upon "the identity of the requestor, or the purpose for the requested material".

You have asked that I review the matter, particularly the fee, which you wrote would be "considered ridiculous by any reasonable person".

In this regard, I offer the following comments.

First, I have contacted the Division of State Police in an effort to learn more about the issue. As I understand the situation, the licensing program as it currently exists was initiated in 1936. Further, the filings received by the Division are cumulative. In general, the Division is not advised nor does it have a way of knowing whether a licensee dies or changes residence. As such, there is no mechanism for determining the accuracy or currency of approved licenses, some of which were issued more than fifty years ago.

Second, the approved applications are apparently individually filed, and the Division maintains no list that identifies licensees either in "hard copy" or electronically, i.e., on computer tape. Since no list exists, it appears that the only method of providing records indicating the identities of licensees in response to a request made pursuant to the Freedom of Information Law would, under the circumstances, involve copying the applications, or perhaps the first pages of those documents as Lieutenant Colonel Dunne suggested.

Third, as a general matter, 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, if no list or index identifying licensees is maintained by the Division of State Police, the Freedom of Information Law would not require that the Division prepare such a list on your behalf.

Fourth, as you may be aware, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy when it reproduces records. I point out that, while the federal Freedom of Information Act (5 U.S.C. section 552) establishes conditions under which fees should be waived, the New York Freedom of Information Law is silent with respect to fee waivers. Moreover, in a recent decision, it was held that, in view of its silence on the matter, the Freedom of Information Law does not require that fees be waived, despite an applicant's status as an inmate or an indigent person [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

In sum, since the Division of State Police maintains no list of licensees, it appears that the method of providing the information sought suggested by the Division is consistent with the Freedom of Information Law, notwithstanding the amount of the fee to which Lieutenant Colonel Dunne referred.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Colonel Dunne, Assistant Deputy Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1788
FOIL-AO-6175

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

July 12, 1990

Mr. Vincent Rossi, Sr.
Acting Town Attorney
Paul Building
P.O. Box 209
Utica, New York 13503-0290

Dear Mr. Rossi:

I appreciate receiving a copy of your letter sent to Mr. Alexander Rogers following our recent conversation, and I would like to offer clarification of my views on the matter.

By way of background, you informed me that a lawsuit had been initiated against the Town of Deerfield by a resident who claimed that his civil rights were violated by its enactment of an ordinance concerning the use of a reflective dish on private property. The Town Board conducted an executive session to discuss the litigation, and the issue raised by Mr. Rogers pertained to minutes of the session. You wrote that I advised that "minutes of such executive sessions need not be made public" and that it is your view that minutes of executive sessions "should not be made public at any time while the litigation is pending."

If I recall our conversation correctly, that was not precisely the nature of my advice.

In this regard, I offer the following comments.

First, it appears that the matter could appropriately be considered during an executive session, for section 105(1)(d) of the Open Meetings Law permits a public body to enter into executive session to discuss "proposed, pending or current litigation."

Second, section 106 of the Open Meetings Law pertains to minutes of meetings and provides what might be characterized as minimum requirements concerning the contents of minutes. Subdivision (2) of section 106 deals with minutes of executive sessions and states that:

> "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."

Subdivision (3) concerns the time within which minutes must be prepared and made available and provides 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."

In my view, based upon the language quoted above, if a public body enters into an executive session and discusses an issue but takes no action, there is no requirement that minutes of the executive session be prepared. On the other hand, if action is taken by formal vote during an executive session, minutes must be prepared indicating the nature of the action taken, the date and the vote of the members, but any such minutes need not include information that is not required to be disclosed under the Freedom of Information Law. Further, assuming that such minutes are accessible, they must be made available to the public within one week of the executive session.

Unless I am mistaken, during our telephone conversation, you indicated that no action was taken during the executive session that is the subject of Mr. Rogers' inquiry. If that is so, again, I do not believe that minutes would have been required to be prepared.

If, however, action is taken by formal vote during an executive session, even if the issue relates to litigation, I believe that the obligation to disclose the minutes or, alternatively, the authority to withhold them, would be dependent upon the nature of the action taken and the specific contents of the minutes. 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.

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 section 4503 of the Civil Practice Law and Rules, which deals with the attorney-client privilege. As you are aware, communications made between an attorney and client that fall within the scope of the privilege are confidential unless the client waives the privilege. I point out, too, that the courts have long held that a municipal attorney may, under appropriate circumstances, engage in a privileged relationship with a municipal board, the client [see e.g., People ex rel. Updyke v. Gibon, 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 aff'd 17 AD 2d 392 (1963); and Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx County, NYLJ, December 7, 1979].

In the context of minutes of action taken during executive sessions relating to litigation, the minutes might, in my view, be justifiably withheld based upon the attorney-client privilege. For instance, if a town board directs its attorney to initiate a lawsuit, and disclosure of its action would enable the party to be sued to evade legal action, minutes could likely be withheld. Similarly, to the extent that the minutes would indicate the Town's litigation strategy, they could likely be withheld. However, after the suit has been initiated and the party is aware that legal action has been commenced, I believe that the minutes would be available. Likewise, if a public body authorizes its attorney to appeal a lower court decision, I believe that minutes directing the attorney to appeal or reflective of a vote to appeal would be public.

In sum, if no action is taken during an executive session, minutes of the executive session need not be created. However, if action is taken in an executive session, the nature of the action and the contents of the minutes would, in my view, determine the extent to which they must be disclosed.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Alexander J. Rogers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6176

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

July 12, 1990

Mr. Wallace S. Nolen
[redacted]

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

Dear Mr. Nolen:

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

As I understand the situation, the Dutchess County Clerk's office maintains certain of its information in a computer system that uses "Fastback" software as a means of "translating" the data into a "language" different from that used to program and input the data. Fastback is no longer being manufactured, and that system is apparently incompatible with your equipment. However, a new system, "Fastback Plus," has replaced Fastback and is commerically available. Further, you wrote that the manufacturer of Fastback will update systems with Fastback Plus at no charge. It is your view that the data must be supplied "in the manner in which they are maintained," and that the County is obliged to supply you with the data in the Fastback Plus format, or alternatively, that the data be "backed up" with the existing program, rather than being translated into the Fastback format. In addition, although you contend that the County can readily use Fastback Plus, the Deputy County Clerk informed you otherwise.

In this regard, I offer the following comments.

First, the Freedom of Information Law generally deals with agencies' obligations to disclose records and, concurrently, its authority to withhold records to the extent permitted by the Law. At this juncture, there is nothing in the Freedom of Information

Law that pertains to the manner in which agencies keep their records or the format in which the records must be maintained. If agencies are able to reproduce records in the format requested by an applicant, I believe that they must do so, so long as they are able to do so through the use of their existing programs, software and hardware.

Second, having discussed the matter with the Deputy County Clerk, Earl Bruno, I was informed that the County is unable to reproduce the requested data in a format that is appropriate for your use. He explained that the County's equipment has only enough memory or storage capacity to use Fastback, that Fastback plus requires more of a memory capacity, and that the use of Fastback Plus would require the County to use different or upgraded hardware. In my view, the Freedom of Information Law does not require an agency to purchase new or different equipment in an effort to accommodate the needs of an applicant for records. Moreover, Mr. Bruno informed me that the data will be transferred to a mainframe system in October, and that, at that time, the existing system will be out of date.

In sum, although the County could and is willing to disclose the information using a Fastback system, which is apparently unusable for your purposes, I do not believe that it is required to manipulate its data or upgrade its equipment to satisfy a request made under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Earl T. Bruno, Jr., Deputy County Clerk
Ian MacDonald, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6177

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

July 16, 1990

Ms. Rochelle J. Auslander
Plunkett & Jaffe, P.C.
1 North Broadway
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. Auslander:

I have received your letter of July 9, which was written in response to an advisory opinion addressed to Alan M. Sussman in June. In his capacity as attorney for a student's parent, his inquiry pertained to rights of access to records maintained by the Onteora Central School District concerning an incident involving a teacher and the student. You represent the District, and you and Mr. Sussman presented a statement of facts to which you mutually agreed and indicated that you agreed to abide by my opinion.

The focal point of the opinion is an evaluation of the teacher, which you have characterized as a "Holt" letter, and you specified that the document is an evaluation rather than a reprimand. You added that:

> "The distinction between 'reprimand' and 'evaluation' is crucial. A reprimand could not be put into the teacher's file unless the teacher had been charged, tried and convicted in accordance with Section 3020-a of the Education Law. In contrast, a teacher can always be evaluated for any performance of whatever nature and a letter of evaluation can be

> placed in a teacher's file. This distinction was addressed by the Court of Appeals in Holt v. Board of Ed. of Webutuck Central School District, 52 N.Y. 2d 625, 439 N.Y.S. 2d 839, 422 N.E. 2d 499 (copy enclosed), the case which gave rise to the term 'Holt letter.'"

While you do not take issue with my analysis, that reprimands must be disclosed under the Freedom of Information Law, you suggested that "the conclusion would be different where the document is an evaluation or appraisal, as it is here." Having reviewed my opinion, I do not believe that I reached what could be considered a "conclusion." Following an analysis of decisions dealing with the privacy of public employees, it was advised that "to the extent that the material in question is reflective of a reprimand or a finding of misconduct on the part of a teacher, that portion...must...be disclosed." As indicated in that opinion, I was and remain unfamiliar with the specific contents of the record, and my "conclusion" was that if the record includes a reprimand, that portion of the record must be disclosed. The remainder of the opinion largely involved a discussion of section 87(2)(g) and the possibility that the Family Educational Rights and Privacy Act might be relevant to a determination of rights of access. In short, my "conclusions" were based upon a variety of factors that might have been relevant without knowledge of whether those factors were indeed relevant.

If the document in question may be characterized as a "Holt letter," the language of the opinion rendered by the Court of Appeals is likely relevant to a determination of rights of access. Holt focused upon "whether a written communication from a school administrator to a tenured teacher which criticized the latter's performance or conduct may be made a part of the teacher's permanent personnel file without affording him an opportunity for a hearing pursuant to section 3020-a of the Education Law" (id., 630). In brief, the Court found that section 3020-a "was not intended by the Legislature to apply to such evaluations and does not require a formal hearing as a prerequisite to the inclusion of such documents in the teachers' personnel file" (id., 632).

In my view, the most important passage in the Holt decision insofar as it relates to the issue at hand is the Court's analysis that:

> "The critical evaluations in issue fall within this permissible range of administrative evaluation. While the language of the administrators' letters may appear to some to be in the nature of a

> 'reprimand' within the literal meaning of that word, it falls far short of the sort of formal reprimand contemplated by the statute. Although the sharply critical content of the letters is unmistakable, the purpose of such communications - to call to the teacher's attention a relatively minor breach of school policy and to encourage compliance with that policy in the future - is also clear. The purpose is to warn, and hopefully to instruct - not punish. Further, the documents in question are issued by a single administrator. While the inclusion of such letter in the teacher's permanent file may have some effect on his future advancement or potential employability elsewhere, it is by no means as damaging as a formal reprimand issued by the board of education as the result of a determination of misconduct made by an impartial hearing panel. Each letter represents one administrator's view, not a formal finding of misconduct."

From my perspective, notwithstanding its title or characterization, a document consisting of a "warning" or an administrator's opinion regarding a teacher's conduct, rather than a formal finding of misconduct, could be withheld pursuant to section 87(2)(g). Such a document would not in my view represent a "final agency determination," which I believe would be accessible pursuant to section 87(2)(g)(iii).

In sum, if my understanding of use of the phrase "Holt letter" is accurate, and if the document in question is a "Holt letter," it could apparently be withheld.

A copy of this opinion will be sent to Mr. Sussman. Once again, if either you or Mr. Sussman have questions or comments regarding the opinion, please do not hesitate to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Alan M. Sussman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6178

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

July 16, 1990

Mr. Walter D. Schroeder
New York State Professional
Applicators Coalition
P.O. Box 301
Yaphank, New York 11980

Dear Mr. Schroeder:

Your letter of July 5 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Freedom of Information Law.

According to your letter and the correspondence attached to it, you sent a request by certified mail under the Freedom of Information Law on June 14 to Arthur Woldt of the Department of Environmental Conservation. The request, which was delivered to the Department on June 18, involves a "list of the structural pest control business registrations in the State of New York for 1990..." You specified that you would prefer that such list be formatted alphabetically "by last name of individual," alphabetically "by name of Company," or "numerical by zip code."

In this regard, I have contacted the Department of Environmental Conservation on your behalf to learn more of the matter. One of the reasons for the delay in response is likely due to the fact that Arthur Woldt is not the Department's records access officer. The records access officer, the person having the duty of coordinating an agency's response to requests, is Mr. Thomas Rider. Having spoken with Mr. Rider, I was informed that Mr. Woldt forwarded the request to him and that Mr. Rider wrote to you on July 9, acknowledged the receipt of your request and indicated that the request is under review.

For future reference, I point out that the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

For your information, the person designated to determine appeals at the Department of Environmental Conservation is Counsel to the Department.

Lastly, I have no knowledge of whether the Department maintains the kind of list that you are seeking, or whether any such list is maintained in the kind of format that you sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 6179

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

July 16, 1990

Mr. Mark E. Raabe
[redacted]

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

Dear Mr. Raabe:

I have received your letter of July 7 and the correspondence attached to it, which deals with your unsuccessful efforts to obtain financial records from the College of Agriculture and Life Sciences at Cornell University.

You have contended that the University has failed to comply with the Freedom of Information Law due to its refusal to produce records and a variety of actions, or lack of action, concerning the procedural requirements of that statute. It is your view that since the matter "is now at a standstill," your only recourse involves the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. As such, you requested "an explanation of the judicial review process, and specifically what procedures are required to initiate it."

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. While I believe I can offer advice pertaining to duties imposed by the Freedom of Information Law, I cannot provide specific guidance with respect to Article 78. As a general matter, however, an Article 78 proceeding is the vehicle employed to bring an action against a governmental body of officer, and such a proceeding must be initiated within four months of a final determination by a body or officer (see Civil Practice Law and Rules, section 217). Generally, a person who initiates such a proceeding has the burden of demonstrating that a governmental

body or officer has acted unreasonably or has failed to perform a duty required by law to be performed. It is noted that, under the Freedom of Information Law, section 89(4)(b), an agency subject to the Law has the burden of demonstrating that records withheld fall within the scope of the grounds for denial appearing in section 87(2) of the Law. As such, while the burden of proof in Article 78 proceedings is almost always borne by a member of the public, the opposite is so when such a proceeding is brought against an agency subject to the Freedom of Information Law.

To obtain more specific information concerning Article 78, it is suggested that you confer with an attorney or review its provisions at a law library.

There may be other alternatives for investigating the matter. For instance, since grant monies were apparently received from the State Department of Agriculture and Markets, that agency may have the authority to review the matter. Often funding agencies reserve the power to investigate to determine whether monies were properly spent. If you choose to follow that course, Counsel to the Department is Ms. Joan Kehoe, whose address is 1 Winners Circle, Albany, New York 12235.

Lastly, as suggested in the earlier correspondence, rights conferred by the Freedom of Information Law pertain to agency records. To reiterate, 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."

Here I point out that it has been established that the State University is an integral part of the government of the state and that it is an "agency" [see e.g., State University of New York v. Syracuse University, 285 AD 59, 135 NYS 2d 539 (1954)]. Section 352 of the Education Law, entitled "State University of New York established," describes in subdivision (3) the institutions included within the State University and makes specific reference to "statutory or contract colleges," such as the State University College of Agriculture and Life Sciences at Cornell University. In addition, section 5712 of the Education Law, which pertains specifically to the College of Agriculture and Life Sciences, provides that the College "shall continue to be under the supervision of the state university trustees and that:

"2. All buildings, furniture, apparatus and other property heretofore or hereafter erected or furnished by the state for such college of agriculture and life sciences shall be and remain the property of the state. The Cornell university shall have the custody and control of said property, and, as the representative of the state university trustees, shall, with whatever state moneys may be received for the purpose, administer the said college of agriculture and life sciences as the establishment of courses of study, the creation of departments and positions, the determination of the number and salaries of members of the faculty and other employees thereof, the appointment and employment thereof, the maintenance of discipline and as to all other matters pertaining to its educational policies, activities and operations, including research work.

3. The state university trustees shall maintain general supervision over the requests for appropriations, budgets, estimates and expenditures of such college. Cornell university shall receive no income, profit or compensation for the exercise and performance of the powers and duties conferred and imposed by this section, but all moneys received from state appropriations for the said college of agriculture and life sciences or derived from other sources in the course of the administration thereof, shall be credited by said university to a separate fund, and shall be used exclusively for said New York state college of agriculture and life sciences. Such moneys as may be appropriated to be paid to the Cornell university by the state in any year, to be expended by said university in the administration of said college of agriculture and life sciences, shall be payable to the treasurer of Cornell university in three equal payments to be made on the first day of October, the first day of January, and the first day of April in

> such year, and shall be expended upon vouchers approved by the chancellor of the state university, as the chief administrative officer of the state university, or by such authority or authorities in the state university as shall be designated by the chancellor by a rule or written direction filed with the comptroller, when and in the manner authorized by the state university trustees."

Based upon the foregoing, the College of Agriculture and Life Sciences at Cornell University is part of the State University of New York; it is under the supervision of the State University trustees; all of its property is the property of the state; Cornell University acts as the "representative" of the State University trustees; and the State University trustees maintain general supervision over the finances of the College and approve the College's expenditures. Although there is no judicial decision dealing specifically with the issue, in consideration of the factors described above, the decision rendered in Holden v. Board of Trustees of Cornell University [80 Ad 2d 37 (1981)] and the court's expansive interpretation of the Freedom of Information Law referenced in our earlier correspondence, it appears that the New York State College of Agriculture and Life Sciences at Cornell University is an "agency" required to comply with the Freedom of Information Law.

Moreover, I believe that a decision rendered by a federal court, the United States Court of Appeals, Second Circuit, stands for the proposition that statutory or contract colleges are entities of the state government that are accountable in the same manner and extent as the state government.

Like Cornell University, Alfred University is clearly private in part. Part of the university is the New York State College of Ceramics ("CC"), which is described in sections 6101 to 6103 of the Education Law. Like the College of Agriculture and Life Sciences at Cornell University, the College of Ceramics at Alfred University is "under the jurisdiction and control of the state university trustees" [Education Law, section 6101]; all of its property and equipment is the property of the state, and Alfred University serves as "the representative of the state university trustees" [Education Law, section 6102]; further, the state university trustees maintain general supervision of the College's finances and made expenditures "upon vouchers approved by the chancellor of the state university [Education Law, section 6103]. The decision involved the legality of suspending students

involved in a demonstration at the University. Some of the students were enrolled in the private colleges in the University; others were enrolled in the "contract" college. The decision distinguished between the students based upon their enrollment, and found that "state action" was involved with respect to the "contract" college students, but not to those from the private colleges. In so holding, the Court stated that:

> "We hold that regulation of demonstrations by and discipline of the students in the New York State College of Ceramics at Alfred University by the President and the Dean of Students constitutes state action, for the seemingly simple but entirely sufficient reason that the State has willed it that way. The very name of the college identifies it as a State institution. In part I of this opinion we have extensively reviewed the statutes making the college an intregal part of the State University; it suffices here to cite Education Law [section] 6102, whereby Alfred University maintains discipline and determines educational policies with respect to the State College 'as the representative of the state university trustees.' We see no reason why the State should not be taken at its word. The statutory provisions are not mere verbiage; they reflect the Legislature's belief that the citizens of New York would demand retention of State control over an educational institution wholly supported by State money. If the discipline has been administered by the Dean of CC, all of whose salary is paid by the State, because of acts of CC students in the State-owned buildings, the existence of state action would hardly be doubted. We do not think a different result is justified because here the CC students were demonstrating on another part of the campus, which the State's payments on their behalf entitled them to enter for proper purposes, and the authority was exercised by delegates of the State who also have other roles...[T]he students of the

> New York State College of Ceramics can properly regard themselves as receiving a public education and entitled to be treated by those in charge in the same way as their counterparts in other portions of the State University... However one characterizes Alfred's relationship to the State with respect to the New York State College of Ceramics, it is much closer than that of an independent contractor. The State furnishes the land, buildings and equipment; it meets and evidently expects to continue to meet the entire budget; it requires that all receipts be credited against that budget, Education Law [section] 6102; and in the last analysis it can tell Alfred not simply what to do but how to do it" [Powe v. Miles, 407 F. 2d 73, 32 ALR 3rd 846 (1968)].

In my view, due to the similarities in the statutory language involving the New York State College of Ceramics at Alfred University and the New York State College of Agriculture and Life Sciences at Cornell University, once again, it appears that the latter is an "agency" for the purposes of the Freedom of Information Law.

Copies of this opinion will be forwarded to Cornell University officials and others identified in your correspondence.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: David L. Call, Dean
Kenneth E. Wing, Associate Dean
Walter J. Relihan, Jr., Counsel
Keith S. Porter, NYS Water Resources Institute
Assemblyman Martin Luster

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-110
FOIL-AO-C180

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

July 16, 1990

Mr. Wayne Singleton
85-A-1925
P.O. Box 618
Auburn, New York 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. Singleton:

I have received your letter of July 9 in which you requested copies of our brochures on the Freedom of Information and the Personal Privacy Protection Laws and in which you sought assistance concerning a request for records of the New York City Police Department.

Enclosed, as requested, are copies of the two publications.

With respect to your problem, you wrote that you sought records from the Department in a request received on May 21. Although the receipt of your request was acknowledged, the acknowledgement did not include an estimate of the date when the records would be granted or denied.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

For your information, the person designated by the Department to determine appeals is Eileen Millet, Assistant Deputy Commissioner.

Lastly, since you expressed interest in the Personal Privacy Protection Law, I point out that the statute in question is generally applicable to state agencies, and section 92(1) of the Personal Privacy Protection Law defines "agency" for the purposes of that stattute to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for

> the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based upon the foregoing, municipal police departments, such as the New York City Police Department, are not subject to the requirements of the Personal Privacy Protection Law.

Further, although section 95(1) of the Personal Privacy Protection Law generally grants rights of access to records to a person to whom the records pertain, section 95(7) provides that rights of access "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by section 92(8) to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of 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, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty-seven-a, eight hundred thirty-seven-b, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

As such, although the Personal Privacy Protection Law applies to records maintained by state agencies, rights of access conferred by that law do not include records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement of persons in correctional facilities.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6181

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

July 17, 1990

Mr. Garland Wells
89-T-1714 - B131
McGregor Correctional Facility
Box 2071
Wilton, New York 12866

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

Dear Mr. Wells.

I have received your letter of July 13.

You wrote that you would like to obtain records that evaluate your "progress" as an inmate and you questioned whether you have the right to "dispute [a] wrong entry in [your] record." In addition, you requested a "list of all the parole programs and what [your] parole officer...can do to help [you] get aid in [your] area."

In this regard, I offer the following comments.

First, the regulations promulgated by the Department of Correctional services indicate that a request for records kept at a correctional facility should be directed to the facility superintendent or his designee.

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, it is likely in my view that records containing evaluations of your progress, performance or conduct, for example, could be withheld, at least in part. 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. 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, an evaluation consisting of an opinion of your performance prepared by Department staff could likely be withheld under section 87(2)(g).

Third, there is nothing in the Freedom of Information Law that provides the right to "dispute" the contents of records or the right to amend or correct records that may be erroneous. I point out, however, that the regulations promulgated by the Department of Correctional Services state in part that:

> "5.50 Challenge to accuracy. If the completeness or accuracy of any item of information contained in the personal history or correctional supervision history portion of the record of the inmate is disputed by him, the inmate shall convey such dispute to the custodian of the record or the designee of the custodian reviewing the record with him. The inmate may obtain a copy of any record that contains information the accuracy or completeness of which the inmate disputes. The fee for copies of records shall be in accordance with section 5.40 or the Part.

5.51 Investigation. (a) If the completeness or accuracy of any item of information is disputed by the inmate, the custodian of the record shall, within a reasonable period of time, investigate the accuracy and completeness of the information unless he has reasonable grounds to believe that the dispute by the inmate is frivolous. If the record in dispute is one which has been received from another governmental agency, then the custodian shall direct the inmate to make his challenge to such governmental agency.

(b) If the custodian, after investigation, shall determine the disputed information is erroneous or incomplete, he shall make such changes as are necessary and shall report to the inmate the results of the investigation and the changes, if any, which have been made.

5.52 Appeal from determination. If the inmate still disputes the accuracy or completeness of the information after investigation and determination, the inmate may appeal the determination of the custodian to the Inspector General, Department of Correctional Services, State Campus, Building 2, Albany, N.Y. 12226. The appeal shall be in writing. The Inspector General shall affirm, modify or reverse the determination of the custodian and shall promptly notify the inmate of his decision.

5.53 Names of previous recipients. Upon request, an individual whose record has been corrected shall be given the names of all known agencies, individuals, or organizations to whom the erroneous or incomplete data has been given.

5.54 Notification of previous recipients. The department shall notify all known recipients of the erroneous or incomplete information or the corrected data."

Lastly, 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 dealing with programs offered by or through the Division of Parole. It is suggested that you discuss the matter with a representative of the Division of Parole at your facility or that you write to the Division of Parole at 97 Central Avenue, Albany, New York 12206.

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-6182

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

July 18, 1990

Mr. Harvey M. Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your letter of July 12, as well as the materials attached to it.

You have requested an advisory opinion concerning certain aspects of a May 26 request for records of the New York City Department of Investigation. As I understand the matter, you alleged that Ms. Leslie Kamelhar, formerly an assistant corporation counsel, engaged in improprieties in conjunction with a proceeding in which you were involved. Although a "closing memorandum" prepared on January 31 by Juan Monserrate, an investigator for the Department, was disclosed, apparently a different closing memorandum had been prepared by Investigator Monserrate on November 16, 1988. As such, in your request of May 26, you sought:

> "a) Juan Monserrate's November 16, 1988, closing memorandum in the Kamelhar matter;
>
> b) all records relating to the Kamelhar matter contained inside the case file(s) in which the two Kamelhar closing memoranda were filed; and
>
> c) to the extent not encompassed within item b above, all memoranda, notes, letters, reports, and other records, whether handwritten or typewritten, sent

> to (as an original, as a copy, or as an item of referred correspondence) or authored by Juan Monserrate and his co-investigator in connection with the Kamelhar matter (**Note**: These documents very likely include correspondence with Leslie C. Kamelhar, James T. Stein, and officials or employees of Community School Board 24, the NYC Board of Education, the NYC Law Department, and the NYC Department of Investigation, and the Departmental Disciplinary Committee)."

In response to the request, Assistant Commissioner John J. Kennedy, the Department's records access officer, denied access to the earlier Monserrate closing memorandum, stating that you had already received the Department's "final determination in the Kamelhar investigation, a closing memorandum dated January 31, 1990." In addition, Mr. Kennedy wrote that the remainder of the documentation would be withheld on the ground that section "87(2)(g)(iii) exempts from disclosure inter-agency or intra-agency materials which are not final agency policy or determinations." It is your view that Mr. Kennedy has misinterpreted section 87(2)(g).

In this regard, I offer the following comments.

First, if Mr. Kennedy has interpreted section 87(2)(g) to require that only final agency policies or determinations must be disclosed, I believe that such an interpretation would be inconsistent with 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..."

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 many instances, inter-agency or intra-agency materials do not contain final agencies policies or determinations that would be available under section 87(2)(g)(iii). However, they often consist in whole or in part of other kinds of information that must be disclosed pursuant to subparagraphs (i), (ii) or (iv) of section 87(2)(g).

Further, it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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 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" [90 AD 2d 568, 569 (1982)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or final agency determinations, would be available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal 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" [65 NY 2d 131, 133 (1985)].

In short, if section 87(2)(g) is the only basis for denial, the characterization of records as inter-agency or intra-agency materials without more is, in my view, not determinative of rights of access. To reiterate, the contents of those records would constitute the basis for determining the extent to which such records must be disclosed or may be withheld.

With specific respect to the denial of the 1988 Monserrate "drafting memorandum," since that was supplanted by a later closing memorandum, it would appear that the former did not represent a final agency determination. In the memorandum of January 31, the final portion is entitled "conclusions and recommendations." In my view, a recommendation, for example, would not be reflective of a final agency determination; rather,

it would consist of an opinion that could have likely been affirmed, modified or rejected by the ultimate decision maker. The memorandum of January 31 appears to have been adopted by the agency as its final determination. The earlier memorandum, despite its characterization, appears to have been preliminary in that it was not adopted by the agency. If that was so, it would not have contained "conclusions," nor would it have represented the agency's "closing" statement on the matter. Further, if my assumptions are accurate, that the earlier memorandum was not final, portions of that document, or perhaps the document in its entirety, might justifiably have been withheld [see McAulay v. Board of Education, 61 AD 2d 1048 (1978), aff'd 48 NY 2d 659 (aff'd w/no opinion)].

Second, while I am unfamiliar with the documents that you requested, various decisions indicate that inter-agency or intra-agency materials that are "predecisional" in contexts similar to that presented here may be withheld [see e.g., Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Kheel v. Ravitch 62 NY 2d 1 (1984); and McAulay, supra]. Again, however, the contents of those materials would determine the extent to which they may be withheld.

Third, it is possible that a different ground for denial, section 87(2)(b), may be relevant to those materials. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion 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); Scaccia, supra; Sinicropi, supra; Gannet 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].

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 ac-

countability for misconduct." On the other hand, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, 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 the City of Syracuse, 430 NYS 2d 460 (1980)].

In short, while section 87(2)(g) was the only basis for denial cited by the Department, there may be a second exception that would permit a denial with respect to various records or portions thereof prepared in conjunction with the inquiry.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: John J. Kennedy
Steven M. Gold

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6183

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

July 18, 1990

Mr. Newnon A. Flax
88-C-0596
Wende Correctional Facility
PO Box 1187, Wende Road
Alden, New York 14004-1187

Dear Mr. Flax:

I have received your correspondence of July 10, which reached this office on July 17.

You cover letter is addressed to an "appeals officer," who is not identified by name or address, and which is captioned as a "Freedom of Information Law Appeal." As such, it is unclear whether you are appealing to this office, or whether that letter is a copy of an appeal sent elsewhere. In either case, 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 power to determine appeals nor does it have the capacity to compel an agency to grant or deny access to records. The provision concerning the right to appeal an agency's denial of a request for 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 ex-

> plain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

Second, your requests involve court records maintained by the Monroe County Clerk. In my view, the Freedom of Information Law would not apply, for that statute 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."

Based upon the foregoing, the Freedom of Information Law does not include the courts or court records within its coverage. This is not to suggest that all court records are exempted from disclosure. On the contrary, other statutes often provide substantial rights of access to court records (see e.g., Judiciary Law, section 255).

Under the circumstances, since you are seeking records in conjunction with litigation, it is suggested that you discuss the matter with your attorney.

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-6184

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

July 18, 1990

Ms. Deanna L. Dauber
[redacted]

The staff of the Committee on 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. Dauber:

I have received your letter of July 12, which, as in the case of your earlier correspondence, deals with your efforts in gaining access to records concerning asbestos in a New York City school.

By way of background, in response to your previous inquiry, based upon information provided to me by the State Education Department, it was advised that federal law requires that the records in which you are interested must be maintained in each school building and at a central administrative location in a school district. Further, it was indicated the New York City Board of Education had established an asbestos task force, which apparently maintains the records sought at an office in Long Island City that was identified by address and with the names of those who maintain the records at that office.

Your current inquiry pertains to the propriety of a response to a request by John R. Nolan, Secretary to the Board of Education. Mr. Nolan also serves as the Board's appeals officer for the purpose of the Freedom of Information Law. You had unsuccessfully requested records from the Board, and you appealed under the Freedom of Information Law.

Upon receipt of your appeal, Mr. Nolan wrote that:

> "This is in response to your letter claiming an alleged denial of access to information concerning the above-referenced request.

> "I am advised that the Deputy Records Access Officer responded to your request on April 5, 1990. In that letter, you were advised that the records you seek are maintained in the general office P.S. 9-K. Under the Board Of Education's Regulations Relating to Inspection and Copying of Records, a request for such records must be made to the Deputy Access Officer of the community school board in which the records are located. An appeal from adverse decision may be made to the Chancellor."

It is your view that Mr. Nolan directed you "to an improper place" to obtain the materials and that "his directions are inconsistent with law...because the records...are not stored at the community school board."

In this regard, I offer the following comments.

First, I have no personal knowledge concerning Mr. Nolan's familiarity with the federal statute, the Asbestos Hazard Emergency Response Act (AHERA), which requires the maintenance of records in certain locations.

Second, assuming that he was aware that the records sought are maintained on behalf of the Board at its Long Island City Office by its asbestos task force, the documentation sought would in my opinion have constituted records of the Board. It is noted that 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."

Based upon the foregoing, again, assuming that Mr. Nolan was aware of the Board's maintenance of the records, I do not believe that he should have directed you to a different source or

repository; rather, as required by federal law and the Freedom of Information Law, it is my opinion that the records should have been made available by him or through the Board's records access officer.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: John R. Nolan, Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6185

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

July 19, 1990

Ms. Rita J. DeGlopper
Town Clerk
Town of Grand Island
2255 Baseline Road
Grand Island, New York 14072

The staff of the Committee on 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. DeGlopper:

I have received your letter of July 16 in which you sought advice concerning the Freedom of Information Law.

According to your letter:

> "A research company in this area is gathering information to use to create lists of miscellaneous data to be purchased by private enterprise. [You] have been contacted to supply this information from various departments -- tax, assessing, highway, etc. [You] have basically explained the process used to obtain information from [your] office such as the Request for Information for, cost per page, etc."

You added that your office maintains various computer lists, such as dog licenses, for example, that the applicant seeks to buy.

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" to mean:

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

As such, the Law includes within its scope traditional paper records, as well as computer tapes, disks and similar information storage devices.

It is emphasized, however, that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that, unless specific direction is provided to the contrary, an agency need not create or prepare a record in response to a request. Although the information sought might be maintained in the Town's computers, some of it might not be readily retrievable. To the extent that the information sought is accessible under the Freedom of Information Law and may be retrieved based upon existing computer programs, I believe that the Town would be obliged to disclose to the extent required by the Law. On the other hand, if the information can be retrieved from a computer or other storage medium only by means of new programming or altering existing programs, those steps would, in my opinion, be the equivalent of creating a new record. Since section 89(3) of the Freedom of Information Law does not require an agency to create or prepare a record in response to a request, I do not believe that the Town would be required by the Law to reprogram or develop new programs to retrieve information that would otherwise be available.

Second, assuming that the information in question exists in lists or can be generated by a computer with existing programs, those records would in my opinion be 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.

Third, of likely relevance 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." Further, section 89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "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)].

The provision quoted above represents what might be viewed as an internal conflict in the Law. As a general matter, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records [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)]. However, due to the language of section 89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Colbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought. In that decision, it was stated that:

> "The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents' denials of petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgment for that of the respondents" (id.).

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses.

It is emphasized, however, that 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 a list identifies entities, such as business establishments, rather than natural persons, I do not believe that those records could be withheld based upon considerations of privacy.

Moreover, in a recent decision rendered by the Court of Appeals that focused upon the privacy provisions, 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, 73 NY 2d 92 (1989)]. 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.

In a more recent decision involving a request for a list of names and addresses, the opinion of this office was cited and confirmed, and the court held that "the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and

this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence" [American Society for the Prevention of Cruelty to Animals v. New York State Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). On the other hand, a request for a list of holders of dog licenses, for instance, that is sought for a commercial purpose, could in my opinion be withheld on the basis of section 89(2)(b)(iii).

I point out, too, that in some situations, other statutes or judicial decisions provide guidance. For example, in in Szikszay v. Buelow [107 Misc. 2d 886, 436 NYS 2d 558 (1981)], the applicant sought assessment information as well as tax maps. The assessment information existed in computer tape format. Although the decision referred to section 87(2)(b), as well as section 89(2)(b)(iii) (id. at 558) of the Freedom of Information Law concerning lists of names and addresses, the court granted access to the computer tapes and held that:

> "In view of the history of public access to assessment records and the continual availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.L.R.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted'" (id.).

The Court also found that:

> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner's purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy. It is therefore improper for respondent to deny petitioner's request for copies of the County assessment rolls in computer tape format" (id.).

The same conclusion was reached by another court in an unreported decision (Real Estate Data v. Nassau County and Abe Seldin, Chairman, Board of Assessors, Sup. Ct., Nassau Cty., September 18, 1981).

In view of the foregoing, I believe that assessment information that is now stored on a computer tape or in some other format is available to anyone, including a firm that seeks to use the information for commercial purposes.

Lastly, with respect to fees for the duplication of accessible records, section 87(1)(b)(iii) of the Freedom of Information Law states that such fees "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" (i.e., computer tapes), unless a statute (an act of the state legislature) other than the Freedom of Information Law permits a different fee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1789
FOIL-AO-6186

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

July 19, 1990

Ms. Gail Shariff
[redacted]

The staff of the Committee on 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. Shariff:

I have received your recent letter, which pertains to what you characterized as "the misuse of Executive Sessions by the Cherry Valley-Springfield School Board."

According to your letter:

> "...after the Cherry Valley and Springfield schools merged and built a new school, the old buildings had to be disposed of. So far, one of the four has successfully been sold. The problem with selling the old High School here in East Springfield is that the district does not seem to have a clear title to the land. Knowing this, the Superintendent/Board had an auction and a Ms. Minnerly purchased it for $15,000. and paid a $1,500. retainer. Ms. Minnerly has since been writing to the Superintendent/Board attempting to obtain a title but has received no answer to her letters. In the meantime, the building has been unmaintained and unheated, pipes have broken, floors have buckled, and there is a hole in the kitchen roof to let the weather in."

You added that, at its meeting held on July 11, "the Board had on its agenda to declare that sale void and Ms. Minnerly's down payment forfeited." You speculated that the Superintendent might have found another buyer for the property and "was hoping Ms. Minnerly would just go away and that he could void the sale without embarrassment to himself and the Board." Nevertheless, Ms. Minnerly and approximately 250 others attended the meeting, and the sale was not voided due, in your view, to their presence.

The president of the Board "moved to take this problem up in Executive Session." Although you protested, "the discussion was moved to executive session where Ms. Minnerly's claims were adjusted in a way fairly satisfactory to Ms. Minnerly but at a cost to us tax payers." You also wrote that "only those of [you] who have spoken to Ms. Minnerly know the results and none of [you] know the costs."

In this regard, I offer the following comments.

First, it is emphasized that the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an issue may properly be discussed during an executive session. Paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may appropriately be considered during an executive session.

Second, from my perspective, only one of the grounds for entry into executive session would have been potentially relevant to the facts that you presented. Specifically, section 105(1)(h) permits a public body to enter into an executive session to discuss:

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

In my view, the authority to conduct an executive session under section 105(1)(h) is dependent upon the presence of certain facts and conditions. Clearly not every discussion that relates to a real property transaction may be held behind closed doors: only "when publicity would substantially affect the value" of real property would an executive session be appropriate. If, for example, a discussion pertains to a particular parcel or parcels,

and the public is unaware of the location of those parcels, it is possible that public discussion would "substantially affect the value" of the property. When that harmful affect of publicity would occur as a result of public discussion, I believe that an executive session would likely be appropriate.

However, in this instance, the public was aware of the nature and location of the property to be sold, the identity of the prospective purchaser, and the proposed terms of sale between the District and the purchaser. Based upon those facts, I do not believe that publicity would have "substantially" affected the value of the property, particularly since it was offered at an auction. Consequently, in my opinion, neither section 105(1)(h) nor any other ground for entry into executive session could property have been asserted.

Fourth, since you wrote that the District has not disclosed the terms of the agreement between Ms. Minnerly and the District, I point out the Open Meetings Law requires that minutes of meetings be prepared to reflect action taken by a public body. 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, 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.

Moreover, 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, viewing the outcome of the executive session from a different perspective, I point out that the Freedom of Information Law, the statute dealing with access to government records, like the Open Meetings Law, is based upon a presumption of access. Stated differently, all records 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.

A record indicating an agreement between the District and Ms. Minnerly, such as a contract or similar document describing the terms of such an agreement, would in my view be accessible under the Freedom of Information Law. In short, I do not believe that any of the grounds for denial in the Freedom of Information Law could be cited to withhold such a record or records.

As you requested, copies of this opinion will be forwarded to the persons designated in your letter, including Thomas Sobol, Commissioner of the State Education Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Tom Gracie, Daily Star
Carl Schrader
Leslie Rathbun
Linda Buddle
Bernard Barnes
Bobby Weaver
Leigh Harrington
Nancy Erway
Dr. Stanley King
Thomas Sobol, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6182

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

July 19, 1990

Mr. Warner Gates
78-A-2665
NYSID 0880315 P
F.B.I. 71532E
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, New York 12733-0116

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

Dear Mr. Gates:

I have received your letter of July 15, in which you appealed a denial of access to records by the Department of Correctional Services and raised a variety of questions concerning the Freedom of Information Law.

According to your letter, you requested various records from your facility, including a "central office file," your "inmate records folder," "parole files" and "counselor and guidance files." You wrote, however, that "very limited access" to those records was provided, and that deletions were made from several of the records. Further, you questioned the duties of the records access officer and asked whether a request can be denied because it is "burdensome."

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 render a determination pursuant to an appeal made following a denial of access to records. The provision in the Freedom of Information Law pertaining to the right 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."

Further, the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information law indicate that the person designated to determine appeals is Counsel to the Department.

Second, the Department's regulations indicate that a request for records kept at a facility should be made to the facility superintendent or his designee. While I am not fully familiar with the arrangement, it would appear that records maintained by a parole officer at a facility would be in the custody of the Division of Parole rather than the Department of Correctional Services. Similarly, I believe that records of satellite mental health units at correctional facilities are in the custody of the Office of Mental Health, not the Department of Correctional Services. Therefore, while the Superintendent has general authority regarding records maintained at a facility, there may be exceptions in which other agencies or individuals have custody of certain records.

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. It is emphasized that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record might contain information that must be disclosed, as well as information that may be withheld. Consequently, there may be situations in which portions of a record may properly be deleted prior to disclosure of the remainder of the record.

While I am unfamiliar with the records in which you are interested, it is likely that deletions were made in accordance with section 87(2)(g). That provision pertains to memoranda and similar communications prepared by the staff of an agency that are transmitted within the agency or to officials of 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. Therefore, if the records in question contain opinions of staff concerning your performance, recommendations and the like, those portions of the records could in my view be withheld.

Lastly, I do not believe that an agency may deny a request because it is "burdensome" [see e.g., United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)]. Nevertheless, it is emphasized that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. As such, a request must contain sufficient detail to enable agency officials to locate and identify the records.

Enclosed for your review is a copy of the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law.

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-6188

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

July 20, 1990

Mr. Steven Briecke
85-A-4706
Great Meadow Correctional Facility
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. Briecke:

I have received your letter of July 16, as well as the correspondence attached to it.

According to the materials, you have unsuccessfully attempted to obtain copies of certain "disposition sheets" from the Suffolk County District Court. The request, which is attached to your letter, was based upon the Freedom of Information Law and the "Privacy Act of 1974."

In this regard, I offer the following comments.

First, the Privacy Act of 1974 is a federal statute that pertains to records maintained by federal agencies. As such, that statute would not apply to records of the District Court in Suffolk County.

Second, the other statute that you cited, the Freedom of Information Law, 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."

Based upon the foregoing, the courts and court records are not subject to the Freedom of Information Law.

While neither of the statutes cited in your request would be applicable to the records sought, other provisions of law often grant substantial rights of access to court records (see e.g., Judiciary Law, section 255). Therefore, it is suggested that you resubmit your request to the clerk of the court or, alternatively, that you discuss the issue with your attorney.

I hope that the preceding commentary serves to clarify the matter and 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-6189

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

July 20, 1990

Mr. Jeffrey A. Copp
89-C-1276 1H5-15
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. Copp:

I have received your letter of July 17 in which you requested assistance concerning the use of the Freedom of Information Law.

According to your letter, you requested all records pertaining to yourself from the Elmira City Police Department. In the request, you included your name, date of birth, social security number, address, and a specific time period. However, in response to the request, you were informed that you would have to provide "dates and numbers" that you have no way of knowing. You also indicated that you are unaware of the manner in which the Department maintains its files.

In this regard, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. In brief, it has been held that a request reason- ably describes that records when the agency can locate and identify the records based upon the terms of a request. Further, to deny a request on basis that it is overbroad, an agency must establish that "the descriptions were insufficient for purposes of locating the identifying the documents sought" [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)]. As such, it has been suggested that a request include as much detail as possible, such as descriptions of events, approximate dates, index and docket numbers and similar information that might enable agency officials to locate records.

It is noted that Konigsberg, supra, involved a request by an inmate for records kept on him and his identification number. The Department of Correctional Services, the agency in possession of records, was able to locate some 2,300 pages of documents on the basis of the terms of the request. In holding that that Department could not reject the request due to its breadth, it was 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).

As such, 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.

I am unfamiliar with the records in which you may be interested. However, the records maintained by a police department may involve a variety of topics, including reports of crimes, domestic disputes, accident reports, neighbors complaints, damage due to weather conditions, etc. In short, there may be a great number of unrelated records kept by a police department, and it is questionable in my view whether the Department could locate records pertaining to you solely on the basis

of the information that you provided. Therefore, if possible, it is suggested that you resubmit your request and that you include additional detail so that Department officials can locate the records.

Lastly, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) which deal with the procedural implementation of the Freedom of Information Law, state that an agency's designated records access officer "is responsible for assuring that agency personnel...Assist the requester in identifying requested records, if necessary" [see regulations, section 1401.2(b)(2)]. As such, it might be worthwhile to contact the records access officer for the purpose of seeking guidance regarding the means by which the Department's records can be located and retrieved.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Joseph Michalko, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6190

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

July 20, 1990

Mr. Richard Rubin
Deputy Personnel Officer
County of Ulster
244 Fair Street
Box 1800
Kingston, New York 12401

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

Dear Mr. Rubin:

I have received your letter of July 18 in which you requested an advisory opinion.

You asked whether it is permissible "for the Ulster County Personnel Department to provide a town in Ulster County information on employees in another town in Ulster County consisting of employee name, social security number, title and salary." You added that the purpose of providing the information "would be to instruct the second town on an acceptable format for providing such information, and to provide a sample for them to use."

In this regard, I offer the following comments.

First, as I understand your inquiry, the disclosure would not be made in response to a request made under the Freedom of Information Law by a member of the public seeking government records. On the contrary, it appears that the disclosure would be made by one governmental entity to another governmental entity and that those entities would respectively have furnished and received the information in the performance of their official duties.

Second, most of the information in question would be available to the public under the Freedom of Information Law. One of the few instances in that statute in which an agency is required to maintain a record involves payroll information. Specifically, section 87(3) of the Freedom of Information Law states in relevant part that:

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

As such, I believe that three of the four items of information would be available to any person under the Freedom of Information Law. The fourth, social security numbers, could in my view be withheld, for disclosure would likely constitute "an warranted invasion of personal privacy" pursuant to sections 87(2)(b) and 89(2) of the Law.

While social security numbers of public employees may be withheld or deleted from records that would otherwise be available, there is nothing in the Freedom of Information Law that would require an agency to withhold those items. The introductory language of section 87(2) states that an agency may withhold records or portions thereof that fall within the scope of the grounds for denial that follow. As stated by the Court of Appeals, the state's highest court:

> "...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 such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, even though a municipal agency may withhold records or perhaps portions of records to protect against an unwarranted invasion of personal privacy, the Freedom of Information Law imposes no requirement that the records must be withheld.

In sum, there is no provision of which I am aware that would preclude the County from disclosing the information in question to a town.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6191

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

July 23, 1990

Mr. Marvin Datz
[redacted]

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

Dear Mr. Datz:

I have received your letter of July 12. As in the case of your previous correspondence, your letter deals with requests directed to the New York City Police Department and Department of Transportation and the State Department of Motor Vehicles.

You alleged that thirteen requests made to the Police Department remain unanswered, and you asked for my "confirmation of violation" of the Freedom of Information Law by the Department. I cannot confirm any such violation, for this office is not a court of law; its function is advise with respect to the Freedom of Information Law. As indicated previously, if you believe that the Department has withheld records, you may appeal such denial in accordance with section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

If you have appealed and the appeal has resulted in a denial of access, you may seek judicial review of the denial by commencing a proceding under Article 78 of the Civil Practice Law and Rules.

You also wrote that, in my letter to you of July 10, I failed to refer to "assurance of compliance by Records Access Officer Cohen of the New York City Department of Transportation." In this regard, I spoke with Mr. Cohen some time ago and reported that he intends to comply with the Freedom of Information Law. That assurance was, in my view, sufficient and I see no reason to contact him to seek renewed assurances of compliance. If you believe that your requests have been denied, you can follow the same procedural steps as those described with respect to your requests for records of the Police Department.

Lastly, I have contacted the Department of Motor Vehicles on your behalf. I was informed, based upon a review of its outstanding requests, that the records access officer was unable to locate any outstanding requests under your name that might have been submitted since April of this year. Any further requests for records of the Department of Motor Vehicles should be made to its records access officer, Ms. Marion Drexel.

Sincerely,

Robert T. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1791
FOIL-AO-6192

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

July 23, 1990

Mr. John Anthony
[redacted]

Dear Mr. Anthony:

I have received your letter of July 17 addressed to the members of the Committee on Open Government, as well as the correspondence attached to it. The correspondence deals with issues involving what appears to be a volunteer fire company. In addition, in your letter, you alleged that I "worked it out" with Richard Herbek, Village Manager of Croton-on-Hudson, so that fifty requests made under the Freedom of Information Law have been constructively denied. Further, at the end of your letter, in phrases that are not complete sentences, you appear to have asked questions, for you wrote as follows: "To find out what, where, who, and why etc. is WHY there is an NYS FOIL. Or if it is otherwise, please let me know promptly in writing."

In this regard, first, you know well that there is a New York Freedom of Information Law. The intent of that statute is described in its legislative declaration, which is found in the initial section of the Law (Public Officers Law, section 84).

Second, for the record, I have not "worked out" any sort of agreement, procedure or scheme with Mr. Herbek concerning your requests. If anything, for years, I have maintained continuing professional and personal interest in attempting to do whatever I can to see that the Freedom of Information Law works well. Certainly I have no interest in seeing the purpose of the Law defeated.

Finally, since you referred to the status of a volunteer fire company, the issue is whether such companies are required to comply with the Freedom of Information Law and the Open Meetings Law. As I have indicated in the past, the Freedom of Information Law is applicable to records of an "agency," a term defined in section 86(3) of the Law to mean:

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

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

However, 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 more 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.

Although there are no judicial decisions of which I am aware that involve the status of meetings of volunteer fire companies, I believe that such meetings would be subject to the Open Meetings Law.

Section 102(2) of that statute defines "public body" to mean:

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

By reviewing the components in the definition of "public body", I believe that each is present with respect to the board of a volunteer fire company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law.

In view of the decisions cited earlier, I believe that the board of a volunteer fire company, as well as committees that it may designate, fall within the definition of "public body" and would be required to comply with the Open Meetings Law.

I hope that the foregoing will be useful to you.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6193

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

July 24, 1990

Mr. Emil Murtha
[redacted]

Dear Mr. Murtha:

As promised, enclosed is a copy of a letter addressed to Walter C. Foster, formerly clerk of the Village of Island Park.

In that letter, it was suggested that there is nothing in the Freedom of Information Law pertaining to a waiting period of thirty days before an agency can disclose records in response to a request, and that reference to that time period made in a judicial decision inappropriately referred to the Personal Privacy Protection Law, which in my view was inapplicable to the situation. That statute, a copy of which is enclosed, applies to state agencies only and specifically excludes units of local government from its coverage. The only provision in the Freedom of Information Law that refers to thirty days is section 89(4)(a), which enables a person who has been denied access to records to appeal the denial within thirty days.

For your information, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 order to enhance her understanding of the Freedom of Information Law, copies of this letter and the letter sent to Mr. Foster will forwarded to Ms. Ann Leonard, the current 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
Enclosures

cc: Ann Leonard, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6194

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

July 24, 1990

Mr. Michael J. Good
88-A-2485
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. Good:

I have received your letter of July 17 concerning your ability to request and view your "inmate file."

In this regard, I offer the following comments.

First, 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 made to the facility superintendent or his designee.

Second, 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 Department officials to locate and identify the records in which you are interested.

Third, the Department's regulations specify that an inmate may inspect or copy records involving his "personal history," which includes "records consisting of inmate name, age, birthdate, birthplace, city of previous residence, physical description, occupation, correctional facilities in which the inmate has been incarcerated, commitment information and departmental actions regarding confinement and release" [see regulations, section 5.5(i) and 5.21(c)].

I am unfamiliar with the nature or content of other records that might be contained in your file. As such, I cannot offer specific guidance concerning rights of access to those records. However, 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.

Enclosed is a copy of the Freedom of Information Law for your review.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6195

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

July 24, 1990

Mr. William Spratley
173040
P.O. Box 27264
Richmond, Virginia 23261

The staff of the Committee on Open 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 July 19.

You asked how you can use the Freedom of Information Law to gain access to "police files" pertaining to your case and how you may obtain "court records of someone who made [a] statement about [you] in their own trial."

In this regard, since you are writing from the State of Virginia, it is unclear whether your questions deal with governmental entities in New York or elsewhere. Since the duties of this office involve advising with respect to the New York Freedom of Information Law, my comments will pertain only to my understanding of the law in this state.

First, with respect to police files, a request or requests should be directed to the agency or agencies that you believe maintain the records in which you are interested. Further, requests 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.

Second, 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 requested records.

Third, with respect to agency records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unfamiliar with the nature of the records in question and I cannot offer specific guidance concerning rights of access. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies persons other than yourself, for example.

Perhaps the most relevant provision concerning access to 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 and 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.

Records prepared by agency employees or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the content of agency records in question and the effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld under the Freedom of Information Law.

Lastly, the courts and court records are not, in my view, subject to rights conferred by the Freedom of Information Law. As inferred previously, the Freedom of Information Law applies 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."

While court records fall beyond the requirements of the Freedom of Information Law, other provisions of law often require disclosure of those records (see e.g., Judiciary Law, section 255). As such, it is suggested that court records be requested from the clerk of the appropriate court, again, in a manner in which adequate detail is given to permit the location and retrieval of the records.

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

OML-AO-1792
FOIL-AO-6196

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

July 24, 1990

Mr. Myron Unger
[redacted]

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

Dear Mr. Unger:

I have received your letter of July 17 in which you described problems in obtaining records from the Mahopac Public Library.

According to your letter, you submitted a request to the Library's records access officer, Ms. Maria Brech, on June 27. In the request, a copy of which is attached to the letter, you sought "all records relating to June 1990 Mahopac Library elections (press release, legal notices, etc.)." When you appeared at the Library on July 5, Ms. Brech asked you "to see a member of the Board of Trustees." Although she permitted you to inspect the legal notices, she "insisted the [you] specify the items that [you] wish to see." You returned to the Library on July 16 to review the requested documents, but the request was again denied. When you asked that Ms. Brech provide a reason for the denial in order that you could appeal, "she refused." In addition, you wrote that "the Library refused to make the minutes of the May meeting of the Board of Trustees when [you] requested [to] read them on July 16, 1990."

You have sought assistance in this matter. 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 regulations concerning the procedural aspects

of the Law (see regulations, 21 NYCRR Part 1401). In turn, section 87(1)(a) of the Law requires that agencies adopt rules and regulations consistent with the Freedom of Information and the regulations 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 persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.

(4) Upon request for copies of records:

(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the 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 provides direction concerning the time limits within which agencies must respond to requests. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The application form attached to your letter indicates that you may appeal a denial of access to the Library Director, who is identified as Ms. Brech. In this regard, if Ms. Brech is the records access officer, I do not believe that she can serve as the person to determine appeals, for the Committee's regulations state that: "The records access officer shall not be the appeals officer [section 1401.7(b)].

Third, section 89(3) of the Freedom of Information Law also provides that an applicant must "reasonably describe" the records sought. It is noted that the Freedom of Information Law as originally enacted in 1974 required that an applicant seek "identifiable" records. That standard resulted in a series of difficulties, for applicants often could not name or identify records sought with particularity. Under the current standard, which became effective when the Law changed in 1978, it has been held that a request reasonably describes the records when agency officials can locate the records based upon the terms of a request. Further, as indicated earlier, the regulations state that the records access officer is responsible for assuring that agency personnel "assist the requester in identifying requested records, if necessary."

Lastly, with respect to your request for minutes of a meeting, I direct your attention to the Open Meetings Law, which requires that minutes of meetings of public bodies by prepared and made available. Specifically, section 106 of that statute provides 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."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Minutes of executive sessions reflective of action taken, the date and the vote must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. I point out that if a public body conducts an executive session and merely engages in a discussion but takes no action, there is no requirement that minutes of the executive session be prepared.

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. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes 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 now what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

In an effort to enhance compliance with the law, a copy of this opinion will be forwarded to Ms. Brech.

I hope that 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 Brech

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6197

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

July 25, 1990

Mr. Joseph M. Cotazino, Jr.
Orchard Park Neighborhood
Association, Inc.
P.O. Box 122
Voorheesville, New York 12186

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

Dear Mr. Cotazino:

I have received your letter of July 20. As in the case of previous correspondence, your inquiry concerns rights of access to records maintained by the Department of Transportation.

You wrote that the Orchard Park Neighborhood Association, which you serve as president, "discovered a new file" within the Department, which is known as "file 7.500 'Albany County Salt Storage - Voorheesville.'" The Department has permitted you to review 48 of the 82 documents in the file; the documents that are being withheld have been denied on the basis of section 87(2)(g) of the Freedom of Information Law.

You asked that I review the list of the records that have been denied, a copy of which is attached to your letter, for the purpose of advising with respect to the propriety of the denial. In addition, you wrote that three of the items identified in the list of documents denied were mistakenly disclosed to you and your attorney previously, and you asked whether their disclosure would "set any kind of precedent regarding them having to allow [you] to review the rest of file #7.500." Finally, you questioned your recourse and referred specifically to the "time frame in which appeals can be filed."

In this regard, I offer the following comments.

First, it is emphasized that I am unfamiliar with the records appearing on the list of the documents that have been withheld. While most of those records appear to fall within the scope of section 87(2)(g), some might not.

To put the matter in perspective, section 87(2)(g) of the Freedom of Information Law pertains to "inter-agency and intra-agency materials." Inter-agency materials involve records prepared by agency staff that are transmitted among or between two or more agencies; intra-agency materials involve records prepared by agency staff that are used or transmitted within an agency. Section 86(3) of the Freedom of Information Law defines that 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."

As such, communications between Department officials, as well as those between Department officials and those of other state or municipal agencies would, in my view, fall within the scope of section 87(2)(g). However, communications between Department staff and the State Legislature would not in my opinion constitute inter-agency materials, for the State Legislature is excluded from the definition of "agency." Similarly, insofar as the list of denied records includes communications with members of the public or private, non-governmental entities or persons, for example, section 87(2)(g) would not be applicable.

Second, due to the structure of section 87(2)(g) and its specific language, the mere characterization of records as inter-agency or intra-agency materials does not necessarily result in a conclusion that those materials may be withheld. Rather, the contents of those materials determine the extent to which they may be withheld or must be disclosed. 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 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.

Further, it has been held that factual information found within inter-agency or intra-agency materials appearing in narrative form, as well as those portions appearing in numerical or tabular form, would generally be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held 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 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" [90 AD 2d 568, 569 (1982)].

Therefore, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, as well as any policy or final agency determinations, would be available if no other ground for denial could appropriately be asserted.

Similarly, the Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal 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" [65 NY 2d 131, 133 (1985)].

In short, if section 87(2)(g) is the only basis for denial, the characterization of records as inter-agency or intra-agency materials without more is, in my view, not determinative of rights of access. To reiterate, the contents of those records would constitute the basis for determining the extent to which such records must be disclosed or may be withheld.

Third, the fact that three documents included in the list of records withheld had been disclosed to you previously is, in my opinion, irrelevant to rights of access to the other documents appearing on the list. I point out that it has been held that an inadvertent disclosure of an exempt record does not create a right to copy the record [McGraw-Edison Co. v. Williams, 509 NYS 2d 285 (1986)]. In this instance, I do not believe that the disclosure of the three documents in question, inadvertent or otherwise, creates a right of access to other records.

Lastly, 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:

> "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 records are denied following an appeal, an applicant may seek judicial review of the denial pursuant to section 89(4)(b), which provides in relevant part that:

> "a person denied access to a record in an appeal determination under the provision of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record in denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two."

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Franklin E. White, Commissioner
John McNeill, Administrative Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6198

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

July 26, 1990

Mr. Salvatore J. Ribaudo
[redacted]

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

Dear Mr. Ribaudo:

I have received your letter of July 23 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, after reading a legal notice pertaining the availability of the tentative budget of the Village of Falconer, you requested a copy of the tentative budget. In response to the request, you indicated that the Village Clerk informed you "that her instructions from the Mayor were that [you] could see the tentative budget in the clerk's office but that [you] could not have a copy..." Despite further inquiry and your contention that a copy must be made available, Village officials refused to provide a copy.

In this regard, I offer the following comments.

First, as you are aware, section 5-508 of the Village Law deals with the process by which a village budget is adopted. That provision requires that a public hearing be held concerning the tentative budget, and that notice of the hearing must be published. Further, section 5-508 specifies that: "The notice of hearing shall state the time when and place where such public hearing will be held, the purpose thereof and that a copy of the tentative budget is available at the office of the village clerk where it may be inspected by any interested person during office hours." As such, it is clear that the tentative budget must be disclosed to the public.

Second, long before the enactment of the Freedom of Information Law, it was found judicially that the right to copy is concomitant with the right to inspect [see e.g., In Re Becker, 200 AD 178 (1922)]. Therefore, a general matter, if a record is made available for inspection, I believe that it is also available for copying.

Third, the Freedom of Information Law is broad in its application, for it pertains to all agency records. 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 upon the foregoing, a tentative budget is clearly a "record" subject to rights conferred by the Freedom of Information Law.

In brief, section 87(2) of the Freedom of Information Law requires that agencies "make available for inspection and copying all records," unless records fall within the scope of the grounds for denial that follow. Under the circumstances, since the Village Law requires that the tentative budget be disclosed, none of the grounds for denial could justifiably be asserted. Further and perhaps most importantly, when a record is accessible, section 89(3) of the Freedom of Information Law states in relevant part that: "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record..." As such, I believe that an agency, such as a village, has the duty to prepare a copy of a record accessible under the law upon payment of the appropriate fee, which generally cannot exceed twenty-five cents per photocopy [see Freedom of Information Law, section 87(1)(b)(iii)].

In sum, for the reasons described in the preceding commentary, it is clear in my view that the Village is obliged to prepare a photocopy of its tentative budget upon payment of the proper fee.

As you requested, copies of this opinion will be forwarded to those identified at the end of 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:saw

cc: Hon. Albert Mattison, Mayor
David Mareri, Trustee
Maurice Roach, Trustee
Sue Benson, Village Clerk
Joseph Gerace, Director, NYS Office of Rural Affairs
Hon. William Parment, NYS Legislature
Marion Lombardo
Sally Ribaudo, Legal Aide

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6199

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

July 26, 1990

Mr. William Spampinato
Attorney and Counselor at Law
Ten South Fourth Street
Hudson, New York 12534

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

Dear Mr. Spampinato:

I have received your letter of July 23 and the materials attached to it.

According to your letter, you represent an entity that is attempting to establish a planned unit development in the Town of Gallatin. In that process, you have made a series of requests under the Freedom of Information Law. You wrote that:

> "What we find troublesome about the response of the Town of Gallatin is the delegation of authority from the Records Access Officer to the Town Attorney. We believe this manner of response is inappropriate and beyond the scope of an agency's power under [section] 89(3) of the Public Officers Law."

Based upon the foregoing, you requested an advisory opinion concerning whether the records access officer "has the authority to request the Town Attorney or any other official to respond to a request made under the Freedom of Information Law."

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 regulations concerning the procedural aspects of the Law (see regulations, 21 NYCRR Part 1401). In turn, sec-

tion 87(1)(a) of the Law requires that agencies adopt rules and regulations consistent with the Freedom of Information and the regulations promulgated by the Committee.

Second, 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 persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
>
> (4) Upon request for copies of records:

(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the 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.

In sum, so long as responses to requests are properly given, I believe that the records access officer may consult with the town Attorney or other Town officials when requests are made. Further, I know of nothing in the Freedom of Information Law, the Committee's regulations or any other applicable provision that would preclude officials other than the records access officer from responding to requests pursuant to the direction of 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

Robert J. Freeman
Executive Director

RJF:saw

cc: Catherine Dancy, Town Clerk
Warren S. Replansky, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6202

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

July 26, 1990

Mr. James L. Kirby
89-A-7787
P.O. Box 618
135 State Street
Auburn, New York 13021-9000

Dear Mr. Kirby:

I have received your letter of July 21 and the correspondence attached to it.

In brief, your inquiry pertains to records apparently maintained by Family Court in Orange County that you requested pursuant to the Freedom of Information Law. You indicated that two requests have been made, but that the clerk had not responded as of the date of your letter to this office.

In this regard, it is noted at the outset the 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) of the Freedom of Information Law defines that 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, the Freedom of Information Law does not apply to the courts or court records, and I believe that the matter you described is, therefore, beyond the jurisdiction of this office.

I have, however, enclosed a copy of section 166 of the Family Court Act, which pertains to access of family court records.

I regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Encl.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6201

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

July 26, 1990

Mr. Fred Brown
89-A-4090
Southport Correctional Facility
Inmate Law Library Program
P.O. Box 2000, Institution Road
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. Brown:

I have received your letter of July 23 in which you requested assistance.

According to your letter, you made requests for records of the New York City Police Department on April 23 and May 18. As of the date of your letter, you had received no response to the requests.

In this regard, the Freedom of Information Law provides direction concerning the time within which an agency must respnd to a request. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person at the Police Department designated to determine appeals is Eileen Millet, Assistant Deputy Commissioner.

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

OML-AO 1795
FOIL-AO-6202

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

July 26, 1990

Mr. Bernard Blum
Friends of Rockaway, Inc.
67-11 Beach Channel Drive
Arverne, New York 11692

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

Dear Mr. Blum:

I have received your letter of July 20, which reached this office today. You have raised a series of issues concerning both the Freedom of Information and the Open Meetings Law and enclosed a variety of materials pertaining to meetings of Community Board #14, as well as requests made under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to public bodies, and, for the following reasons, I believe that a community board, as well as a committee consisting of members of such a board, would constitute a public body required to comply with the Open Meetings Law.

By way of background, community boards were created initially by local law No. 39, which was added to the New York City Charter in 1969. Under that provision, community boards were governed by section 84 of the New York City Charter. Section 84 of the Charter was repealed by the passage of local No. 102 enacted in 1977. The cited provision was replaced by section 2800 of the Charter entitled "Community Boards". According to section 2800, the members of a community board are appointed by a borough president. Further, it is clear that a community board performs duties of a governmental nature for the City of New York.

Section 102(2) of the Open Meetings Law defines "public body" to mean:

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

By breaking the definition into its components, I believe that it may be concluded that a community board is a "public body" subject to the Open Meetings Law. First, it is an entity that may consist of up to fifty persons. Second, while there may be no specific reference in the City Charter to a quorum, section 41 of the General Construction Law requires that any entity consisting of three or more persons designated to perform a duty collectively as a body can only do so by means of a quorum, a majority of the total membership. Third, based upon section 2800 of the City Charter, a community board clearly conducts public business and performs a governmental function. And fourth, the duties of a community board are performed on behalf of a public corporation, the City of New York.

In view of the foregoing, a community board is, in my view, clearly a "public body" subject to the Open Meetings Law in all respects. Further, since the definition of "public body" includes committees of a public body, I believe that the committees consisting of members of such boards are also public bodies subject to the Open Meetings Law.

Second, all meetings of a public body must be conducted open to the public, except to the extent that an executive session may be convened. I point out that the term "meeting" has been construed broadly to include 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, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978).

Third, section 102(3) defines "executive session" 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; rather it is a portion of an open

meeting. Further, section 105(1) of the Law prescribes a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session. Based upon the description of the subject matter of meetings in the materials that you enclosed, it does not appear that any of the grounds for entry into an executive session could justifiably have been asserted.

I point out, too, that every meeting must be preceded by notice given in accordance with section 104 of the Open Meetings Law. Specifically, that provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place should be given to the news media (at least two) and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice must be given to the news media

and posted in the same manner as described above, "to the extent practicable," at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Finally, insofar as my comments pertain to the Open Meetings Law, it is emphasized that the Law deals with certain procedural requirements (i.e., giving notice), and the extent to which public bodies must discuss public business in public. The Open Meetings Law, however, does not deal with the subjects that a public body must consider or the depth of their consideration of issues within their jurisdiction. Further, as inferred earlier, if less than a quorum of the membership of a public body confers, the Open Meetings Law, in my view, would be inapplicable.

Next, having reviewed your requests made under the Freedom of Information Law, the requests generally seek to elicit information through a series of questions. In this regard, the title of the Freedom of Information Law may be somewhat misleading, for that statute does not deal with information per se but rather with records. In other words, the Freedom of Information Law is a vehicle under which any person may seek records of an agency that requires that agency to grant access to such records to the extent required by law; it is not a vehicle that requires government officials to answer questions, although they may generally choose to do so. Further, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states that, unless specific direction is provided to the contrary, an agency need not create a record in response to a request. For example, in one of your requests, you asked that the Planning Commission "draw up a list of written communications" concerning a particular project. In my view, if the Commission does not maintain such a list, it would not be required to prepare a list on your behalf in response to a request made under the Freedom of Information Law.

Lastly, since one of the requests involved a "roll call vote," I direct your attention to section 87(3) of the Freedom of Information Law. That provision represents an exception to the general rule that an agency need not create records, for it requires that certain records be maintained. In conjunction with the issue of roll call voting, 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..."

As such, when an issue is the subject of a vote by a community board or a committee thereof, I believe that a record must be prepared that indicates how each member cast his or her vote. Ordinarily, the voting record prepared pursuant to section 87(3)(a) will appear in minutes of meetings (see Open Meetings Law, section 106).

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Encl.

cc: Jonathan Gaska, District Manager
Sallijane Seif, Chairperson
Richard L. Schaffer, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6203

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

August 23, 1990

Mr. Wallace 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:

As you are aware, I have received your letter of July 26 in which you requested an advisory opinion.

Attached to your letter is a copy of a request of July 17 addressed to the records access officer of the Town of Amenia for "records of the Town Constable(s) that are required to be kept pursuant to Section 110(a)(1) and Section 111 of the Uniform Justice Court Act for the last three (3) years." Due to the Town's failure to respond, you appealed on July 26.

By way of background, section 110 of the Uniform Justice Court Act states in relevant part that:

> "Unless the rules shall otherwise provide, and subject to such variations as they may provide, the enforcement officers of the court shall be, and shall have such powers and duties as are provided in this section and section 701 of this act. Each of such officers shall keep a record of official acts performed by him upon or in connection with the court's process or mandate. The rules may prescribe the manner in which such record shall be maintained.

> (a) Civil matters. In civil matters, in addition to such other persons as are designated by the municipal board to be enforcement officers, the enforcement officers shall be, in the case of:
>
> 1. a town court, the constables of the town and the sheriff of the county...."

Section 111 provides that:

> "(a) Accounting. The accounting for and payment over of fees, including those received by an enforcement officer in connection with the service or execution of a process or mandate of the court, shall be as provided by law applicable in the municipality or to the particular non-judicial employee or officer.
>
> (b) Oath. Before entering upon the discharge of his official duties, each non-judicial employee shall take the oath of office prescribed by law and file it in the office of the county clerk. The same requirement shall be applicable to an enforcement officer whose oath of office does not otherwise embrace the duties imposed on him by section 110 of this act.
>
> (c) Bond. With such oath as is required to be filed by subdivision (b) shall be filed a bond, in an amount fixed and approved by the municipal board, conditioned for the faithful performance of duty."

In this regard, 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 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 in my view clearly applies to records maintained by a town, for example. However, the Freedom of Information Law does not include the courts or court records within its coverage.

Assuming that the records sought are maintained by an "agency," rather than a court, I believe that they would fall within the scope of the Freedom of Information Law. Assuming further that the Freedom of Information Law is applicable, it is noted that it provides direction concerning the time within which an agency must respond to requests. Specifically, section 89(3) states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

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. While I am not familiar with the records in question, it would appear that they should be disclosed, for the request, insofar it involves section 110(a)(1), concerns records relating to civil matters.

Second, if the records in question are not agency records, but rather are considered to be court records, the Freedom of Information Law would not apply. While the Freedom of Information Law does not extend to the courts or records, other statutes often grant substantial rights of access to those records. For instance, the introductory language of section 2019-a of the Uniform Justice Court Act provides that: "The records and dockets of the court except as otherwise provides by law shall be at reasonable times open for inspection to the public..." Therefore, if the Freedom of Information Law is inapplicable, it would appear that, unless a different law provides to the contrary, section 2019-a would confer rights of access.

In an effort to enhance compliance, copies of this opinion will be forwarded to the Town of Amenia.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6204

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

August 23, 1990

Mr. Leslie Perez
89-B-3130
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. Perez:

As you are aware, I have received your correspondence of July 24. Please accept my apologies for the delay in response.

You have asked that I answer the following questions:

> "1. Are fingerprints mandatory in a prison arrest, by B.C.I. (Bureau of Criminal Investigation)?
>
> 2. In such case, how may one obtain the name of investigating officer(s)?
>
> 3. Are Miranda Warnings and finger-printing constitutional? If so, under what amendment(s)?"

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. Questions 1 and 3 deal with issues unrelated to the Freedom of Information Law or rights of access to records. Consequently, the issues raised in those questions fall beyond the scope of the jurisdiction or expertise of this office.

With respect to your capacity to obtain the name of an investigating officer or officers, I offer the following comments.

First, as a general matter, a request should be made to the "records access officer" at the agency that maintains the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests.

Second, 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.

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. Without knowledge of the facts concerning the investigation, your relationship to the investigation, or the effects of disclosure of the records containing the information sought, I cannot provide specific guidance concerning rights of access to such records. Nevertheless, I hope that the foregoing information provides a sufficient basis for enabling you to prepare an appropriate request.

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-6205

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

August 23, 1990

Mr. Harvey Elentuck
[redacted]

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

Dear Mr. Elentuck:

As you are aware, I have received your letter of July 27.

Much of your commentary relates to issues described in your letter of July 12 and my ensuing response of July 18. The focal point of that correspondence involved rights of access to a so-called "closing memorandum" prepared in 1988 that was withheld and was supplanted by a second such memorandum prepared in 1989 that was disclosed to you.

You offered a series of speculative comments and conjecture in an effort to suggest that the first closing memorandum should be disclosed. Having reviewed my opinion of July 18, there is nothing that you wrote that would in my view merit changes in the advice offered in that opinion. As I understand the situation, it appears that the initial closing memorandum was likely a draft that was subject to review and modification and that the document made available to you represented the product of that review.

You also asked whether I concur with the meaning of the term "final" as it was construed in <u>Miracle Mile Associates v. Yudelson</u> [68 AD 2d 176, 182 (1979)]. That decision represents an expansive view of section 87(2)(g) of the Freedom of Information Law with which I concur. The decision in my view indicates that determinations made in multi-tiered proceedings may be viewed as "final," even though additional proceedings, i.e., appeals may be made. By means of analogy, a decision rendered by the Supreme Court would be public, even though the decision might be

appealed to the Appellate Division, which might affirm, modify or reverse. In this instance, however, the initial "closing memorandum" and the second such memorandum were prepared in conjunction with one stage of the process; again, it would appear that the initial memorandum was a draft that was subject to review and modification. As such, that situation is in my view different from the kind of process described above, which involved succeeding steps and an appeal mechanism.

Lastly, you suggested that the decision rendered in Farbman v. New York City, [62 NY 2d 75 (1984)] "extended" the "ambit of the Freedom of Information Law" and "reversed all existing FOIL cases in the State on the 'final agency policy and determinations' issue." I disagree with such a conclusion. In my view, Farbman stands for the notion that any person may utilize the Freedom of Information Law, and that one's status as a litigant neither enhances nor limits that person's rights as a citizen when seeking records under the Freedom of Information Law. There is nothing in Farbman that deals specifically with access to final agency policies or determinations. The only reference to that phrase appears at the end of the decision, in which the Court found that inter-agency or intra-agency materials should be reviewed in camera to ascertain the extent to which those materials consist of information, such as final agency policy or determinations, that must be disclosed (id. 83) pursuant to section 87(2)(g).

I hope that the foregoing serves to clarify my views and your understanding regarding the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6206

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

August 24, 1990

Mr. Anthony Ramos
89-T-5132
Clinton Correctional Facility
Box 367-B
Dannemora, New York 12929

Dear Mr. Ramos:

As you are aware, I have received your letter of July 30. Please accept my apologies for the delay in response.

You have requested from this office a copy of a police report relating to an incident for which you were arrested and convicted.

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, nor is it empowered to compel an agency to disclose records. In short, I cannot provide a copy of the report in question because this office does not possess it. Further, the request does not indicate where the arrest occurred or who made the arrest. Nevertheless, I offer the following comments and suggestions.

First, as a general matter, a request should be made to the records access officer at the agency that maintains the record in which you are interested. The records access officer has the duty of coordinating an agency's response to requests.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the record sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the record.

Lastly, 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 ap-

pearing in section 87(2)(a) through (i) of the Law. Without familiarity with the content of the report in question or the effects of its disclosure, I cannot provide specific guidance concerning the extent to which it would be available. However, I hope that the preceding comments will enable you to submit an appropriate request to the agency that maintains the record 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 6207

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

August 24, 1990

Mr. Paul Williams
80-A-1977
Clinton Correctional Facility
Box 367-B
Dannemora, New York 12929

Dear Mr. Williams:

As you are aware, I have received your letter of July 30. Please accept my apologies for the delay in response.

You asked whether this office could obtain a copy of a "DD-5" for you relating to a proceeding in which you were involved and convicted. You also questioned the cost of obtaining a copy of the report.

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 possession of records generally and is not empowered to compel an agency to disclose records. In short, I cannot provide a copy of the DD-5, because this office does not possess it. Nevertheless, I offer the following comments and suggestions.

First, it is unclear whether the record in question would be maintained by the New York City Police Department or the court, or both. Assuming that the Police Department maintains the record, a request should be directed to the Department's records access officer, Sgt. John G. Sultana, whose office is located at 1 Police Plaza, Room 110-C, New York, New York 10038. The records access officer has the duty of coordinating an agency's response to requests.

Second, section 89(3) of 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.

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. Since I am unfamiliar with the content of the record in question or the effects of its disclosure, I cannot provide specific guidance concerning the extent to which it must be disclosed. However, when records are available under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy [see Freedom of Information Law, section 87(1)(b)(iii)].

Lastly, I point out that the Freedom of Information Law does not apply to the courts or court records. However, such records are often available under other provisions of law. Therefore, if you believe that the record is maintained by a court, a request could be directed to the clerk of the appropriate court. Again, such a reguest should contain adequate detail to permit the location of the record.

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-6208

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

August 24, 1990

Ms. Angie Gray
[redacted]

The staff of the Committee on 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. Gray:

As you are aware, I have received your letter of July 30. Please accept my apologies for the delay in response.

According to your letter, you were charged one dollar per copy for records made available by the Dutchess County Office of Real Property Tax Services. It is your belief that copies should cost twenty-five cents. As such, you requested a copy of the law that so provides and asked whether you can get a refund.

In this regard, I offer the following comments.

First, that statute that deals generally with access to agency records is the Freedom of Information Law, a copy of which is attached.

Second, the Freedom of Information Law requires that agencies adopt rules and regulations concerning the procedural aspects of the Law, as well as fees for copies. Specifically, section 87(1)(b)(iii) requires that an agency's rules and regulations include reference to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

Therefore, assuming that the records made available to you were photocopies and do not exceed nine by fourteen inches, the agency could not in my opinion charge more than twenty-five cents per photocopy, unless a statute, an act of the State Legislature, authorizes a different fee.

As you requested, copies of the Freedom of Information Law and this opinion will be sent to Mr. Bud Carlquest, Director of the Office of Real Property Tax Services. If the fee of one dollar was inconsistent with law, it is suggested that you seek an appropriate refund.

I hope that 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

cc: Mr. Bud Carlquest, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6209

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

August 24, 1990

Mr. David Davis
[redacted]

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

Dear Mr. Davis:

As you are aware, I have received your letter of July 19, which reached this office on July 30. Please accept my apologies for the delay in response.

You have raised a series of questions concerning the obligations of the City University of New York Law School at Queens College, whose officials you have characterized as "defendants," under the Freedom of Information Law. Specifically, you asked the following questions:

> "Must the defendants allow me to inspect documents at the Law School pursuant to Section 87 subd (I) (i) of the Public Officers Law? Are the defendants required to prepare a list of documents that they claim are exempt? Must the defendants maintain a detailed current list by subject matter of all records in possession of the Law School, whether or not available under the Freedom of Information Law... Must the Law School treat me the same as an individual not involved in litigation with them? How many days does the Law School have to respond to my request before I can appeal to the Chancellors office?"

In this regard, I offer the following comments.

First, assuming that records maintained by an agency are accessible under the Freedom of Information Law, section 87(2) of the Law specifies that such records must be made available for inspection and copying.

Second, when records are initially denied, section 89(3) of the Law states that the denial must be in writing and the regulations promulgated by the Committee on Open Government require that the reasons for the denial be given [21 NYCRR section 1401.2(b)(3)(ii)]. When records are denied following an appeal, section 89(4)(a) of the Freedom of Information Law requires that such a determination must "fully explain in writing to the person requesting the record the reasons for further denial..." While the judicial interpretation of the federal Freedom of Information Act has in certain circumstances required federal agencies to prepare a list that identifies records claimed to be exempt [Vaughn v. Rosen, 484 F2d 820 (1973)], I know of no decision rendered under the New York Freedom of Information Law that has imposed such a requirement. Further, one 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 mateirals exempted under Public Offices 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 and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 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)].

Third, the Freedom of Information Law requires that an agency maintain a list, by subject matter, of the records in its possession. Specifically, section 87(3) of the Freedom of Information Law 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."

Fourth, I do not believe that your rights under the Freedom of Information Law as a member of the public are altered by your status as a litigant or potential litigant. As stated by the court of Appeals, the state's highest court: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected byt 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, which is a disclosure device that may be used by litigants. Perhaps the most commonly used discovery mechanism is Article 31 of the Civil Practice Law and Rules (CPLR). 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 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public rights and in the public interest, irrespective of the status of 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 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" [id. at 80].

Based upon the foregoing, in my opinion, the pendency of litigation would not affect your rights as a member of the public under the Freedom of Information Law, notwithstanding your status as a litigant.

Lastly, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests. Section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: David Fields, Associate Dean and Records Access Officer

PPPL-AO 111
OML-AO-1798
FOIL-AO-6210

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

August 24, 1990

Ms. Michele Kisiday
[redacted]

The staff of the Committee on 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. Kisiday:

As you are aware, I have received your letter of July 30. Please accept my apologies for the delay in response.

In conjunction with your request, enclosed are materials concerning the Freedom of Information Law, the Open Meetings Law and the Personal Privacy Protection Law. The package includes copies of those statutes, "Your Right to Know," which describes the Freedom of Information Law and the Open Meetings Law, and "You Should Know," which pertains to the Personal Privacy Protection Law.

You asked initially whether those statues supersede "school law." In this regard, it is unclear what in meant by school law. However, I would like to offer the following general comments.

First, it is noted that the Personal Privacy Protection Law does not apply to school districts or other entities of local government. That statute is applicable to agencies, and for purposes of the Personal Privacy Protection law, the term "agency" is defined in section 92(1) to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmen-

> tal entity performing a governmental or proprietyary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Therefore, the Personal Privacy Protection Law generally pertains to state agencies, rather than units of local government, such as school districts, cities, towns, villages, etc.

The Freedom of Information Law also applies to agencies, but its definition of that term is expansive. Specifically, 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."

The Open Meetings Law pertains to 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."

As such, the Open Meetings Law applies to boards, councils, commissions and the like at the state and local levels.

Second, each of the statutes to which you referred might be characterized as "general laws." The Freedom of Information Law, for example, deals with rights of access to government records generally. However, if a different statute (an enactment of the State Legislature or Congress) deals with particular records, that provision, which could be characterized as a

"special statute," would supersede a general law. For instance, a federal act, the Family Education Rights and Privacy Act, deals solely with education records identifiable to students. That law, insofar as it might conflict with the Freedom of Information Law, would supersede the Freedom of Information Law, for it is a federal law, and because it deals with particular records rather than records generally.

If your reference to school law in intended to mean policies, resolutions or rules adopted by a school board, I point out that those policies are not statutes. Therefore, the Freedom of Information Law or the Open Meetings Laws, as the case may be, would override such provisions. However, if a statute found within the Education Law provides direction concerning access to specific records, again, that statute would prevail.

Lastly, you asked "what happens when an organization (such as a school board) operates in violation of these laws." In this regard, none of the laws in question are self-enforcing. From my perspective, the best method of ensuring compliance would involve an effort to guarantee that the officials responsible for compliance are familiar with the laws. To attempt to enhance compliance, this office provides informational materials, such as those enclosed, and prepares advisory opinions. Although the opinions are not binding, it is hoped that they are educational and persuasive. If a question or problem arises concerning the holding of executive sessions by a school board, for example, you (or any person) could describe the situation in writing and seek an advisory opinion, a copy of which would be sent to the school board.

Alternatively, under each of the three laws, the actions of an agency or public body may be reviewed by initiating a lawsuit. For instance, section 107(1) of the Open Meetings Law states in part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

I hope that 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-621

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

August 24, 1990

Mr. Peter Graziano
86-A-4738
Eastern New York Correctional
Facility
P.O. 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. Graziano:

As you are aware, I have received your letter of July 24. Please accept my apologies for the delay in response.

You have sought assistance concerning requests made to the Office of the Kings County District Attorney on January 2 and to the Public Service Commission on June 11. The receipt of the request to the District Attorney was acknowledged on January 12, in which it was written that you would be informed regarding the records and the cost of duplicating a transcript of a statement. However, you have received no further response. The request for records of the Public Service Commission was made to Arthur A. King, a consumer services representative, following a complaint. In that request you asked for records pertaining to the investigation of the complaint. As of the date of your letter to this office, you had received no response to the request.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

For your information, I believe that the person designated to determine appeals for the District Attorney is Peter A. Weinstein, First Deputy Bureau Chief, Appeals Bureau.

Second, as a general matter, a request made under the Freedom of Information Law should be directed to an agency's "records access officer." The records access officer has the duty of coordinating an agency's response to requests. The consumer services representative to whom you directed your request is not

the records access officer. However, having contacted Mr. King on your behalf, I was informed that he forwarded the request to the records access officer, who responded to you by letter dated August 6. As such, the matter insofar as it pertains to the Public Service Commission, appears to have been resolved.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Elliot Marc Cohen
Arthur D. King

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6212

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

August 27, 1990

Mr. Natale E. Albanese
89-A-6051
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601-0168

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

Dear Mr. Albanese:

As you are aware, I have received your letter of July 30. Please accept my apologies for the delay in response.

You asked whether "the records office could supply an abstract on [your] dates of arrest and bookings", and whether an "admittance record" prepared pursuant to 9 NYCRR 7002.2(d) would be available under the Freedom of Information Law.

In this regard, I offer the following comments.

First, I believe that criminal history records including arrest and conviction data is generally available to the subjects of the records. The source of the records is the Division of Criminal Justice Services (DCJS), and the regulations promulgated by the Department of Correctional Services, section 5.22 indicate that the DCJS report shall be released to an inmate.

Second, with respect to admittance records, the provision that you cited states that:

> "(d) The admissions process shall include the recording of:
>
> (1) the name of the prisoner received;
> (2) the authority for admission to the facility;

(3) an itemization of all documents and property received with the prisoner;
(4) the date and time of admission; and
(5) the name, rank, badge number and authority of delivering officer."

In my view, such a record would be available under the Freedom of Information to an inmate, for none of the grounds for denial appearing in section 87(2) of the Freedom of Information Law would appear to apply.

Lastly, the Department's regulations indicate that requests for records kept at a correctional facility may be directed to the facility superintendent or his designee.

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

PPPL-AO-113
FOIL-AO-623

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

August 27, 1990

Ms. Frances C. Zuke
[redacted]

The staff of the Committee on 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. Zuke:

As you are aware, I have received your letter of August 1. Please accept my apologies for the delay in response.

By way of background, the issue involves your efforts in gaining access to records in order to effectively challenge your assessment. To do so, you submitted a request for assessment files concerning some eighteen properties in the Town of Stephentown to the Town Clerk, including data cards, photographs of properties, communications between property owners and the Assessor or the Board of Assessment Review, and any other "pertinent information". The Clerk indicated that the records were not in his office and wrote that you should request them from the Assessor. You did so, but the Assessor denied your request stating that "section 96 of the Public Officers Law expressly precludes disclosure" when such disclosure would constitute "an unwarranted invasion of personal privacy". As of the date of your letter to this office, you had not received the records sought.

In this regard, I offer the following comments.

First, section 96 of the Public Officers Law is part of the Personal Privacy Protection Law, which is found in Article 6-A of the Public Officers Law. The Personal Privacy Protection Law in my view has no relevance to rights of access to the records in question, for it does not apply. The Personal Privacy Protection Law pertains to personally identifiable records maintained by certain agencies, and for purposes of that law, section 92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Therefore, the Personal Privacy Protection Law specifically excludes any unit of local government from its scope, such as towns.

Although the Freedom of Information Law also defines the term "agency", its definition is more expansive. Section 86(3) of that statute 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."

Therefore, the Freedom of Information Law pertains not only to state agencies, but also to municipalities, such as towns.

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, 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)]. 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 addition, in Szikszay v. Buelow [107 Misc. 2d 886, 436 NYS 2d 558 (1981)[, the applicant sought assessment information as well as tax maps. The assessment information existed in computer tape format. The court referred to section 87(2)(b), as well as section 89(2)(b)(iii) (id. at 558) of the Freedom of Information Law, which states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes". Notwithstanding those provisions, the court granted access to the computer tapes and held that:

> "In view of the history of public access to assessment records and the continual availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.L.R.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted'" (id.).

The Court also found that:

> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner's purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy. It is therefore improper for respondent to deny petitioner's request for copies of the County assessment rolls in computer tape format" (id.).

I point out, too, that the same conclusion was reached by another court in an unreported decision (Real Estate Data v. Nassau County and Abe Seldin, Chairman, Board of Assessors, Sup. Ct., Nassau Cty., September 18, 1981).

In short, based upon judicial decisions, it appears that the records sought are public records that should have been disclosed.

Lastly, 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 persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.

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

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

(i) make records 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 requester 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, such as the Assessor, act appropriately in response to requests. In addition, I believe that the response by the Assessor, or by an official who denies access to records, must indicate that the applicant has the right to appeal a denial of a request, including the name and address of the person or body to whom an appeal may be made.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to Town 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: Arthur Maxwell, Supervisor
Sylvester Close, Clerk
Thomas MacVeigh, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1112
FOIL-AO-6214

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

August 27, 1990

Mr. Thomas G. Menary
[redacted]

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

Dear Mr. Menary:

As you are aware, I have received your letter of August 2. Please accept my apologies for the delay in response.

Your inquiry concerns a request made under the Personal Privacy Protection Law directed to the privacy compliance officer at the New York City Transit Authority on June 20. As of the date of your letter to this office, you had received no response to the request.

In this regard, I offer the following comments.

It is noted initially that the Personal Privacy Protection Law is applicable to records that contain personal information retrievable by means of a name or other identifier which are maintained by certain agencies. For the purposes of that statute, section 92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

I point out that the Freedom of Information Law in section 86(3) of that statute defines the term "agency" as follows:

> "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 Personal Privacy Protection Law generally applies to state agencies; the Freedom of Information Law applies to entities of both state and local government.

The status of the New York City Transit Authority under the Personal Privacy Protection Law may be somewhat unclear. As I understand the matter, that entity operates as something of an extension of the Metropolitan Transportation Authority of the State of New York, which I believe is an agency subject to the Personal Privacy Protection Law.

While it is not certain that the Transit Authority must comply with the Personal Privacy Protection Law, the following remarks will pertain to both the Freedom of Information Law and the Personal Privacy Protection Law.

First, both statutes require that an applicant must "reasonably describe" the records sought. Therefore, a request must include sufficient detail to enable agency officials to locate and identify the records. Having reviewed a copy of your request attached to your letter, there is a minimal amount of information describing the requested records or your relationship to them, and it is questionable in my view whether the request meets the standard of reasonably describing the 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. Where the Personal Privacy Protection Law applies, the subject of a record generally enjoys rights of access to records pertaining to him or her pursuant to section 95, subject to certain limitations described in that section, and again, the requirement that an applicant describe the records with sufficient detail as to permit their location by the agency.

Third, one aspect of your request involves copies of references from former employers. Although a reference might pertain to you, I believe that there would be privacy considerations concerning the author of the reference. Here I point out that section 89(2)(b) of the Freedom of Information Law provides examples of unwarranted invasions of personal privacy, the first of which involves "disclosure of employment, medical or credit histories or personal references of applicants from employment". Therefore, in my opinion, a reference could be withheld to protect the privacy of its author, unless the deletion of identifying details would effectively prevent the recipient of such a record from determining the identity of the author of the reference.

Fourth, you requested "copies of each and every disclosure" of records pertaining to you by the Authority to units of state and local government and to private corporations. As I understand that aspect of your request, you have asked that the Authority inform you as to which agencies or corporations received records about you from the Authority. In this regard, as suggested earlier, the request does not include any detail concerning the nature of any such records. You did not indicate your relationship to the Authority, as a former employee or otherwise. Further, the requirement that an agency account for its disclosures is limited. There is no requirement to do so under the Freedom of Information Law, and the requirement to do so under the Personal Privacy Protection Law limited to circumstances described in section 94(3) of that statute, which refers to disclosures made pursuant to section 96(1)(d), (i) and (l). I point out, too, that the Personal Privacy Protection Law became effective in September of 1984. Therefore, it is doubtful, in my view, that the Authority could or would be required to inform you of all of the disclosures of records pertaining to you that it might have made.

To enhance your understanding of the Freedom of Information Law and the Personal Privacy Protection Law, enclosed are explanatory brochures dealing with both statutes.

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-6215

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

August 28, 1990

Ms. Christine L. Uljua
Invisible Boundaries, Inc.
P.O. Box 955
Millbrook, NY 12545

Dear Ms. Uljua:

I have received your recent letter, which is dated August 28, but which reached this office on August 27. You have requested from the Committee on Open Government the names and addresses of licensed dog owners for certain counties.

In this regard, it is emphasized that the Committee is authorized to advise with respect to the Freedom of Information Law. This office does not maintain records generally, nor is it empowered to compel an agency to grant or deny access to records. In short, I cannot provide the information sought, because this office does not possess it. Nevertheless, I offer the following comments.

First, as a general matter, a request should be directed to the "records access officer" at the agency that maintains records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests.

Second, I believe that the agency that maintains the records in question is the Department of Agriculture and Markets, which is located at 1 Winners Circle, Albany, NY 12235.

Third, in view of your business card, which indicates that your firm provides "canine fencing", it is likely in my opinion that the information sought could be withheld. Although the Freedom of Information Law provides broad rights of access, section 87(2)(b) of the 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 privacy. One of those examples, section 89(2)(b)(iii), states that an unwarranted invasion of personal privacy includes the "sale or release of a list of names and addresses if such lists would be

used for commercial or fund-raising purposes". Therefore, if the request for a list of holders of dog owner licenses would be made for a commercial purpose, I believe that such a request could properly be denied. I point out that, ordinarily, the purpose for which a request is made is irrelevant to rights of access. However, due to the language of the provision quoted above, it has been held that an agency may inquire as to the reason for which a list of names and addresses is requested [Golbert v. Suffolk County Department of Consumer Affairs, Supreme Court, Suffolk County, September 5, 1980].

The foregoing is not intended to suggest that you cannot request the information from the appropriate agency; rather, under the circumstances, I have attempted to describe a particular limitation concerning access.

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-6216

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

August 28, 1990

Mr. Wayne Phillips
90-A-1661
Clinton Correctional Facility Annex
Box 367-A
Dannemora, NY 12929

Dear Mr. Phillips:

I have received your letter of August 22, which reached this office on August 27.

You have requested from this office "a list of Judges and Lawyers in New York State who are or who have undergone disciplinary censure within the last five years", as well as:

> "1. Forms for the procurement of documents relating to Judges & Lawyer censorship by the Committee for Judicial Review.
>
> 2. General forms for obtaining documents, records, and Master Index lists from various government agencies.
>
> 3. A list, if available, of the record keeping agencies within New York State that involve disciplinary measures instigated or enacted against police officers, Judges, and attorney's with regards to their performance in their official capacity."

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 records sought, because this office does not possess them. However, I offer the following comments.

First, I point out that the Freedom of Information Law pertains 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."

As such, the Freedom of Information Law excludes the courts and court records from its coverage.

Second, with respect to the discipline of attorneys, section 90(1) of the Judiciary Law 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 complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Therefore, when records are subject to section 90(1) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, rather than the Freedom of Information Law. Further, a request concerning attorney discipline should apparently be addressed to the Appellate Divisions. Whether the Appellate Divisions maintain lists of attorneys who have been disciplined is unknown to me.

Third, proceedings concerning the discipline of judges are undertaken by the Commission on Judicial Conduct, which is located at 801 Second Avenue, New York, NY 10017. The provision concerning its records is section 45 of the Judiciary Law, which in subdivision (1) states that:

> "Except as hereinafter provided, all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential and shall not be made available to any person except pursuant to section forty-four of this article. The commission and its designated staff personnel shall have access to confidential material in the performance of their powers and duties. If the judge who is the subject of a complaint so requests in writing, copies of the complaint, the transcripts of hearings by the commission thereon, if any, and the dispositive action of the commission with respect to the complaint, such copies with any reference to the identity of any person who did not participate at any such hearing suitably deleted therefrom, except the subject judge or complainant, shall be made available for inspection and copying to the public, or to any person, agency or body designated by such judge."

Fourth, with respect to forms used to request records, the Freedom of Information Law contains nothing concerning the use of a particular form. Section 89(3) of the Freedom of Information Law states that a request should be made in writing and must "reasonably describe" the records sought. Ordinarily a request should be directed to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests.

Similarly, there is no particular form used to request a "master index", which is also known as a subject matter list. That record is required to be prepared pursuant to section 87(3) of the Freedom of Information Law, which 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."

Lastly, I am unaware of any central source of records involving disciplinary action regarding police officers. I believe that the employing agencies would maintain such records, such as cities, counties, towns, etc.

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-6217

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

August 28, 1990

Mr. Clifford Heim
[redacted]

Dear Mr. Heim:

As you are aware, I have received your letter of August 3. Please accept my apologies for the delay in response. I also received your letter of August 28, which involves a second request. That request has been forwarded to Samuel Messina.

It is noted at the outset that your letter of August 3 is addressed to the records access officer at the Department of State. I am not the records access officer, and I believe that your letter was mistakenly delivered to this office. I am taking the liberty, however, of responding.

You requested "photocopies of the mailing labels used in a statewide news release". In this regard, I offer the following comments.

First, 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 and identify the requested record. Although you characterized the release as "statewide", without knowledge of the particular news release to which you referred, it is unknown whether that release might have been distributed to daily newspapers, daily and weekly newspapers, newspapers and radio and television stations, or a combination thereof. Therefore, it is suggested that you resubmit the request to Samuel Messina, the Department's records access officer, with a copy or description of the specific news release to which you referred.

Second, it is unlikely that the Department maintains a copy of mailing labels that might have been used. However, it could likely print a list of those receiving the release.

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 point out that section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records which if disclosed would constitute an unwarranted invasion of personal privacy. In addition, section 89(2)(b) provides a series of examples of unwarranted 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)].

Moreover, in a recent decision rendered by the Court of Appeals that focused upon the privacy provisions, 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.

In a more recent decision involving a request for a list of names and addresses, the opinion of this office was cited and confirmed, and the court held that "the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence" [American Society for the Prevention of Cruelty to Animals v. New York State Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989).

Therefore, if a list identifies entities, such as newspapers, radio and/or television stations, there would be no personal privacy considerations, and such a list would, in my view, be available under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6218

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

August 28, 1990

Ms. Karen A. Nuckel
[redacted]

Dear Ms. Nuckel:

Your letter of August 21 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to advise with respect to the Freedom of Information Law.

As a representative of a citizens' group in Yonkers, you wrote that you are interested in obtaining information concerning the Yonkers Police Department. For example, you raised questions concerning the number of days per week that patrolmen and commanding officers are supposed to work, their shifts, benefit packages and the like.

In this regard, I offer the following comments.

First, the vehicle that is generally used to obtain records from government is 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.

Second, it is likely in my view that virtually all of the information to which you referred in your letter would be included within collective bargaining agreements or other contracts between the City of Yonkers and public employee unions. I believe that any such agreements would be available under the Freedom of Information Law, for none of the grounds for denial appearing in the Law could appropriately be asserted.

If the information in question is not contained in a collective bargaining agreement or agreements, I believe that other records containing the information, if they exist, would be public under section 87(2)(g) of the Freedom of Information Law. Although that provision represents a basis for denial, 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. Requirements concerning the number of days to be worked, shifts, the ability to work overtime and the like would in my view represent the policy of the City and would be available pursuant to section 87(2)(g)(iii). Again, however, I would conjecture that the information in question would likely be found within collective bargaining agreements.

Third, a request for records should be directed to the records access officer at the agency that maintains the records in which you are interested. The records access officer has the duty of coordinating the agency's response to requests. I believe that the records access officer for the City of Yonkers is Ms. Linda DiGangi, whose office is in City Hall. A request should be made in writing. In addition, 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 and identify the records.

Enclosed are copies of the Freedom of Information Law and "Your Right to Know," which explains the Law and contains a sample letter of request.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6219

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

August 28, 1990

Mr. Robert Reninger
[redacted]

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

Dear Mr. Reninger:

As you are aware, I have received your letter of August 6. Please accept my apologies for the delay in response.

You referred to issues considered in an advisory opinion prepared on April 16 concerning a requirement imposed by the Town of Greenburgh that a "preprinted form be used to request documents" and added that the Town Clerk also insists that a signature appear on the form. You asked whether I can provide any information more current than that offered on April 16.

Having reviewed that opinion, there is little that I can add to it. In short, nothing in the Freedom of Information Law refers to a particular form that must be completed for the purpose of requesting records. As such, I believe that any request made in writing that reasonably describes the records sought should be adequate and accepted by an agency. Similarly, there is nothing in the Freedom of Information Law that requires that a request be accompanied by a signature. From my perspective, a signature is generally irrelevant, for records accessible under the Law must be made equally available to any person, regardless of status or interest [see Farbman & Sons v. New York City, 62 NY 2d 75 (1984); also Burke v. Yudelson 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Therefore, whether a request is made and or signed by a resident, a corporation, a journalist or a foreign national is irrelevant.

A copy of this letter will be sent to the Town Clerk in an effort to enhance compliance with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
cc: Susan Tolchin, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-622d

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

August 29, 1990

Mr. Donald Strickland
85-D-0109
135 State 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 Mr. Strickland:

As you are aware, I have received your letter of August 6. Please accept my apologies for the delay in response.

You asked whether, under the Freedom of Information Law, you may obtain documents from a district attorney relating to your criminal case. In addition, if such records are subject to the Freedom of Information Law and the district attorney fails to disclose them, you asked to whom you would appeal a denial.

In this regard, I offer the following comments.

First, the records of an office of a district attorney in my view are subject to rights granted by the Freedom of Information Law, for the Freedom of Information Law pertains to records of an "agency," a term defined in section 86(3) of the Law to mean:

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

Based upon the language quoted above, 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., Barrett v. Morgenthau, ___ NY 2d ___, NYLJ, Nov. 20, 1989' Moore v. Santucci, 543 NYS 2d 103, ___AD 2d___(1989); 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, 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 am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 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.

Records prepared by employees of a law enforcement agency or the office of a district attorney, or records transmitted between those agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Lastly, with respect to procedure, a request should be made initially to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests. If the records access officer denies the request, the reasons for the denial must be stated in writing, and the applicant must be informed of the name and address of the person or body to whom an appeal may be made 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."

If an appeal is denied, an applicant may seek judicial review of the denial in a proceeding brought under Article 78 of the Civil Practice Law and Rules.

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-6221

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

August 29, 1990

Ms. Danamaria Martin
[redacted]

The staff of the Committee on 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. Martin:

I have received your letter of August 8. I recently returned from vacation and apologize for the delay in response.

According to your letter, the provost at Brooklyn College designated a "fact finding panel to investigate student allegations against a professor." The panel, which was advisory in nature, conducted interviews and offered recommendations to the provost concerning a solution to the problem. Therefore, at this juncture, the matter appears to be closed. However, it is your view that it is "normal" or routine for such an advisory panel to prepare minutes. Nevertheless, according to the records access officer at the College, no minutes exist. You asked whether any such minutes should be available if they do exist.

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 states in part that an agency need not create records in response to a request. Therefore, if the information in which you are interested does not exist in the form of a record or records, the Freedom of Information Law, in my view, would be inapplicable.

Second, 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. It appears that two of the grounds for denial might be relevant to the records in question.

Section 87(2)(g), as indicated in previous correspondence, 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..."

Perhaps somewhat similar the situation that you described are the facts presented in McAulay v. Board of Education, which involved records reviewed by a Chancellor's advisory panel designated to review an unsatisfactory rating of a teacher and which was later affirmed by the Court of Appeals. In McAulay, the Appellate Division stated that:

> "The Freedom of Information Law, as recently amended (L 1977, ch 933, eff Jan. 1, 1978), specifically exempts intra- and inter-agency materials which are not: statistical or factual tabulations or data; instructions to staff that affect the public; or final agency policy or determination (Public Officers Law, section 87, subd 2, par [g]). Petitioner contends that the subject documents represent the application of agency policy and rules to a specific case and that to deny disclosure would allow appellants to perpetuate their tradition of maintaining a body of 'secret agency law' in this area. Appellants, on the other hand, contend that the subject documents represent precisely the kind of predecisional information which is prepared in order to assist the decision-making process and, hence, exempt from disclosure. We agree with appellants. The hearing panel documents or report

> sought are not final agency determinations or policy. Rather, they are predecisional material, prepared to assist an agency decision maker (here, the Chancellor) in arriving at his decision. Only the latter has the legal authority to decide whether the rating should stand. The panel's recommendations and reasoning are not binding upon him and there is no evidence that he adopts its reasoning as his own when he adopts its conclusion. Petitioner's desire to bring to light the policies and rules governing the appellants' evaluation of what constitutes a satisfactory teacher is commendable. However, the real problem here, considering the administrative process set up in the appellant board's by-laws, is the absence of any obligation upon the Chancellor to explain his decisions. The Freedom of Information Law does not require an agency to develop a body of written law or policy. Nor does it permit us to substitute therefore a compilation of nonfinal recommendations which may be based upon reasoning rejected or never adopted by the ultimate decision maker, the disclosure of which might not only impinge upon the agency's predecisional processes but affirmatively mislead the public" [61 AD 2d 1048, aff'd 48 NY 2d 659 (1978)].

It appears that records in question, if they exist, may be analogous to the records sought in McAulay, for they might contain a series of recommendations, which may have been adopted, rejected or modified by the decision maker.

Another decision of possible relevance involved a situation in which opinions and factual materials were "intertwined." 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 re-

> port 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); 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, 65 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.

The other ground of potential 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". Although 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); 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, it has been held that records concerning public employees that are not relevant to the performance of their official duties may be denied on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1984].

Based upon the judicial determinations cited above, I believe that a record reflective of a final determination indicating a finding of misconduct, for example, 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 or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would 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)].

I am unfamiliar with the contents of any of the records in which you are interested. However, it is possible that portions would, if disclosed, result in an unwarranted invasion of personal privacy.

In sum, to the extent that either section 87(2)(g) or (2)(b) could be asserted, the records, insofar as they exist 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:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6222

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

August 29, 1990

Mr. James Beyrau
[redacted]

Dear Mr. Beyrau:

I have received your recent letter in which you requested the address indicating where you can request court documents and related materials under the Freedom of Information Law concerning a proceeding held in the 1960's in Onondaga County.

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."

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

Second, other provisions of law often grant substantial rights of access to court records (see e.g., Judiciary Law, section 255). Therefore, it is suggested that a request be made to the clerk of the court in which the proceeding was conducted. The request should include sufficient detail to permit the location of 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

OML-AO-1802
FOIL-AO-6223

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

August 29, 1990

Ms. Theresa Lonergan
[redacted]

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

Dear Ms. Lonergan:

As you are aware, I have received your letters of August 7. Please accept my apologies for the delay in response.

The first letter involves the requirements imposed by the Freedom of Information Law concerning the time within which agencies must respond to requests for records. In this regard, section 89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

The other letter involves the requirements concerning legal notices published prior to public hearings. As indicated in a letter addressed to you on May 11, section 104 of the Open Meetings Law contains requirements concerning meetings to be held by public bodies. Those requirements are separate from provisions involving the publication of notice prior to hearings. It was also advised that there is no statute that is generally applicable regarding notice of public hearings, and that a variety of statutes provide direction concerning specific kinds of hearings.

Since you appear to be interested particularly in hearings concerning municipal budgets, I direct your attention to sections 108 of the Town Law and 5-508 of the Village Law, which deal respectively with notice of hearings on budgets prepared by towns and villages.

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-6224

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

August 30, 1990

Ms. Rita Lauber
[redacted]

The staff of the Committee on 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. Lauber:

As you are aware, I have received your letter of August 12. Please accept my apologies for the delay in response.

You have asked how you may obtain a copy of the Freedom of Information Law and seek records from the Metropolitan Transportation Authority. By way of background, you wrote that you recently received a summons from Metro North Police for smoking in Grand Central Terminal, and you are interested in obtaining records indicating:

> "how many summonses the police officer who ticketed [you] has given out since January, 1990;
>
> how many summonses other Metro North police have given out."

Further, since Metro North uses surveillance cameras, you would like to know:

> "if the cameras view the platforms where the trains are, where there are always smokers, and if they view any areas of the Terminal itself;
>
> what Metro North police do when the camers show someone smoking in the Terminal, i.e., does an officer run out of the office to track that smoker..."

In this regard, I offer the following comments.

First, enclosed are copies of the Freedom of Information Law and "Your Right to Know", which describes the Law and contains a sample request letter.

Second, in terms of procedure, a request should be made in writing and addressed to the agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests. Further, 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 in which you are interested. The administrative offices of both the Metropolitan Transportation Authority and the Metro-North Commuter Railroad Company are located at 347 Madison Avenue, New York, NY 10017.

Third, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency need not create a record in response to a request. Therefore, if, for example, there is no record or statistical compilation indicating the number of summonses issued for smoking, the agency would not be obliged to prepare such a record on your behalf. When making a request, rather than raising a question (i.e., how many tickets have been issued), it is suggested that you seek records containing the information sought (i.e., records indicating the number of tickets issued).

Fourth, insofar as an agency maintains 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.

Assuming that records exist containing the information in question, I believe that two of the grounds for denial would be relevant in determining access to such records.

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. Records indicating numbers of tickets issued would consist of statistical or factual information and would be accessible under section 87(2)(g)(i). Procedures involving steps to be taken when smokers are seen might constitute instructions to staff that affect the public or agency policy available under section 87(2)(g)(ii) or (iii), if no other basis for denial could 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 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" 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.

I hope that I 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-6225

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

August 30, 1990

Mr. Edward Parnell
89-A-9258 R121
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Parnell:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You asked whether a bank's "surveillance camera photos", which were presented to the jury at your trial, "can be gotten in color as opposed to black and white".

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. That statute pertains to records of an agency, and 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 would not apply to records maintained by a court, such as those presented to the jury, nor would it apply to records maintained by a private entity, such as a bank.

With respect to your specific question, I have no knowledge as to whether the photos in question could be obtained in color. I would conjecture that the nature of the film would determine whether photographs could be produced in color.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1804
FOIL-AO-6226

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

August 30, 1990

Mr. Stephen L. Williams
Reporter
The Gazette Newspaper
100 Milton Avenue
Ballston Spa, NY 12020

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

Dear Mr. Williams:

As you are aware, I have received your letter of August 13. Please accept my apologies for the delay in response.

According to your letter, the Galway Board of Education "has traditionally elected its officers by secret ballot". You added that "Blank pieces of paper are distributed, each board member writes a candidate's name, and ballots are taken until someone has achieved a four-vote majority for president, and then vice-president". Following your objection to the practice, the Board raised the issue with its attorney, "who told them they could cite section 2031-3 of the state Education Law".

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

First, section 2031 of the Education Law states in its entirety that: "All district officers shall be elected by ballot". That provision neither refers to secret ballot voting, nor does it contain a subdivision 3.

Second, 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 municipal board [see section 86(3)], such as a board of education, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

Second, in the context of a vote taken by the Board to elect its officers, often a series of ballots may be taken until a particular member receives an affirmative vote of a majority of the membership of the body. If that is so, it does not appear that the preliminary votes, i.e., those votes that do not result in a majority, must be recorded, for they are not "final". However, the vote resulting in an affirmative total of a majority of the membership of the Board would, in my opinion, be required to be recorded and indicate how each member voted. Therefore, if the final vote was 4 to 3, for example, a record, presumably a portion of the minutes of a meeting, must identify how each member cast his or her vote.

Third, in terms of the rationale of section 87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its 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 en effort to enhance compliance with law, copies of this opinion will be forwarded to the Board of Education and its attorney.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Robert Van Vranken

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6227

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

August 30, 1990

Mr. Rafael Robles
88-A-8275 LH5-6
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. Robles:

As you are aware, I have received your letter of August 8. Please accept my apologies for the delay in response.

You have asked for assistance in obtaining records from the New York City Police Department. Having directed a request to the Department pertaining to your case, which has apparently been concluded, you were granted access to few records; the remaining records falling within the scope of your request were withheld.

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, this office cannot 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. Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 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.

Records prepared by employees of a law enforcement agency, such as the Police Department, or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to Ms. Eileen D. Millet, the Department's appeals officer. In addition, as you requested, a copy of your correspondence is enclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Eileen D. Millet

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6228

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

August 30, 1990

Mr. Robert H. Davison
[redacted]

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

Dear Mr. Davison:

As you are aware, I have received your letter of August 9. Please accept my apologies for the delay in response.

Attached to your letter is a copy of a response to a request for records rendered by Richard C. French, a senior administrative assistant for the Long Island regional office of the Office of Parks, Recreation and Historic Preservation. Among the documents requested was a "rating and ranking list", and Mr. French indicated that he had "been advised that no 'rating' or 'ranking' list exists and, therefore, none can be provided to you". Nevertheless, you obtained such a list from a different source, and it is your belief that a state agency "deliberately misled" you or perhaps "lied" to you.

You have asked whether "they [are] in violation of the law since the request was made through the Freedom of Information Law".

In this regard, I offer the following comments.

First, as a general matter, when an agency receives a request for a record, if the record can be located, it may make the record available or deny the request. A denial of an existing record must be made in writing, informing the applicant of the name of the person or body to whom an appeal may be made. If a record does not exist or cannot be found, a response to a request should so indicate, as Mr. French did. In such a

circumstance, an applicant may seek a certification pursuant to section 89(3) of the Freedom of Information Law, which states in part that, upon request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

Second, it is assumed that Mr. French made a good faith effort to respond to your request. If that was so, and if he is unaware of the existence of the record in question, he apparently acted properly. However, I point out that a new provision of the Freedom of Information Law, 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."

A companion statute was added to the Penal Law, section 240.65. Under those new provisions, if it is found that a person "willfully" concealed a record "with intent to prevent" its disclosure, that person could be found guilty of a violation. Whether section 89(8) would apply would be dependent upon the facts, and I am unaware of whether it is necessarily relevant in this instance.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6229

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

August 30, 1990

Mr. Anthony J. Samaritan
[redacted]

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

Dear Mr. Samaritan:

As you are aware, I have received your letter of August 13. Please accept my apologies for the delay in response.

According to your letter, you requested various records from the Town of Fallsburg on July 25. As of the date of that letter, you had received no response to the request. The records sought include:

> "1) Resume of the current Director of Parks and Recreation as well as that of her assistant.
>
> 2) Complete job descriptions for the Parks and Recreation Director, her assistant and her secretary.
>
> 3) Copies of the resumes of the other applicants for the positions referred to above.
>
> 4) Copies of the advertisements for the positions set forth.
>
> 5) A copy of the Town Board determination of the duties, activities and policies of the Parks and Recreation Department.

> 6) Criteria used by the Town Board and/or the Town Manager to establish the current salaries for these positions...
>
> 7) Copies of the accident reports relative to incidents involving Town vehicles driven by the current Parks and Recreation Director."

You have asked that I "take the necessary corrective and or disciplinary action to require conformity to Public Information Law".

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 is not empowered to compel an agency to grant or deny access to records, nor can it impose disciplinary sanctions. Nevertheless, in an effort to assist you, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time within which an agency must respond to a request. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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, 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.

Relevant with regard to resumes or applications for positions is 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". Also relevant is section 89(7), which states in part that the Freedom of Information Law does not require the disclosure of "the name or home address...of an applicant for appointment to public employment...". Therefore, the identities of persons who applied for a position but who were not hired need not, in my opinion, be disclosed. However, in the case of a person who has been hired, it is likely that portions of a resume or application would be available.

I point out that although the 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].

In addition, 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 an application, for example, I do not believe that they could necessarily be cited to withhold those kinds of documents in their entirety.

If, for example, an individual must have certain types of experience of educational accomplishments as a condition precedent to serving in a particular position, those aspects of a documentation would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agencies or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that the record sought contains information pertaining to the requirements that must have been met to hold to the position, it should be disclosed, for I believe that disclosure of those aspects of the document would result in a permissible rather than an unwarranted invasion of personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Further, although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see section 87(3)(b)]. On the other hand, information included in a document that is irrelevant to criteria required for holding the position, such as grade point average, class rank, home address, social security number and the like, could in my opinion be deleted prior to disclosure of the remainder of the record to protect against an unwarranted invasion of personal privacy.

Job descriptions, records indicating criteria for the establishment of salaries, descriptions of duties and advertisements for positions would, in my opinion and insofar as such records exist, be public. I do not believe that any ground for denial could be asserted regarding access to advertisements for positions. The other records referenced in this paragraph would fall within the scope of section 87(2)(g). While that provision represents a ground 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.

I believe that job descriptions would be available, for they would represent a factual rendition of the duties required to be carried out by an employee in a particular job title; further, such a record might also be considered as an instruction to staff that affects the public. Criteria used to determine salary levels would in my view represent an agency's policy in determining compensation.

Lastly, except in unusual circumstances, accident reports prepared by police agencies 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)].

In an attempt to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the Town Supervisor.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Darryl Kaplan, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6230

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

August 30, 1990

Mr. Aaron Samuel Reid
86-A-5559 L-271
354 Hunter Street
Ossining, NY 10562

Dear Mr. Reid:

I have received your correspondence of August 27.

Although the document is addressed to the Committee on Open Government and is characterized as an appeal relating to a request to the New York City Police Department, it is unclear whether it is intended to be an appeal made to the Committee or a copy of an appeal that you sent to the Department. I point out that, at the end of the document, you wrote that "the Freedom of Information Law directs that all appeals and the determination that follow be sent to New York City Police Department, Deputy Commissioner for Legal Matters, 1 Police Plaza, New York City, 10038".

In this regard, to avoid any confusion, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office cannot render a determination following an appeal, nor it is empowered to compel an agency to grant or deny access to records. The provision in the Freedom of Information Law concerning 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 ex-

> plain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Based upon the foregoing, an appeal should be made to a person or body at the agency that maintains the records sought, and that agency is required to send copies of appeals and the determinations that follow to the Committee on Open Government. Further, I believe that the person designated to determine appeals at the New York City Police Department is Ms. Eileen D. Millet, Assistant Deputy Commissioner.

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-6231

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

August 30, 1990

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 August 10 in which you requested a clarification concerning the role of a municipality's records access officer.

In brief, when you have requested a record "that is not stored or maintained in the office space occupied by the clerk/records access officer", you wrote that the request has been denied because the record is not "in this office". It is your assumption that the phrase "in this office" is intended to mean the office occupied by the records access officer. You added that most offices in the municipalities in question "are in the same building -- one office located right next to the other".

In this regard, 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 persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records 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 requester 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.

In my view, if an agency has designated a series of records access officers (i.e., a different records access officer for each department), a request should be initially made to the records access officer for the department maintaining the record sought. On the other hand, if there is one records access officer for the entire municipality, I believe that person would have the responsibility for coordinating responses to requests for records physically kept or maintained in any office or by any department within the municipality. In such a case, even though the records sought are not kept in the office of the records access officer, that person would in my view have the duty of obtaining and disclosing records to the extent required by the Freedom of Information Law, or ensuring that agency personnel respond in a manner consistent with the Law.

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-6239

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

August 31, 1990

Mr. Abelardo Miranda
87-C-422
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. Miranda:

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

You wrote that have encountered difficulty in obtaining records relating to your conviction from the Monroe County District Attorney's office and the City of Rochester Police Department. According to the correspondence attached to your letter, it appears that you wrote initially to the Office of District Attorney. In response, you were directed to submit the request to the County's records access officer. Having done so, the access officer wrote that the County does not have the records that you requested and suggested that you direct your request to the City of Rochester. You made such a request on July 17. However, as of the date of your letter to this office, you had not received a response. It is your view that since the case was prosecuted by the Office of the District Attorney, it should maintain most if not all of the records in which you are interested.

You have asked for assistance in the 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 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."

I point out that the language quoted above has been interpreted by the state's highest court as broadly as its specific terms suggest [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)]. Although I have no knowledge concerning the extent to which the County or the City maintain the records sought, I believe that any such records in their possession, irrespective of their origin, would be subject to rights conferred by the Freedom of Information Law and that the agencies would be obliged to disclose those records to the extent required by the Freedom of Information Law. For example, if records prepared by the Police Department are maintained by the County, the County would in my view be required to respond in accordance with the Freedom of Information Law.

In addition, when an agency indicates that it does not maintain a record, section 89(3) of the Freedom of Information Law states in part that the agency, upon the request of the applicant, "shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

Second, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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, 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 am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 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 ex-

ternal 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.

Record prepared by employees of a law enforcement agency, such as the Police Department, or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to representatives of Monroe County and the City of Rochester.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Constance Wilder, Records Access Officer
Records Access Officer, City of Rochester

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6033

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

September 4, 1990

Mr. Mark A. Cody, Sr.
86-A-2204
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

Dear Mr. Cody:

I have received your letter, which reached this office on August 16. You have asked for assistance in obtaining records from Kings County Supreme Court.

Having reviewed the correspondence attached to your letter, you requested records pertaining to yourself from the court pursuant to the federal Freedom of Information and Privacy Acts and the New York Freedom of Information Law. In this regard, I offer the following comments.

First, the federal acts referenced above pertain to records maintained by federal agencies. Therefore, I do not believe that they apply with respect to records maintained by a state court.

Second, the New York Freedom of Information Law, the statute that falls within the scope of the advisory jurisdiction of the Committee on Open Government, 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, courts and court records fall outside the scope of the Freedom of Information Law.

Under the circumstances, it is suggested that you discuss the matter with your attorney.

I hope that the foregoing serves to clarify the application of the Freedom of Information Law and 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-6234

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

September 5, 1990

Mr. Kenneth J. Bellet
[redacted]

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

Dear Mr. Bellet:

I have received your letter of August 18 in which you requested advice and information.

According to your letter, your daughter was killed in 1981, and the district attorney's office conducted an investigation concerning the incident. You wrote that you would like to obtain information concerning how your daughter "met her death", including medical records, police reports and records prepared by the office of the district attorney.

In this regard, I offer the following comments.

First, the statute over which the Committee on Open Government has advisory jurisdiction is the Freedom of Information Law. That statute is applicable to records maintained by an agency, and 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 applies to records maintained by entities of state and local government, such as a police department or the office of a district attorney. However, the Freedom of Information Law would not apply to records maintained by a private hospital, for example.

Second, a request made under the Freedom of Information Law should be directed to the "records access officer" at the agency or agencies that you believe would maintain the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests. In addition, 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 requested 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. Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 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).

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.

Records prepared by employees of a law enforcement agency, such as a police department or an office of a district attorney, or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Fourth, information regarding the cause of your daughter's death would likely be found in an autopsy report. Although autopsy reports are generally confidential with respect to the public, section 677(3)(b) of the County Law provides that such records are available to the next of kin. Consequently, if you have not yet obtained a copy of the autopsy report, a request could be made to the coroner.

Fifth, when copies of records requested under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy. However, if a record is accessible under the Law and you wish to inspect it, no fee may be charged for inspection.

Lastly, although the Freedom of Information Law might not apply to hospital records, section 18 of the Public Health Law generally provides patients or persons acting on their behalf with rights of access to medical records maintained by a hospital or a physician. Since I am not an expert with respect to that provision, I regret that I am unaware of what your rights might be as the father of the deceased. However, 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, NY 12237

Enclosed is an explanatory pamphlet concerning the Freedom of Information Law that includes a sample letter of request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6235

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

September 5, 1990

Mr. David P. Brinson
90-A-5489 E-103-B
Mt. McGregor Correctional Facility
P.O. Box 2071
Wilton, NY 12866

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

Dear Mr. Brinson:

I have received your letter of August 17.

You asked whether you can obtain a copy of the Department of Correctional Services' "directive 4945" under the Freedom of Information Law. You indicated that your supervisor informed you that "this directive is available only to security personnel".

In this regard, I offer the following comments.

First, although I am unfamiliar with the contents of directive 4945, it is noted 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.

Second, from my perspective, three 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 record in question consists of instructions to staff that affect the public or an agency's policy. Therefore, I believe that it would be available, unless a different basis for denial could be asserted.

A second 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 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 record in which you are interested was "compiled for law enforcement purposes" and disclosure would enable people to evade law enforcement activities, it could in my view be withheld.

Finally, section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person". Without knowledge of the content of the directive, I cannot advise as to the application of section 87(2)(f). However, since you wrote that it may be available only to security personnel, it may be relevant to a determination of rights of access.

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-6236

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

September 5, 1990

Mr. Perry Lee Tillman
89-A-5230 I-6-30
Box 500
Elmira, NY 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. Tillman:

I have received your letter of August 20 in which you requested advice concerning the Freedom of Information Law.

Having been convicted of a felony in 1989, you wrote that you want to obtain copies of police reports relating to a statement by an informant, whom you named in your letter, as well as a copy of a record indicating that he was paid for "setting [you] up". You added that you do not know where to direct your request, but that the records are likely maintained by the City of Saratoga Springs Police Department.

In this regard, I offer the following comments.

First, a request should be directed to the "records access officer" at the agency that you believe maintains the records. The records access officer has the duty of coordinating an agency's response to requests. Further, 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 and identify the 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.

Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example, even when you are aware of the identity of such a person or persons [see Hawkins v. Kurlander, 98 AD 2d 14 (1983)].

Perhaps the most relevant provision concerning access to 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). Particularly significant under the circumstances is section 87(2)(e)(iii), for it relates to confidential information relating to a criminal investigation [see Moore v. Santucci, 543 NYS 2d 103 (1989)].

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.

Record prepared by employees of a law enforcement agency, such as the Police Department, or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

I hope that the foregoing enhances your understanding of the Freedom of Information Law 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-6237

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

September 5, 1990

Mr. Sanford L. Church
Village Attorney
Village of Albion
3 East Bank Street
Albion, NY 14411

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

Dear Mr. Church:

I have received your letter of August 16 in which you requested an advisory opinion concerning a request directed to you as attorney for the Village of Albion. The records in question pertain to an arbitrator's decision in a grievance proceeding brought by a suspended police officer pursuant to a collective bargaining agreement.

By way of background, the arbitrator's decision concluded with the following award:

> "The grievance is sustained. Grievant shall be reinstated with full back pay and benefits, including lost overtime opportunities. In addition, Grievant is to be reimbursed for the cost (including interest) of medical examinations and associated travel expenses related to the suspension. Finally, the letter of suspension and related documents shall be expunged from Grievant's personnel file. The arbitrator retains jurisdiction should a dispute arise concerning the determination of the monetary remedy."

You wrote that:

> "The arbitrator's report refers to a medical report, a report by a psychiatrist and the testimony of the psychiatrist which reports and testimony contain references to a medical problem the officer has that causes changes in behavior under some conditions.
>
> "The suspension was based on the report by the Orleans County District Attorney of behavior by the police officer in a public place during confrontation with the District Attorney. The reported behavior caused the District Attorney to report the behavior to the Village Mayor because of his concern for the officer's safety and well being and that of the general public.
>
> "Pursuant to the arbitrator's decision, the officer's personnel file has been expunged of information regarding the disciplinary proceeding and grievance. The complete arbitrator's report is not part of the officer's personnel file."

In addition, in your capacity as Village Attorney, your files contain documents obtained in preparation for the disciplinary action, for the grievance proceeding, confidential correspondence with Village officials, work product, records from the union and its attorney, and the arbitrator's report. Further, the grievant has instructed the union's attorney not to release the arbitrator's report to the news media.

Based upon the foregoing, you raised the following questions:

> "1) Are [your] files as Village Attorney pertaining to the disciplinary proceeding and the grievance subject to the attorney-client confidentiality provided by statute and therefore not available under the Freedom of Information Law in the absence of waiver of confidentiality by the Village?
>
> 2) The Village Clerk is the designated custodian of Village records. Is the request to [you] as Village Attorney proper?

> 3) Does this matter fall within the private proceeding exception and the requested information therefore not available under the Freedom of Information Law?
>
> 4) Would the release of the requested information result in an unwarranted invasion of the officer's privacy and therefore not available under the Freedom of Information Law?
>
> 5) Is the requested information unavailable to the press pursuant to the Freedom of Information Law?"

In this regard, I offer the following comments. Those comments will not necessarily appear in the order of your questions.

First, in terms of its scope, the Freedom of Information Law is expansive. The Law is applicable to all 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."

Based upon the foregoing, even though the materials sought may be in your physical possession, since they are kept and were produced for the Village, I believe that they clearly constitute "records" subject to rights conferred by the Freedom of Information Law. You referred in question three to "the private proceeding exception". I am unaware of the provision to which you alluded. Nevertheless, since you maintain the materials for or on behalf of the Village, and since the matter involved a Village employee, the documentation in my view falls within the framework of the Freedom of Information Law.

Second, 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 the governing body of a public corporation, such as a village board of trustees, to designate one or more records access officers. The records access officer has the duty of coordinating an agency's response to requests (21 NYCRR section 1401.2). Although I believe that requests should generally be made to the records access officer, a request made to a different official or employee would not in my view be inappropriate or defective. In such a circumstance, to give effect to the intent of the Freedom of Information Law, I believe that the official in receipt of a request should either forward the request to the records access officer or inform the records access officer that the request has been received and confer with the records access officer in order that the access officer may "coordinate" the agency's response.

Third, in terms of the duty to disclose, 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 likely in my opinion that three of the grounds for denial are pertinent in determining rights of access to the records sought.

The initial ground for denial in the Freedom of Information, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". With respect to the assertion of the attorney-client privilege, section 4503 of the Civil Practice Law and Rules states that:

> "[U]nless the client waives 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 in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative act, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee of body

> thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof."

It appears, therefore, that confidential communications between an attorney and his client are exempted from disclosure pursuant to section 87(2)(a), which incorporates the privilege envisioned by section 4503 of the Civil Practice Law and Rules. However, it is noted that an appellate court in a case involving a request made under the Freedom of Information law recently 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 withheld 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" [Williams & Connelly v. Axelrod, 139 AD 2d 806, 527 NYS 2d 113,115 (1988)].

Similarly, I would conjecture that some of the materials sought consist of attorney work product, which may in my view be considered as exempt from disclosure by statute when section 87(2)(a) of the Freedom of Information Law is read in conjunction with section 3101(c) of the Civil Practice Law and Rules.

As suggested in the preceding commentary, the exceptions to rights of access would apply to the extent that records have not been disclosed to an adversary in the course of a proceeding. Once records that would otherwise be privileged are disclosed to a party other than the client, I believe that they would lose the protection conferred by the provisions of the Civil Practice Law and Rules discussed herein.

Another ground for denial of likely 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". Further, section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first two of which include:

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

> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

As such, insofar as the records in question pertain to the officer's medical or psychiatric condition, those portions of the records could, in my view, be withheld to protect privacy.

On the other hand, the award itself, which does not refer to the officer's medical or psychiatric condition, would, based upon the facts that you described, be public. You indicated during our recent conversation that the public is aware that the officer had been suspended. Under the circumstances, since the arbitrator essentially exonerated the officer and reinstated him to his position with back pay and benefits, disclosure of the determination would in my opinion result in a permissible rather than an unwarranted invasion of personal privacy. As such, I believe that the award would be accessible under the Freedom of Information Law to any person, including the news media.

The remaining ground for denial of likely 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, 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.

The request might include a variety of documents consisting of communications among or between Village officers and employees that would fall within the scope of section 87(2)(g). I point out that some of the materials might be factual, such as medical tests; however, that factual information might fall within a different exception, i.e., section 87(2)(b) pertaining to unwarranted invasions of personal privacy. The award itself would in my opinion represent a final agency determination and would be available under section 87(2)(g)(iii), particularly in view of the facts that you presented.

I hope that I 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-6238

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(518) 474-2518, 2791

September 6, 1990

William R. Glendon, Esq.
Rogers & Wells
200 Park Avenue
New York, NY 10166

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

Dear Mr. Glendon:

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

You have requested an advisory opinion concerning a denial of a request by the New York City Department of Finance (DOF). By way of background, a request was made for a document summarized in the July, 1971 edition of the Finance Administration Bulletin, which was published by DOF. The record sought was referenced under the heading of "Recent Tax Rulings". Although the initial denial by the records access officer characterized the record as a "ruling", it was found to be exempt from disclosure pursuant to section 87(2)(g) of the Freedom of Information Law. You pointed out by means of attachments that administrative rulings and similar documents have long been disclosed. For instance, the November, 1988 issue of the Department of Finance Bulletin specifies that "Copies of administrative rulings, new regulations and policy bulletins summarized in this issue" can be obtained from DOF's records access officer; similarly, the index to Finance Letter Rulings appearing in the Summer, 1989 edition of the Finance Quarterly Bulletin, states that the rulings are "Furnished under the Freedom of Information Law" and that the "rulings reflect the opinions of the Office of Legal Affairs as of the dates of issuance...". Notwithstanding the foregoing, the denial was affirmed following an appeal. In addition to his citation of section 87(2)(g) of the Freedom of Information Law, the appeals officer expressed the view that the record is exempted from disclosure through the assertion of the attorney-client privilege, on the ground that it constitutes attorney work product, and pursuant to sections 11-716, 11-538 and 11-688 of the New York City Administrative Code.

In this regard, I offer the following comments.

First, the provision upon which DOF initially relied to withhold the record, section 87(2)(g), states that:

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

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)].

The passage from the decision quoted above is in my view consistent with the intent of section 87(2)(g). In a letter addressed to me on July 21, 1977 by Assemblyman Mark Siegel, the lead sponsor of the amended Freedom of Information Law in 1977 and the author of the provision, he wrote that:

> "The basic intent of [section 87(2)(g)] is twofold. First,it is the intent that any so-called 'secret law' of an agency be made available. Stated differently, records or portions thereof containing any statistical or factual information, policy, or determinations upon which an agency relies is accessible. Secondly, 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."

The characterization of the document in question as a "ruling" suggests that it represents something other than advice rendered by staff. Rather, according to an ordinary dictionary definition of that term, a "ruling" is "an official authoritative decision, decree, statement or interpretation" (Webster's Seventh New Collegiate Dictionary). Further, reference to the ruling in a DOF publication suggests that it has some precedential value or effect and that the agency intends to rely upon it in circumstances analogous to those presented in the proceeding that led to the preparation of the ruling. If the document at issue is a ruling as that term is generally used, its substance would, in my opinion, constitute a final agency determination that should be disclosed pursuant to section 87(2)(g)(iii) of the Freedom of Information Law, unless some other basis for denial may properly be asserted. Further, if it can be assumed that a ruling, although perhaps initially prepared by a DOF attorney, is not issued by an attorney but rather by the Commissioner or by DOF as the agency, a recent decision indicates that a record adopted by a decision-maker as the agency's determination is accessible under section 87(2)(g)(iii). In Miller v. Hewlett-Woodmere Union Free School District #14 [Supreme Court, Nassau County, NYLJ, May 16, 1990], the court wrote that:

> "On the totality of circumstances surrounding the Superintendent's decision, as present in the record before the Court, the Court finds that petitioner is entitled to disclosure. It is apparent that the Superintendent unreservedly endorsed the recommendation of the Term, adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting '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 Construction Corp. v. Stubing, 82 A.D.2d 546, 549 [2d Dept. 1981]), but the Court bears an equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intra-agency views, when deliberation has ceased and the consensus arrived it represents the final decision, disclosure is not only desirable but imper-

> ative for preserving the integrity of governmental decision making. The Team's decision no longer need be protected from the chilling effect that public exposure may have on principled decisions, but must be disclosed as the agency must be prepared, if called upon, to defend it."

Second, when records are subject to the attorney-client privilege or consist of the work product of an attorney, I believe that they may be withheld under section 87(2)(a) of the Freedom of Information Law, which pertains to records that "are specifically exempted from disclosure by state or federal statute".

With respect to the assertion of the attorney-client privilege, section 4503 of the Civil Practice Law and Rules states that:

> "[U]nless the client waives 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 in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative act, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee of body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof."

It appears, therefore, that confidential communications between an attorney and his client are exempted from disclosure pursuant to section 87(2)(a), which incorporates the privilege envisioned by section 4503 of the Civil Practice Law and Rules. However, it is noted that an appellate court in a case involving a request made under the Freedom of Information law recently 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 withheld 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" [Williams & Connelly v. Axelrod, 139 AD 2d 806, 527 NYS 2d 113,115 (1988)].

In this instance, since the issuance of the ruling presumably was precipitated by a proceeding in which a particular party was involved, it is assumed that the party affected received a copy of the ruling. If that is so, I believe that the privilege, if applicable, would have been waived. Further, as you suggested in your letter, the publication of the ruling in summary form would arguably have constituted a waiver of the privilege. I believe that similar contentions could be offered with regard to an assertion of confidentiality in relation to attorney work product; once that product, i.e., a ruling, has been disclosed to a person other than the client, DOF could not in my view assert confidentiality on the basis of section 3101(c) of the Civil Practice Law and Rules.

The remaining basis for denial offered by DOF's appeals officer involves provisions of the New York City Administrative Code to which reference was made earlier. As indicated previously, section 87(2)(a) of the Freedom of Information Law relates to records that are exempted from disclosure by "statute". It has been held be 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 (1970); 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, ordinarily, provisions of the New York City Administrative Code would not serve to exempt records from disclosure. Nevertheless, through legislation enacted in 1989, certain provisions have the effect of statutes.

Specifically, Chapter 714 of the Laws of 1989 refers to various provisions of the Administrative Code and states with respect to each such provision: "This section shall be deemed a state statute for purposes of paragraph (a) of subdivision two of section eighty-seven of the public officers law".

Each of the three provisions, section 11-538, 11-688 and 11-716, refers to the confidentiality of "reports or returns" maintained by the Commissioner or DOF. In my view, the provisions are intended to protect the privacy of taxpayers. Notably, however, sections 11-538 and 11-688 specify that: "The commissioner of finance may, nevertheless, publish a copy or a summary of any determination or decision rendered..." after a hearing. The foregoing appears to indicate that there is a distinction between reports and returns prepared by taxpayers or in conjunction with a hearing, which are confidential, and the results of a hearing, such as a determination or ruling.

Lastly, although the federal Freedom of Information Act is not applicable, for that statute pertains to federal agencies, its interpretation may be instructive. In this regard, "letter rulings" and "technical advice memoranda" prepared by the Internal Revenue Service were found to be available, for they were not considered to be "returns", which would be confidential under 26 U.S.C. section 6103 [Tax Analysts and Advocates v. Internal Revenue Service, 362 F. Supp. 1298, modified in part on other grounds and remanded, 505 F.2d 350, 164 U.S. App. D.C. 243]. The "ruling" sought in this instance would appear to be analogous, and disclosure would, in my view, be consistent with the intent of the Freedom of Information Law as expressed in section 84. As specified in the appeal to DOF, congressional intent concerning access to letter rulings and similar records was expressed by the Joint Committee on Taxation as follows:

> "The Congress agrees with the previous court decisions that private rulings should be made public. Only in this way can all taxpayers be assured of access to the ruling positions of the IRS. Also, this tends to increase the public's confidence that the tax system operates fairly and in an even-handed manner with respect to all taxpayers" ["General Explanation of the Tax Reform Act of 1976", 304 (December 29, 1976)].

In my view, assuming that the document requested is indeed a "ruling", disclosure would be consistent with the general and specific intent 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: Jerry Rosenthal
Gerald Koszer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6239

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September 10, 1990

Mr. Roberto Merlino
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P.O. Box 338
Napanoch, NY 12458

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

Dear Mr. Merlino:

I have received your letter of August 21 in which you indicated that you have made several requests and appeals to the New York City Police Department, as well as court officials, none of which have been answered.

In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law provides direction concerning the time in which an agency must respond to requests and appeals. Specifically, section 89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my

opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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, your requests for court records fall outside the scope of the Freedom of Information Law. That statute pertains 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."

As such, the Freedom of Information Law does not include the courts or court records in its coverage. Many court records, however, are accessible under other provisions of law (see e.g., Judiciary Law, section 255).

Under the circumstances, it may be worthwhile to discuss the matter with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Sultana
Eileen D. Millet

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6240

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

September 10, 1990

Mr. Mark L. Brooks
90-A-6426 D2-30
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. Brooks:

I have received your letter, which reached this office on August 23.

You requested assistance in gaining access to records, including photographs, that relate to an investigation and your ensuing conviction. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains 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 pertains to records maintained by a police department or an office of a district attorney, for example. Further, section 86(4) 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."

Therefore, documentary materials, as well as photographs maintained by a police department, are subject to rights of access conferred by the Freedom of Information Law.

Second, a request should be directed to the "records access officer" at the agency that you believe maintains the records. The records access officer has the duty of coordinating an agency's response to requests. Further, 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 and identify 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. Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example, even when you are aware of the identity of such a person or persons [see Hawkins v. Kurlander, 98 AD 2d 14 (1983)].

Perhaps the most relevant provision concerning access to 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). Particularly significant under the circumstances is section 87(2)(e)(iii), for it relates to confidential information relating to a criminal investigation [see Moore v. Santucci, 543 NYS 2d 103 (1989)]. Moore also indicates that records which might otherwise be withheld that have been introduced in a public proceeding, such as a trial, must be disclosed.

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.

Records prepared by employees of a law enforcement agency, such as a police department, or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

I hope that the foregoing enhances your understanding 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-624

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

September 10, 1990

Mr. James L. Kirby
89-A-7787
135 State Street
P.O. Box 618
Auburn, New York 13021-9000

Dear Mr. Kirby:

I have received your letter of August 20 in which you sought assistance concerning a request for records of the Department of Motor Vehicles.

In this regard, I have contacted the Department on your behalf to learn more of the matter. In brief, I was informed that the Department has no record of having received your request. As such, it is suggested that you renew your request and direct it to:

Marion Drexel, Chief Clerk
Department of Motor Vehicles
Empire State Plaza
Swan Street Building
Albany, New York 12228

Insofar as the Department maintains the records in which you are interested, I believe that they would be available to you. It is noted, however, that statutes that govern rights of access to the records in question, as well as the fees for providing them, are found in the Vehicle and Traffic Law. Further, although you requested that the records be made available to you free of charge due to your status as a poor person, nothing in the Freedom of Information Law or the Vehicle and Traffic Law would require the Department to waive the fee, absent a court order. I was also informed that the fee for searching and disclosing the records is five dollars. That fee would be assessed under section 202 of the Vehicle and Traffic Law.

In sum, it is suggested that you resubmit your request directly to Ms. Drexel and that the appropriate fee be enclosed with the request.

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-6242

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

September 10, 1990

Mr. John V. Terrana
Office of the City Attorney
126 Glen Street
Glen Cove,NY 11542

Dear Mr. Terrana:

I thank you for forwarding a copy of your response of August 22 to a request for records made by Dr. Joseph M. Cassin.

The response indicates that the request involved "revised budgets for the Civic Center", and that it was denied in its entirety based upon a finding that disclosure "would impair present or imminent contract awards". You also wrote that an appeal could be addressed to you.

In this regard, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, indicate that an agency's records access officer has the duty of coordinating an agency's response to requests [see section 1401.2(a)]. It appears that you responded as records access officer or on behalf of the records access officer. 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."

Further, section 1401.7 of the regulations provides in part that:

> "(a) 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.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

As such, I believe that an appeal should not be determined by the same person who initially denied a request.

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.

As you inferred in your letter, 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.

In sum, while it is possible that the denial might have been appropriate, it is possible that portions of the records should be disclosed and that a blanket denial of the request may have been overbroad.

I hope that the foregoing commentary will be useful to you.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph M. Cassin, Ch.D.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6243

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

September 10, 1990

Mr. Shelton Crosland
85-A-7823
Watertown Correctional Facility
P.O. Box 168
Watertown, New York 13601

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

Dear Mr. Crosland:

I have received your letter of August 20 in which you wrote that you requested records from the Board of Parole on August 5, but that, as of the date of your letter, you had received no response.

In this regard, I offer the following comments.

First, as a general matter, a request should be directed to an agency's designated "records access officer." The records access officer has the duty of coordinating the agency's response to requests. The records access officer for the Division of Parole is William Altschuller, whose office in located at 97 Central Avenue, Albany, New York 12206.

Second, the Freedom of Information Law provides direction concerning the time in which an agency must respond to a request. Specifically, section 89(3) states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

For your information, I believe that the person to whom an appeal may be made at the Division of Parole is Ann Horowitz, Counsel to the Division.

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

OML-AO-1811
FOIL-AO-624

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

September 10, 1990

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 August 21.

You wrote that the Town Board of the Town of Greenburgh regularly holds "work sessions," and it is your belief that certain action was recently taken by the Board at work sessions. Upon your request for minutes of those sessions, you were advised that the Town does not maintain minutes for "work sessions."

You have asked whether such a policy is consistent with law. In this regard, I offer the following comments.

First, it is emphasized that 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)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions", "agenda sessions" and similar gatherings held for the purpose of discussion, but without an

intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "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 dealt with the characterization of meetings as "informal", stating 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.).

Based upon the direction given by the courts, if a quorum of the Town Board meets to discuss public business, such a gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, regardless of its characterization. Further, so long as a work session is conducted in accordance with

the requirements of the Open Meetings Law, I believe that votes could be taken at those gatherings. Moreover, in my opinion, since the Open Meetings Law applies equally to a work session and a regular meeting, it is likely that confusion or questions could be eliminated by referring to each as meetings, rather than distinguishing them in a manner that is artificial.

Second, with respect to minutes of "work sessions", as well as other meetings, 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. 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. Further, if those actions, such as motions or votes, occur during work sessions, I believe that minutes must be prepared indicating those actions and made available to the public.

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, a record, presumably minutes, must be prepared that indicates the manner in which each member cast his or her vote.

A copy of this opinion will be forwarded to Town 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: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6245

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

September 11, 1990

Ms. Leona Lalonde
[redacted]

The staff of the Committee on 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. Lalonde:

I have received your letter of August 22. You asked whether you are entitled "to have access to school records of money that is spent in wages and legal fees."

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, contracts, cancelled checks and other documents concerning the expenditure of public money maintained by a school district would, in my view, constitute "records" subject to rights of access conferred by the Freedom 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.

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.'"

Based on the foregoing, subject to the qualifications discussed above, I believe that the records sought should be disclosed.

Lastly, with respect to "wages," I point out that section 87(3) of the Freedom of Information Law states in relevant part that:

"Each agency shall maintain...

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

As such, a school district must maintain and disclose a record identifying every employee that includes each employee's salary.

I hope that 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-6246

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

September 11, 1990

Ms. Cathy House

[redacted]

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

Dear Ms. House:

I have received your letter of August 20 in which you raised several questions concerning the Freedom of Information Law.

Attached to your letter is a draft land use plan concerning the Town of Palermo, and you asked whether that document "as well as the next one are public information."

In this regard, I point out that the Freedom of Information Law is applicable 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."

In view of the language quoted above, I believe that drafts, even though they may be preliminary, constitute "records" subject to rights of access 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. 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 in 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.

In my opinion, the only ground for denial of apparent 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. 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 information 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 correction 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 AD 2d 176, 181, mot for lv to app den 48 NY 2d 706). Respondents erroneously clain 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 addition, the Court of Appeals has held that that the contents of intra-agency materials determine the extent to which they must be disclosed, stating 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" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Having reviewed the draft, it appears that much of it consists of factual information that must be disclosed under section 87(2)(g)(i). A similar analysis would apply to ensuing drafts.

Your remaining question is whether when requesting records from a town clerk, you must "sign to get a copy of something." Here I point out that, if a record is available under the Freedom of Information Law, the courts have held that it should be made equally available to any person, regardless of one's status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Therefore, whether a request is made and/or signed by a resident, a citizen, a foreign national, a corporation or a journalist is generally irrelevant to a determination of rights of access under the Freedom of Information Law, and I know of no requirement that an applicant might sign a request.

Lastly, as you requested, enclosed are seven copies of "Your Right to Know," which describes the provisions of the Freedom of Information Law and the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

cc: Town Clerk, Town of Palermo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6247

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

September 11, 1990

Mr. John A. Asam
[redacted]

Mr. James F. Landers
[redacted]

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

Dear Mr. Assam and Mr. Landers:

I have received your letter of August 22, as well as the correspondence attached to it.

Your inquiry pertains to repeated requests for "bank statements and reconciliation records from the bail account" of a justice in the Town of Gates. Although bank statements have been disclosed, the reconciliation records have not been made available. You wrote further that "the administration provided no explanation, written or oral, as to why the request for access to town records was, in large part, denied".

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains 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 upon the foregoing, a town is an "agency" subject to the requirements of the Freedom of Information Law, but a court or records would fall outside the scope of that statute.

Since I am not familiar with the records in question, is unclear whether the documentation, insofar as it exists, would constitute agency records falling within the coverage of the Freedom of Information Law or court records falling beyond the coverage of that statute. It would appear that the records may be subject to the Freedom of Information Law, for section 2300 of the Uniform Justice Court Act states in relevant part that:

> "(c) Matters not governed by this act. The following, with regard to each court to which this act is applicable as above provided, shall not be governed by this act but shall be governed by such other provisions of law as may be applicable to each such court...
>
> 2. Matters regarding expenses of the court and matters regarding the duties of justices and employees of the court to account for and pay over fines, penalties, fees and any other monies received by them."

On the other hand, separate provisions pertain to bank account requirements for justices which suggest that those records are court records (see attached, 22 NYCRR section 214.9).

Second, irrespective of whether the documentation constitutes town records or court records, I believe that such records would generally be public.

When the Freedom of Information Law applies, as a general matter, it is based upon a presumption of access. Stated differently, all records 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, any such records subject to the Freedom of Information Law could be characterized as intra-agency materials falling within the scope of section 87(2)(g). Although that provision in 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, 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. Under the circumstances, the records in question would appear to consist solely of statistical or factual information that would be available pursuant to section 87(2)(g) (i). The only aspects of the records that might possibly be withheld in my opinion would involve situations in which records may have been sealed pursuant to section 160.50 of the Criminal Procedure Law, which pertains to records involving cases in which the charges have been dismissed in favor of an accused.

Third, when a request is made under the Freedom of Information Law, and if any of the records sought are denied, a denial should be made in writing providing the reasons and advising the applicant of the right to appeal, including the name and address of the person or body to whom an appeal may be made [see Freedom of Information Law, section 89(3) and 21 NYCRR section 1401.7]. 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."

Fourth, in a situation in which a record is requested but is neither granted not denied, section 89(3) of the Freedom of Information Law states in part that, upon request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Lastly, if the records are not subject to the Freedom of Information Law but rather are court records, I believe that they would generally be available under section 2019-a of the Uniform Justice Court Act. The introductory language of that provision states that: "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public...". Therefore, unless a statute precludes public disclosure (i.e., Criminal Procedure Law, section 160.50), I believe that justice court records are open to the public.

In an effort to enhance compliance with law, a copy of this opinion will be sent to the Town Clerk.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard A. Warner, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6248

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

September 11, 1990

Mr. Carl Roemer
[redacted]

Dear Mr. Roemer:

As you are aware, I have received your letter of August 22.

In brief, your inquiry pertains to records maintained by the Supreme Court in Otsego County. Specifically, although the clerk has granted access to records in her possession, you have been unable to inspect records maintained by a judge in his chambers. It is apparently your view that the records must be disclosed under the Freedom of Information Law, as well as section 124 of the Rules of the Chief Administrator of the Courts, section 212 of the Uniform Rules for Courts and section 255 of the Judiciary Law.

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law pertains to agency records, and that 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."

Based upon the foregoing, the Freedom of Information Law, in my view, does not apply to the courts or court records, such as those maintained by a court clerk or a judge.

Second, the rules that you cited are inapplicable to the facts that you presented. Part 124 of the Rules of the Chief Administrator of the Courts specifies that: "This Part sets forth the procedures governing public access to the administrative records of the Office of Court Administration pursuant to the Freedom of Information Law (Public Officers Law, article 6)". As I explained to you by phone, the Office of Court Administration is not a court; rather, as its designation suggests, it is the administrative agency that oversees the court system. In addition, judicial decisions indicate that the Office of Court Administration is an "agency" subject to the requirements of the Freedom of Information Law [see Babigian v. Evans, 427 NYS 2d 688, aff'd 97 AD 2d 992 (1983); Quirk v. Evans, 455 NYS 2d 918, 97 AD 2d 992 (1983)]. The other rule that you cited, 22 NYCRR section 212, involves Uniform Civil Rules for the District Courts. As such, I do not believe that it would be applicable regarding the records at issue.

Third, although section 255 of the Judiciary Law provides broad rights of access, section 255 refers to "files, papers, records, and dockets in his [the clerk's] office".

In sum, it is my opinion that the Freedom of Information Law, the statute with respect to which the Committee on Open Government has the statutory authorize to advise, is inapplicable. Moreover, in view of the jurisdiction of this office, I do not believe that I can offer specific advice or guidance concerning rights of access to records maintained by a justice of the supreme court.

I hope that the foregoing enhances your understanding of 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-6249

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

September 11, 1990

Mr. Wallace Nolen
[redacted]

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

Dear Mr. Nolen:

I have received your letter of August 24.

You wrote that the Town of Milan attaches the following to all responses to records:

> "NOTICE:
>
> TO PREVENT ANY UNWARRANTED INVASION OF PERSONAL PRIVACY, THIS MATERIAL MAY NOT BE USED, SOLD OR RELEASED FOR PRIVATE, COMMERCIAL, OR FUNDRAISING PURPOSES."

You have requested my comments concerning that statement. 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, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the state's highest court, has held 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 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public rights and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

It is noted that Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's rights as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in section 87(2), the use of the records, including the potential for commercial use, is in my opinion irrelevant; when records are accessible, once they are disclosed, the recipient may do with the records as he or she sees fit.

Second, the only exception to the principles described above involves the protection of personal privacy. By way of background, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, section 89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists wold be used for commercial or fund-raising purposes" [section 89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the Law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of

section 89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relief upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought. In that decision, it was stated that:

> "The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgment for that of the respondents" (id.).

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses. That situation, however, represents the only case under the Freedom of Information Law in which an agency may inquire as to the purpose for which a request is made, or in which the intended use of the record has a bearing upon rights of access.

In an effort to enhance their understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6258

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

September 13, 1990

Ms. Elfie Rosenberg
[redacted]

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

Dear Ms. Rosenberg:

I have received your letters of August 22 and August 29, as well as the correspondence attached to them.

As the owner of Stony Brook Travel, you wrote that you responded to an invitation by the Faculty Student Association (FSA) at the State University of New York at Stony Brook (SUNY) to bid for the operation of a travel service agency on campus, and that the award was to be made on July 31. On August 7, you requested a copy of the winning bid. In response to the request, Ms. Kathy Yunger wrote that:

> "After consulting with the Faculty Student Association legal counsel, Mr. J. Attonito, we are unable to send you a copy of the selected vendor proposal since all responses to the Request for Proposals are confidential and considered proprietary information until incorporated into a contract.
>
> "When the contract is complete it will be available for examination in the Campus Auxiliary Services offices in room 186 of the Administration Building."

You have questioned the propriety of the denial. In this regard, I offer the following comments.

First, it is unclear whether the record sought is maintained by the FSA or SUNY, or both. If it is kept by FSA only, the initial question is whether the record is maintained by 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."

Based upon the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities at the state and local levels, and ordinarily, a not-for-profit corporation would not constitute an agency. However, based upoon the judicial interpretation of the Freedom of Information law, it appears that the FSA, due to its relationship with SUNY, is an agency required to comply with the Freedom of Information Law.

By way of background, in a decision rendered a decade ago, the state's highest court, the Court of Appeals, found that volunteer fire companies are subject to the Freedom of Information Law [see Westchester-rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. It is noted that a volunteer fire company is a not-for-profit corporation that performs its duties for a municipality by means of a contractual relationship. Even though a volunteer fire company is not itself government or a governmental entity, the court found that it performs what traditionally might be considered a governmental function and therefore falls within the scope of the Freedom of Information Law.

In so holding, the Court held that:

> "We begin by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local

> government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible'... For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579)."

If the relationship between SUNY and the FSA is similar to that of a volunteer fire company and a municipality, it would appear that the FSA, despite its not-for-profit status, would be an "agency" required to comply with the Freedom of Information Law.

More recently, in a decision pertaining to a foundation associated with a public educational institution, it was claimed that its records fell outside the scope of the Freedom of Information Law because they were maintained by a "private, not-for-profit corporation". The records sought involved the Kingsborough Community College Foundation; Kingsborough is an institution of the City University of New York. In rejecting that contention, the Court stated that:

> "The activities of the Foundation... amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College. Even though the Foundation is set up as a not-for-profit corporation, as it is such an integral part of the College allowing it to stand as a separ-

> ate entity would subvert the purpose of FOIL. I am in accord with the petitioner in rejecting as irrelevant, for the purposes of applying the FOIL, a distinction as to whether the Foundation is an independent, voluntary organization which provides public service to an agency of local government, rather than an 'organic arm of government' as the vehicle for the performance of the purposes and objectives of that agency. (Westchester Rockland Newspapers, Inc. v. Kimball, 50 NY 2d 575 [1980]). Even if the requested records were determined to be private documents of the Foundation, they are nevertheless records in the possesion of a governmental agency and as such maintained by a governmental agency under Public Officer's Law Section 86(3)(4). (Capital Newspapers v. Whelan, 69 N.Y. 2d 246 [1987]).
>
> "It is without question that the '...FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government...(citations omitted) (Capital Newspapers v. Whalen, supra, at 252). In the instant case the respondents have failed to meet their burden of demonstrating that the requested material is within the bounds of some 'specific statutory protection' and therefore 'the Freedom of Information Law compels disclosure not concealment'...(Westchester News v. Kimball, supra, at 580)" [Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988].

As such, there is precedent indicating that a not-for-profit entity associated with a public educational institution constitutes an "agency" subject to the Freedom of Information Law, and I believe that the FSA should be viewed in much the same fashion. If the FSA exists due to its relationship with SUNY, and if the SUNY would perform the functions of the FSA if the FSA had not been created, it could be concluded in my opinion that FSA is an "agency" required to comply with the Freedom of Information Law.

Viewing the matter from a different perspective, I point out that the Freedom of Information Law pertains to agency records and that 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."

Based upon the broad language quoted above, documentation kept, held, filed or produced by or for SUNY would constitute a "record" subject to rights conferred by the Freedom of Information Law. In this instance, it would appear, due to the relationship between SUNY and the FSA, that the record in question was kept or produced for SUNY.

In the decision rendered by the Court of Appeals that was cited earlier, the Court also dealt with the scope of the term "record" and held that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which a document was produced or the function to which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons. The present case provides its own illustration. If we were to assume that a lottery and fire fighting were generically separate and distinct activities, at what point, if at all, do we divorce the impact of the fact that the

> lottery is sponsored by the fire department from its success in soliciting subscriptions from the public? How often does the taxpayer-lottery participant view his purchase as his 'tax' for the voluntary public service of safeguarding his or her home from fire? And what of the effect on confidence in government when this fund-raising effort, through seemingly an extracurricular event, ran afoul of our penal law?" (Westchester News v. Kimball, supra, 581).

Under the circumstances, the situation of the FSA may be somewhat analogous to that described by the Court.

Second, assuming that FSA is an agency or that its records are maintained by or for SUNY and that the Freedom of Information Law applies, it is noted 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.

On the basis of your correspondence, it appears that two of the grounds for denial may be relevant. However, the extent to which those provisions could appropriately be asserted to withhold records would be dependent upon the effects of disclosure and the specific contents of the records.

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.

In 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 of the bids 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, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. At this juncture, since all bids have been received and a contract has apparently been awarded, I do not believe that section 87(2)(c) could be asserted as a basis for denial.

The other provision of potential significance is section 87(2)(d), which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and 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.).

As suggested earlier, the nature of the records submitted and the area of commerce in which the firms submitting proposals are involved would in my opinion determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of the submitter of a bid. Therefore, as in the case of section 87(2)(c), the proper assertion of section 87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the firm that submitted the records. If the record neither represents a novel approach nor a unique method of providing services, it is doubtful in my view that section 87(2)(d) would serve as a basis for denial.

Lastly, since Ms. Yunger characterized bid proposals as "confidential," I point out that such an assertion, 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." If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure," the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)].

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to Ms. Yunger and Mr. Persky of the FSA.

I hope that 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: Kathy Yunger
Ira S. Persky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 6251

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

September 13, 1990

Mr. Harry Wenzel
[redacted]

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

Dear Mr. Wenzel:

I have received your letter of August 27.

You wrote that you would like to obtain your daughter's school records. As such, you asked whether the records are available under the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

Second, and I am unaware of whether the following commentary is relevant, 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 Buckley Amendment 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 of a guardian" (32 CFR 99.3). Further, 34 CFR 99.4 states that:

> "An educational agency or institution shall given full rights underr 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 the Buckley Amendment. I believe that a legally binding document would include a court order or other legal paper that prohibits access to educational reocrds, 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 the Act, 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 the Act "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).

I hope that 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-6252

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

September 13, 1990

Mr. Thomas G. Menary
[redacted]

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

Dear Mr. Menary:

I have received your letter of August 27 and the correspondence attached to it.

According to the materials, you directed a request to the records access officer of the New York City Police Department on August 1. As of the date of your letter, you had received no response. The records sought were apparently prepared in 1962.

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

First, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

For your information, the person designated by the Department to determine appeals in Ms. Eileen D. Millet, Assistant Deputy Commissioner.

Second, I point out that agencies may, in accordance with appropriate guidelines, dispose of records after certain periods. In view of the date when the records sought were prepared, it is possible that they no longer exist.

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

OML-AO-1814
FOIL-AO-6253

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

September 13, 1990

Mr. Ely Myzel
[redacted]

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

Dear Mr. Myzel:

I have received your letter of August 28, as well as the materials attached to it. You have raised a series of questions concerning compliance with the Open Meetings Law and the Freedom of Information Law by the Lackawanna City Council.

The first question involves a situation in which you wrote that the City Attorney recommended the adoption of a resolution by the City Council. You alleged, however, that the resolution was approved and signed by the members, "without benefit of any public meeting." You attached a ocpy of the resolution, which was approved in 1985.

Since the facts, as you described them, upon which your question is based occurred in 1985, it is unclear whether that issue and perhaps others represent isolated incidents or the general practice of the City Council. As such, my comments should be viewed as applicable to public bodies generally.

First, the Open Meetings Law pertains to meetings of public bodies, and section 102(2) of that statute defines the term "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."

The City Council is clearly a "public body."

Second, of relevance to the issue is section 41 of the General Construction Law. Specifically, 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. Further, it is my view that a public body has the capacity to act, i.e., to vote or to approve a resolution, only during duly convened meetings attended by at least a majority of its total membership.

The next question involves the preparation of minutes of executive sessions, and you enclosed a copy of minutes of a meeting held in April of this year. Those minutes indicate that "no minutes were taken of the Executive Session, no votes were taken."

Here 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 records 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 public body 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."

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

Subdivision (3) of section 106 states that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two

> weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

As such, minutes of open meetings must be prepared and made available within two weeks of such meetings. If action is taken during an executive session, minutes indicating the nature of the action taken, the date and the vote must be prepared and made available within one week 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.

With respect to the third area of inquiry, you wrote that:

> "during the recent City Council discussion of the city budget, the public was barred on two occasions. The City Council claimed it was in an Executive Session on both occasions, without first calling a public meeting and then going into an Executive Session."

You asked whether the City Council acted properly.

In this regard, 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. As such, an executive session is not separate and distinct from an open meeting; on the contrary, it is a part of an open meeting. I point out, too, that a procedure must be accomplished by a public body during an open meeting before it may conduct an executive session. Specifically, section 105(1) of the 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 of areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only...."

Therefore, even if the only subject to be considered at a meeting may justifiably be discussed during an executive session, I believe that an open meeting must be initially convened, to be

followed by a motion to enter into executive session. Further, all meetings of public bodies must be preceded by notice given pursuant to section 104 of the Open Meetings Law.

The next area of inquiry pertains to a request made under the Freedom of Information Law. As I understand the situation, you requested certain records, and the request was approved by the City's records access officer. Further, it appears that the records were made available. Nevertheless, you wrote that the City Council has designated itself as the body to determine appeals under the Freedom of Information Law. Since it meets twice a month, you asked whether its designation as appeals body is appropriate.

The Freedom of Information Law provides direction concerning the time within which agencies must respond to requests and appeals. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

If the City Council cannot render a determination on appeal within ten business days of its receipt of an appeal, I believe that it would be appropriate for the Council to designate a different person or body to do so. On the other hand, if the Council can meet to determine an appeal within that period, I believe that it could comply with section 89(4)(a) of the Freedom of Information Law.

Lastly, you referred to a meeting held by a quorum of the City Council, with other city officials, and with state auditors to discuss the auditors' findings and recommendations. You asked whether it was proper to bar the public from the meeting and whether the "audit information" is available under the Freedom of Information Law.

I point out initially that the term "meeting" has been broadly construed by the courts. In a landmark decision rendered more than ten years ago, the Court of Appeals held that any gathering of a quorum held for the purpose of conducting public business constitutes a meeting subject to the Open Meetings Law, even if there is no intent to take action and irrespective of the manner in which a gathering may be characterized [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NYS 2d 947 (1978)].

I have discussed the kind of meeting that you described, so-called "exit conferences," with representatives of the Department of Audit and Control on other occasions. Those officials contend that those gatherings are convened by an auditor, that there is no intent on the part of municipal officials to deliberate or take action and that, therefore, they are not subject to the requirements of the Open Meetings Law. This particular issue has not been reviewed by any court, to the best of my knowledge, and the status of such a gathering is not completely clear.

With respect to rights of access to audits, section 87(2)(g)(iv) grants access to:

> "external audits, including but not limited to audits performed by the comptroller and the federal government..."

Copies of this opinion will be forwarded to City officials as 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:saw

cc: City Council
Gerald S. DePasquale, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1813
FOIL-AO-6254

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 13, 1990

Mr. Joseph Cahill
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cahill:

I have received your letter of August 27 in which you raised a series of questions.

Your first area of inquiry involves the Open Meetings Law and relates to a situation in which a school board "calls an open meeting for the purposes of adjourning to an executive session". In such a situation, you asked whether there must be minutes of the open meeting indicating "how [the members] voted on adjourning to executive session...". You also asked whether minutes of an executive session must be prepared when a vote is taken.

In this regard, section 103(a) of the Open Meetings Law requires that every meeting be convened as an open meeting. When a subject arises that may appropriately be considered during an executive session, a motion to enter into executive session must be made in public. Specifically, section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Further, all motions must be referenced in minutes, including motions to enter into executive sessions. Section 106(1) 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 or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

In addition, 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.

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). That provision 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."

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.

Your second area of inquiry involves your recourse when the records access officer approves a request but "the person who controls the record will not talk to [you]...or make an appointment to meet with [you]". Here I direct your attention to the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Law. The regulations describe the duties of the records access officer and specify that the records access officer has "the duty of coordinating agency response to public access to records" [21 NYCRR section 1401.2(a)]. Further, section 1401.2(b) of the regulations states in relevant part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
>
> (4) Upon request for copies of records:
>
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records."

Based upon the foregoing, it is suggested that you contact the records access officer, for that person, rather than the person who physically maintains the records, has the duty of "coordinating" responses to requests and assuring that agency personnel disclose records as required by law. If that effort fails, you may 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 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, if "an illegal act takes place at an executive session", you asked whether a member of a public body is "excused from the secrecy requirement of executive meetings". In this regard, there is nothing in the Open Meetings Law that requires members of public bodies to maintain secrecy with respect to matters discussed during executive sessions. Further, unless a statute prohibits the disclosure of certain information [i.e., information pertaining to a student that must be kept confidential under the Family Educational Rights and Privacy Act], I do not believe that a member of a public body is prohibited from disclosing information concerning the subject matter of an executive session.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO. 6255

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 13, 1990

Ms. Carole Tanzer Miller
Staff Writer
Westchester Rockland Newspapers
1825 Commerce Street
Yorktown Heights, NY 10598

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Miller:

I have received your letter of August 27, as well as the correspondence attached to it.

According to your letter, you requested a copy of a performance evaluation pertaining to the superintendent of schools of the Somers Central School District. The request was denied,' and the Superintendent wrote that "it is not the practice" in Somers "to make public the evaluations of the Superintendent or any other member of the staff". He did not refer to any particular provision of the Freedom of Information Law in his denial. Further, since the response represented an affirmation of an initial denial rendered pursuant to your appeal, the Superintendent "presume[d] that you have taken whatever steps are necessary to advise the Committee on Open Government on the status of your appeal".

You have requested an advisory opinion on the matter and sought advice "as to the next step in getting the district to comply". In this regard, I offer the following comments.

First, section 89(4)(a) of the Freedom of Information Law, which pertains to the right to appeal a denial of access, states in part that when an appeal is denied, the person responding to the appeal must "fully explain in writing to the person requesting the record the reasons for further denial". In my view, whether the denial was appropriate or otherwise, the Superintendent's response did not "fully explain" the reasons for the denial, and I do not believe that a statement to the effect that

it is not the "practice" of the District to disclose certain records is adequate. I point out, too, that the responsibility to communicate with this office is not borne by the requester, but rather by the District. The last portion of section 89(4)(a) states that "each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon".

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

It is noted that there 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, I believe that two of the grounds for denial are relevant in determining rights of access to evaluations.

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". 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); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Powhida v. City of Albany, 147 AD 2d 236 (1989); 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].

The other ground for denial 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, 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.

It is clear that an evaluation as described in the correspondence constitutes "intra-agency material". It is also clear that there are privacy considerations regarding the subject of an evaluation. Nevertheless, as indicated previously, I believe that the contents of such a record determine the extent to which it must be disclosed or may be withheld.

Although I am unfamiliar with the form of the evaluation that you requested, I believe that a typical evaluation form contains three components.

One component involves a description of the duties to be performed by a person holding a particular position, or perhaps a series of criteria reflective of the duties or goals to be achieved by a person in that position. If the record in question

contains information analogous to that described, I believe that portion would be available. In terms of privacy, a duties description or statement of goals would clearly be relevant to the performance of the official duties of the incumbent of the position. Further, that kind of information generally relates to the position and would pertain to any person who holds that position. As such, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In terms of section 87(2)(g), a duties description or statement of goals would be reflective of the policy of an agency regarding the performance standards inherent in a position and therefore, in my view, would be available under section 87(2)(g)(iii). It might also be considered factual information available under section 87(2)(g)(i).

The second component involves the reviewers' subjective analysis or opinion of how well or poorly the standards or duties have been carried out or the goals have been achieved. That aspect of an evaluation could be withheld, both as an unwarranted invasion of personal privacy and under section 87(2)(g), on the ground that it constitutes opinions concerning performance.

A third possible component is often a final rating, i.e., "good", "excellent", "average", etc. Any such final rating would in my opinion be available, assuming that any appeals have been exhausted, for it would constitute a final agency determination available under section 87(2)(g)(iii), particularly if a monetary award is based upon a rating. Moreover, a final rating concerning a public employee's performance is relevant to that person's official duties and therefore would not result in an unwarranted invasion of personal privacy if disclosed.

Lastly, with respect to the next step that you might take, I will send a copy of this opinion to the Superintendent. Again, I am unaware of the content of the evaluation. However, if it contains any of the information that is apparently available under the Freedom of Information Law, it is my hope that it will be reviewed for the purpose of disclosing those portions of the record. Alternatively, since your appeal was denied, a proceeding for review of the denial could be initiated 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: Joseph G. Ennis, Ph.D.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6256

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 14, 1990

Mr. Marc P. Zylberberg
Senior Assistant
The County of Dutchess
22 Market Street
Poughkeepsie, New York 12601

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zylberberg:

I have received your letter of August 29, which relates to opinion addressed to Ms. Angie Gray on August 24.

Ms. Gray questioned the propriety of the assessment of a fee of one dollar per photocopy concerning records made available by the Dutchess County Office of Real Property Tax Services. She did not specify the nature of the records sought. You indicated that the record in question is form EA-5217, a real property transfer report form. That form is referenced in section 574(5) of the Real Property Tax Law, which states that:

> "Forms or reports filed pursuant to this Section of Section 333 of the Real Property Law shall not be made available for public inspection or copying except for purposes of administration or judicial review of assessments in accordance with rules promulgated by the State Board."

It is your contention that the request was made "pursuant to a specific State statute and not under the Freedom of Information Law." As such, it is your view that section 87(2)(a) of the Freedom of Information Law exempts the record from disclosure, and that the Freedom of Information Law, including its provisions concerning fees, do not apply.

I respectfully disagree with your conclusion insofar as it pertains to fees.

First, the Freedom of Information Law pertains to all agency records, and 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."

Based upon the foregoing, I believe that the forms at issue constitute "records," irrespective of whether they are available under the Freedom of Information Law.

Second, while I agree that the forms are generally exempted from disclosure pursuant to section 574(5) of the Real Property Tax Law, that provision confers rights of access when the forms are sought "for purposes of administrative or judicial review of assessments." As such, there is a limited right of access to the records described in that section.

Third, section 89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records."

Therefore, the Freedom of Information Law preserves rights of access that may be conferred under a different law or judicial decision, and nothing in the Freedom of Information Law could be cited to limit or abridge any right so conferred.

Lastly, in consideration of each of the points offered in the preceding paragraphs, I believe that section 87(1)(b)(iii) of the Freedom of Information Law, particularly in view of its all-encompassing definition of "record," is applicable, unless a statute other than the Freedom of Information Law specifically authorizes the assessment of a different fee. In other words, since the document is a record, I believe that a maximum of twenty-five cents per photocopy may be charged, even though a right to the record is conferred under a different law, unless a statute authorizes the assessment of a different fee.

In short, if you could cite a statute as the basis for a fee of one dollar, I would agree with your contention. However, absent any such statute, I believe that the fee for copying any "record" is limited to twenty-five cents.

If you would like to discuss the issue, I would be pleased to do so.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Angie Gray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-625

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 14, 1990

Ms. Margaret M. Detko
District Clerk
Board of Education
Tarrytown Public Schools
200 North Broadway
North 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 Ms. Detko:

I have received your letter of September 11.

You wrote that a person with whom I had spoken said that I informed him that a citizen "has a right to free copies of records based upon insufficient funds." During our conversation, however, I indicated that there must have been a misunderstanding, for the Freedom of Information Law does not so provide. You asked for a "statement to that effect."

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 that the Committee on Open Government promulgate regulations with respect to the implementation of sectio 87(1) of the Law, which includes reference to fees that may be assessed by agencies (see 21 NYCRR Part 1401). In turn, section 87(1) requires each agency to adopt regulations consistent with the Freedom of Information Law and the Committee's regulations.

Second, with respect to fees for photocopying, section 87(1)(b)(iii) states that an agency may charge up to twenty-five cents per photocopy, unless a different fee is prescribed by a statute other than the Freedom of Information Law.

Third, nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government pertains to waivers of fees. Therefore, an agency may charge up to twenty-five cents per photocopy in accordance with its rules and regulations. Further, in a recent decision involving a request for records by an inmate who asked that fees for copies be waived, it was held that an agency could charge a fee for copies of records accessible under the Freedom of Information Law, notwithstanding the inmate's indigency [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)]. I point out that a court may determine in other contexts, that as a poor person, an agency must supply copies of records free of charge. However, it is reiterated that nothing in the Freedom of Information Law requires the waiver of fees, irrespective of the status of the applicant.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6258

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 14, 1990

Ms. Patricia McCarroll
[redacted]

The staff of the Committee on 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. McCarroll:

I have received your letter of August 28, as well as the correspondence attached to it.

You have sought an advisory opinion with respect to requests for records of the Town of New Castle, particularly in relation to fees charged by the Police Department "for the reproduction of Polaroid pictures".

By way of background, following an incident involving a neighbor, you requested information from the Town. Other than the photographs, the correspondence indicates that the only records that exist that fall within the scope of your request are letters sent by the Town's Counsel to the Supervisor. Those records were withheld based upon a claim of attorney-client privilege. Further, the Town established a fee of ten dollars for each copy of a photograph.

In this regard, I offer the following comments.

First, I point out 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 new records in response to a request.

Second, with respect to existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Third, 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."

With respect to the assertion of the attorney-client privilege, section 4503 of the Civil Practice Law and Rules states that:

> "[U]nless the client waives 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 in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative act, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee of body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof."

It appears, therefore, that when records are prepared in conjunction with an attorney-client relationship, the communications between an attorney and his client (i.e., a town attorney and town officials) are exempted from disclosure pursuant to section 87(2)(a), which incorporates the privilege envisioned by section 4503 of the Civil Practice Law and Rules. However, it is noted that an appellate court in a case involving a request made under the Freedom of Information law recently 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 withheld 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" [Williams & Connelly v. Axelrod, 139 AD 2d 806, 527 NYS 2d 113,115 (1988)].

Lastly, with regard to fees, section 87(1)(b)(iii) of the Freedom of Information Law states that an agency's rules and regulations must include reference to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

As I interpret the language quoted above, unless a different statute provides direction, the first clause provides that an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches. The next clause, which deals with the "actual cost of reproduction", pertains to "other" records, i.e., those records that cannot be photocopied, such as photographs, tape recordings, computers tapes or disks, etc., or those records that are larger than nine by fourteen inches. With respect to those records, the regulations promulgated by the Committee on Open Government indicate that the actual cost of reproduction "is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries" [21 NYCRR section 1401.8(c)(3)].

Therefore, if the fee of ten dollars represents the Town's actual cost of reproducing a photograph, excluding personnel costs, for example, I believe that the fee would be proper. However, if the actual cost of reproduction is less than ten dollars, that fee would in my view be inconsistent with the Freedom of Information Law.

Copies of this opinion will be forwarded to Town 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: Steven Fuchila, Chief of Police
Caroline Corwin, Town Clerk
Lawrence Dittleman, Town Attorney

of Information Law requires a waiver or reduction of fees that may otherwise be charged [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Lastly, section 87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR section 1401.3). I would conjecture that the procedures adopted by Albany County under the Freedom of Information Law specify the locations, presumably county offices, where records may be inspected and copied. In my view, neither the Law nor the regulations require that records be transferred from their usual locations to accommodate an applicant at a site convenient to the applicant.

In short, while inmates may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than its designated or customary locations.

I hope that I 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-6259

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 17, 1990

Mr. Boo Cheung Wat
85-A-0424
135 State Street
Auburn, New York 13024-9000

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Wat:

I have received your letter of August 29, as well as the correspondence attached to it.

According to the materials, you sent requests for records to the New York City Police Department, and those requests were directed to the Commissioner. As of the date of your letter, you had apparently received no response to the requests.

In this regard, I offer the following comments.

First, a request should be directed to an agency's "records access officer." The records access officer has the duty of coordinating an agency's response to requests. The records access officer for the Police Department is Sgt. John G. Sultana. 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 contain sufficient detail to enable agency officials to locate and identify the records requested.

Second, the Freedom of Information Law provides direction concerning the time within which an agency must respond to a request. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

For your information, the person designated to determine appeals at the Police Department is Ms. Eileen D. Millet, Assistant Deputy Commissioner.

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-6260

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 17, 1990

Mr. Leonard Davis
Senior Parole Officer
New York State Division of Parole
Executive Department
92-35 Merrick Blvd.
Jamaica, New York 11433

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Davis:

I have received your letter of August 29, as well as the materials attached to it.

The correspondence pertains to a request for records allegedly prepared in conjunction with charges made against you. The request was made to a regional director on July 13 and was forwarded to the Division's Central offices in Albany. Having received no response, you contacted Ann Horowitz, Counsel to the Division on August 24. She indicated that your request was forwarded to William Altschuller, who prepared a response on August 16 that was "inadvertently not sent out" until August 23. She also wrote that, should you wish to appeal Mr. Altschuller's decision, an appeal could be made to her. Nevertheless, you wrote that you have not yet received the response.

You have asked that I "investigate this matter, citing [your] superiors for their non-compliance, and directing the New Yrok State Division of Parole to cooperate with the request."

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. Neither the Committee nor its staff is empowered to enforce the Freedom of Information Law or compel an agency to grant or deny access to records.

Second, I point out that, pursuant to regulations promulgated by the Committee on Open Government (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, and requests should generally be directed to an agency's records access officer, who in the case of the Division of Parole, is Mr. Altschuller. If your request had initially been made to the records access officer, it is likely that a response would have been made on a timely basis.

Third, for future reference, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

As. Ms. Horowitz indicated, she has been designated to determine appeals.

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. I am unaware of the contents of the records in which you are interested. However, it appears that two of the grounds for denial may be particularly relevant.

Section 87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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.

Another provision of possible significance 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 I am unfamiliar with the records, I cannot offer clear guidance. However, other grounds for denial may be relevant. Further, since the records apparently pertain to you, it might be worthwhile to submit a request under the Personal Privacy Protection Law. With certain exceptions, that statute generally confers rights of access to records pertaining to an individual to that person. Enclosed are copies of the Personal Privacy Protection Law and an explanatory brochure dealing with that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

cc: William Altschuller
Ann Horowitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6261

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 17, 1990

Mr. Wallace Nolen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nolen:

I have received your letter of August 31, as well as the correspondence attached to it.

One of the enclosures is a copy of a letter that you addressed to Mayor Gould of the City of Beacon. In your letter you referred to a request for payroll information required to be maintained pursuant to section 87(3)(b) of the Freedom of Information Law and to an earlier letter addressed to you by Robert Frankel, the City's Commissioner of Accounts, in which he advised that the information sought would be disclosed upon payment of $33.25. In your letter to the Mayor, you characterized Mr. Frankel's response as an attempt "to extort 25 cents per name or a total of $33.25 for a total of 133 alleged employees." Further, you apparently interpret his response as an effort to obtain "the sum of 25 cents per person merely to 'view' the required record."

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 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 information 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 inquiry is paragraph (b) of subdivision three of section eighty-seven. 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 of employee of the agency..."

Based upon the foregoing, the City is obliged to create, maintain and disclose a record identifiable to all City officers and employees that includes their public office addresses, titles and salaries.

Second, 87(2) of the Freedom of Information Law states at the outset that: "Each agency shall, in accordance with its published rules, make available for public inspection and copying all records," unless records may be withheld in accordance with the grounds for denial that follow. There is no question, in my view, but that the payroll record described above must be disclosed, and the City has agreed to disclose equivalent records. Further, the provision quoted above is, from my perspective, clear; it refers to an agency's obligation to permit public inspection and copying.

Third, section 89(1)(b) of the Freedom of Information Law requires the Committee on Open Government to promulgate general rules and regulations concerning the implementation of the section 87(1) of the Law. The Committee has done so, and its regulations appear in 21 NYCRR Part 1401. In turn, section 87(1) of the Law requires that uniform regulations for all agencies in a public corporation (i.e., the City of Beacon) be promulgated "pursuant to such general regulations as may be promulgated by the committee on open government in conformity with the provisions of this article..." As such, an agency's rules and regulations must be consistent with those adopted by the Committee on Open Government and the Freedom of Information Law.

With respect to fees, section 87(1)(b)(iii) of the Freedom of Information Law requires that agencies' rules and regulations include reference to:

> "the fees for copies of records which shall be exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other records, except with a different fee is otherwise prescribed by statute."

Nothing in the provision quoted above refers to the assessment of a fee for inspection of records, and it is my view that no such fee may be imposed unless it is "otherwise prescribed by statute." Consistent with the foregoing is section 1401.8 of the Committee's regulations, which states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
>
> (1) inspection of records;
> (2) search for records; or
> (3) any certificaiton pursuant to this Part."

In short, I believe that accessible records must be made available for inspection at no charge.

In an effort to enhance their understanding of the Freedom of Information Law, copies of this letter will be forwarded to City officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Hon. Clara Lou Gould, Mayor
Robert Frankel, Commissioner of Accounts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6262

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 17, 1990

Mr. George Garcia
#88-A-7603; S.H.V. #B-6
Southport Correctional Facility
P.O. Box 2000
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. Garcia:

I have received your letters of August 27, in which you raised a series of issues concerning access to records.

In this regard, I offer the following comments.

First, insofar as your inquiry pertains to records maintained at correctional facilities, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that a request for those records should be made to the facility superintendent or his designee.

Second, a problem that you raised appears to involve your inability to pay for copies of records. Here I point out that section 87(1)(b)(iii) of the Freedom of Information Law provides that an agency may charge up to twenty-five cents per photocopy or the actual cost of reproducing records that cannot be photocopied (i.e., photographs), unless a statute other than the Freedom of Information Law prescribes a different fee. There is nothing in the Freedom of Information Law that requires that an agency waive fees for duplicating records, and it has been held that an agency is not required to waive the fees, even though an inmate may be indigent [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)]. However, section 5.36 of the regulations adopted by the Department of Correctional Services indicate that Department officials may, in their discretion, waive fees. Further, an available record may be inspected at a facility at no charge.

Third, you indicated that you have attempted unsuccessfully to obtain a copy of a "master index." Reference to the master index appears in the Department's regulations. Those regulations are based upon section 87(3)(c) of the Freedom of Information Law, which requires that each agency maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, 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 states that:

> "(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in this 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 made 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.

The custodian of records at a facility is the superintendent.

Fourth, you referred to a request for "mental records." In this regard, although the Freedom of Information law provides broad rights of access, the first ground for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is section 33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility by kept confidential.

Further, 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, New York 12229. I believe that requests for records maintained by other mental health facilities should be directed to those facilities. I point out that under section 33.16, there are certain limitations on rights of access.

Lastly, since your inquiry also appears to pertain 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.

Further, it appears that the governing statute concerning access to medical records 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(2F)(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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6263

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 18, 1990

Mr. Michael A. Nicolo
Plant Chairman
Local 1752 UAW
103 E. 14th Street
Elmira Heights, New York 14903

Dear Mr. Nicolo:

I have received your letter of August 30, as well as the correspondence attached to it. Your letter pertains to a matter involving the Job Development Authority.

By way of background, you requested copies of "the Schweizer JDA funding application and any other papers related to the granting of this guaranteed loan." In response to the request, Kenneth E. McLaughlin, Senior Vice President and General Counsel of the Job Development Authority, forwarded records to you. His response, however, made "no mention of the withholding of any information." Similarly, there is no reference to the right to appeal a denial, and you wrote that you were "led to believe" that no records were withheld. Nevertheless, upon reviewing the records that were forwarded to you, you felt that certain information had been withheld. After having spoken with officials of the Authority, certain records were located and it was stated that they would be sent to you. When you had not received the records by August 29, you contacted the Authority again and indicated that Mr. McLaughlin "admitted to withholding certain information" and that it was "determined that another request would be necessary."

You have asked that I "investigate" the matter. In this regard, I offer the following comments.

First, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to enforce the Law or compel an agency to grant or deny access to records.

Second, I have discussed the matter with Mr. McLaughlin on your behalf. In brief, be informed me that he had discussed the records with you and stated that certain records constituting trade secrets would be withheld [see Freedom of Information Law, section 87(2)(d)]. He believed that you understood that those aspects of the records would be withheld and that there was no need to refer to them in view of your conversation. He also believed, due to the lack of specificity of your request, that he had honored the request in his initial response. Further, since you were asked to submit a new request, it would appear that Mr. McLaughlin might have determined that the second request involved records that were not initially sought. In short, there appears to have been no intent to withhold records to which you were entitled.

As a general matter, however, I agree that when an agency receives a request for records and some are made available and others are withheld, the response should so indicate. As stated in the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), and agency's records access officer is responsible for assuring that agency personnel, upon locating records, make the records available or "deny access to the records in whole or in part and explain in writing the reasons therefor" [section 1401.2(b)(3)]. Section 1401.7(b) of the regulations states further 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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Kenneth E. McLaughlin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1817
FOIL-AO-6264

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 18, 1990

Mr. H. Murray Blueglass
Superintendent of Schools
Public Schools of the Tarrytowns
Administrative Offices
200 North Broadway
North Tarrytown, NY 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. Blueglass:

I have received your recent correspondence in which you raised an issue relating to the Open Meetings Law.

Your question is as follows:

> "Does an individual Board member have the right to audio-tape an executive session and share this with others, in spite of the fact that the meeting deals with specific personnel matters?"

In this regard, I offer the following comments.

First, to put the matter in perspective, it is noted at the outset that the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies, including boards of education, must be conducted open to the public, unless there is a basis for entry into a closed or "executive" session. Section 105(1) of the Open Meetings Law requires that a procedure be accomplished during an open meeting before an executive session may be held, and paragraphs (a) through (h) of that provision specify and limit the subjects that may properly be considered during executive sessions.

With respect to the procedure for entry into an executive session, section 105(1) states in its introductory language that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Based upon the foregoing, a public body is permitted to conduct an executive session after it follows the procedure described above to discuss an appropriate subject.

The so-called "personnel" exception, section 105(1)(f), permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

It is assumed that, in the context of your question, the Board is permitted to conduct an executive session.

Second, there is nothing in the Open Meetings Law that deals specifically with the use of tape recorders at meetings. There are, however, several decisions pertaining to the use of tape recorders at open meetings. By way of background, until 1979, the only case on the subject was Davidson v. Common Council of the City of White Plains [244 NYS 2d 385], which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee advised that a rule prohibiting the use of unobtrusive tape recordings devices at open meetings would not be reasonable if the presence of such devices would not detract from the deliberative process, and its contention was initially confirmed in a decision rendered in 1979, People v. Ystueta [418 NYS 2d 508], in which it was held that the public could use portable cassette recorders during open meetings.

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.

While the court found that a board of education may adopt reasonable rules to govern its own proceedings, it was held that a rule prohibiting the use of tape recorders at open meetings was unreasonable. There are no decisions of which I am aware that deal with the use of tape recorders during executive sessions. However, I believe that the principle in determining that issue is the same, i.e., that a board may establish reasonable rules governing the use of tape recorders at executive sessions.

Unlike an open meeting, when comments are conveyed with the public present, an executive session is generally held in order that the public cannot be aware of the details of the deliberative process. When an issue focuses upon a particular individual, the rationale for permitting the holding of an executive session generally involves an intent to protect personal

privacy, coupled with an intent to enable the members of a public body to express their views freely. Viewing the matter from a different vantage point, when representatives of public bodies have asked whether they should tape record executive sessions, I have suggested that doing so may result in unforeseen and potentially damaging consequences. A tape recording is a "record" as that term is defined in section 86(4) of the Freedom of Information Law and, therefore, would be subject to rights conferred by that statute. Further, a tape recording of an executive session may be subject to subpoena or discovery in the context of litigation. Again, disclosure in that context may place a public body at a disadvantage should litigation arise relative to a topic that has been appropriately discussed behind closed doors.

There is nothing in the Open Meetings Law that expressly prohibits a member of a public body from disclosing information pertaining to the executive session. However, there may be situations in which it is inappropriate or perhaps contrary to other provisions of law to publicly disclose information acquired or discussed during an executive session. For instance, if an issue arises with regard to a specific student, and a discussion is based upon or relates to education records of a student (i.e., in conjunction with placement, a health problem, an award, discipline, etc.), the disclosure of a tape recording identifying that student would in my opinion violate federal law, unless the parents of the student consent to disclosure [see Family Educational Rights and Privacy Act, 20 U.S.C. section 1232(g)]. In other situations, although disclosure of tape recordings of executive sessions may not be prohibited by statute, it might result in detriment to the taxpayers or the capacity of the board to carry out its duties effectively. A disclosure of a tape recording indicating a board's strategy in collective bargaining negotiations would likely place a board at a disadvantage in ensuing negotiations; a disclosure of the placement of security devices might enable evasion of law enforcement; a disclosure of commentary concerning a particular employee may be stigmatizing and potentially give rise to a claim that one's civil rights have been violated. In short, I believe that there are a variety of valid reason for restricting the use of tape recorders at executive sessions and/or contending that it would be inappropriate to disclose a tape recording of an executive session.

Lastly, as indicated earlier, a public body has the ability to adopt reasonable rules to govern its proceedings, and, in the case of a board of education, section 1709(1) of the Education Law specifies that a board has the authority to "adopt such by-laws and rules for its government as shall seem proper in the discharge of [its] duties...". In my view, a board of education

could establish a by-law or rule, for example, that prohibits a member from using a tape recorder at an executive session absent the consent of a majority of the board. Assuming that such a by-law or rule is adopted by a board, an individual member would not, in my opinion, have the right to tape record an executive session.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6265

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 18, 1990

Ms. June Maxam
Editor/Publisher
The North Country Gazette
Box 408
Chestertown, NY 12817

Dear Ms. Maxam:

I have received a copy of your letter of September 4 addressed to the Department of Motor Vehicles. You requested my comments concerning the issues raised in that letter.

You referred to provisions of the Vehicle and Traffic Law that are intended to offer consumers protection "from unscrupulous unlicensed motor vehicle repair shops" and suggested that it is "contradictory" to require that the public pay a five dollar search fee and an additional fee of one dollar per photocopy in an effort to obtain records indicating whether a facility has violated the Vehicle and Traffic Law. You expressed the belief that those fees are inconsistent with the Freedom of Information Law. You also objected to "DMV selling [your] name and address to other firms for profit without your approval...".

In this regard, I offer the following comments.

First, with respect to fees, as you may be aware, section 87(1) of the Freedom of Information Law requires an agency to promulgate rules and regulations concerning the implementation of the Law. Those 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" [section 87(1)(b)(iii)].

As such, unless a statute, an enactment of the State Legislature, authorizes a different fee, an agency cannot assess a fee for searching for records, nor can it charge more than twenty-five cents per photocopy for a record not in excess of nine by fourteen inches.

In this instance, I believe that a statute authorizes the assessment of the fees to which you alluded. Enclosed is a copy of section 202 of the Vehicle and Traffic Law, in which subdivisions (2) and (3) specify the fees to be charged by the Department.

With regard to the sale of your name and address, I direct your attention to subdivision (4) of section 202. Currently, the Commissioner may, by means of a contract, sell registration lists to "the highest responsible bidder". However, effective November 1, 1993, the Commissioner will be required to notify each vehicle registrant of the means of deleting information from a list. As such, when that provision becomes effective, you will be able to ensure that your name and address are not sold or otherwise made available for use by the successful bidder, except in situations involving a safety recall, for example, or for statistical compilations.

I hope that the foregoing serves to clarify your understanding of the law regarding the issues that you raised and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Patricia Adduci, Commissioner

F 62166

Clerical

ERROR

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6267

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 19, 1990

Mr. David W. McLean
Drawer B
Stormville, New York 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. McLean:

I have received your letter of August 31.

According to your letter, on July 9 you requested records from the New York City Police Department. Since receipt of the request was not acknowledged, you appealed on July 23 to Thomas Flanigan, Commanding Officer of the Legal Bureau. As of the date of your letter, you had received no response.

You asked that the Committee intervene in the matter on your behalf. 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, however, is not empowered to enforce the Freedom of Information Law or compel an agency to grant or deny access to records.

Second, since you did not identify the person to whom your original request was made, I point out that each agency must designate a "records access officer," a person who has the duty of coordinating an agency's response to requests. The records access officer for the Department is Sgt. John G. Sultana.

Third, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests and appeals. Specifically, section 89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 believe that the person designated to determine appeals at the Department is Ms. Eileen D. Millet, Assistant Deputy Commissioner.

In an effort to enhance compliance with the Freedom of Information Law, copies of this letter will be forwarded to Sgt. Sultana and Ms. Millet.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Sgt. John G. Sultana
Eileen D. Millet

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1819
FOIL-AO-6268

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 19, 1990

Ms. Beverly Jean McPeak
[redacted]

The staff of the Committee 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. McPeak:

As you are aware, I have received your letter of September 5. Further, I have discussed the issues raised in that letter with you, with another resident of the Village of Solvay, and with Phyllis DeFlorio, the Village Clerk and Public Information Officer.

In brief, as I understand the matter, three issues have been raised. One involves rights of access to a tape recording of a meeting of the Village Board of Trustees. You wrote that the tape was used by the clerk to prepare the minutes. However, if my recollection is accurate, the clerk indicated that a trustee recorded the meeting for his personal use. The second involves the content and accuracy of minutes of a meeting. The third involves the capacity of the public to participate at meetings.

For purposes of clarifying the issues, 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 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."

If a tape recording of a meeting is produced by or for the Village, I believe that it would constitute a "record" subject to rights of access. Having discussed the matter with you and the clerk, there appears to be a disagreement concerning the basis for recording the minutes. If it was prepared or used as an aid in preparing minutes, I believe that it would be subject to the Freedom of Information Law. On the other hand, if the tape was made by a trustee for his or her personal use and was not used by the clerk, it is questionable whether it could be characterized as an agency record.

Second, assuming that the tape recording is an agency record, 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 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, NYLJ, December 27, 1978].

It is also noted 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 with the Commissioner's consent. Having contacted the Education Department, I have been informed that tape recordings of meetings must be retained for a period of four months after transcription and/or approval of minutes.

Second, the Open Meetings Law 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 on the foregoing, it is clear that minutes need not consist of a verbatim transcript or account 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, and although the Board may include responses to correspondence as part of the minutes, the Open Meetings Law does not require that kind of information to be included in minutes. It is implicit in the Law, however, that whether minutes are brief or expansive, they must accurately describe what transpired at a meeting.

Lastly, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, section 100). However, the Open Meetings Law is silent with respect to the issue of public participation. Consequently, if a public body does not want the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to permit public participation. If a public body does permit the public to speak, I believe that it may do so based upon reasonable rules that treat members of the public equally.

I hope that 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: Phyllis DeFlorio, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6269

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 19, 1990

Mr. Felix Herrera
Din #89-T-4932
C.C.F. (Annex) 9-1-12
P.O. 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. Herrera:

I have received your letter of September 4, as well as the materials attached to it.

Your inquiry pertains to response to requests by Department of Correctional Services officials in which those officials apparently denied access to records. The records sought pertain to a motor vehicle accident, various "directives," regulations, orders, medical and mental health records. One of the responses indicated that requests by inmates should be made to the facility superintendent. In my view, that response did not constitute a denial, for many of the records sought apparently are maintained at your facility, and the response was consistent with the Department's regulations.

Thereafter, you made a request to the Superintendent, who acknowledged its receipt and indicated that the request had been forwarded to the facility's inmate records coordinator, Rodney Moody. Mr. Moody denied access to the directives that you requested on the ground that they are classified as "A" or "D" distributions. He added that the orders that you requested are not maintained by the facility and that a request for medical records should be made to the Health Services Unit.

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, with respect to the directives, I direct your attention to section 87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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.

A directive would in my view be available on the ground taht it constitutes agency policy, unless a different ground for denial applies. Further, having contacted the Department on your behalf, I was informed that directives classified for "A" distribution are generally available under the Freedom of Information Law. Those characterized as "D" involve security at a facility and, therefore, might justifiably be denied under section 87(2)(f). That provision permits an agency to withhold records when disclosure would "endanger the life or safety of any person."

Third, while I am unfamiliar with records that might have been prepared concerning the accident to which you referred, as indicated to you in a letter dated June 15, except in unusual circumstances, accident reports prepared by police agencies 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)].

If reports of an accident are prepared by correction officers those reports would not, in my opinion, fall within the scope of section 66-a of the Public Officers Law; rather, I believe that rights of access would be governed by the Freedom of Information Law.

Next, you referred to a request for "mental records." In this regard, although the Freedom of Information Law provides broad rights of access, the first ground for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is section 33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility by kept confidential.

Further, 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, New York 12229. I believe that requests for records maintained by other mental health facilities should be directed to those facilities. I point out that under section 33.16, there are certain limitations on rights of access.

Lastly, since your inquiry also pertains 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.

Further, it appears that the governing statute concerning access to medical records 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.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Rodney Moody

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6270

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 25, 1990

Mr. Joseph Tierno
Director
Communications/Public Affairs
District Union Local One
106 Memorial Parkway
Utica, NY 13501-4887

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tierno:

I have received your letter of September 4 in which you requested a "ruling" concerning rights of access to records.

According to your letter, the union that you represent has attempted "to obtain information on certain industrial development act bonds which have been issued by Orange County...". Although some of the information sought has been disclosed, certain portions of the "filing application for the bonds" have been withheld. You added that the applicant for the bonds was asked to submit financial statements to the Orange County IDA as part of his applications", and that the applicant is a privately owned company. It is your contention that the financial statements "are a part of the public record, since they are being submitted to obtain public funds".

In this regard, I offer the following comments.

First, it is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to issue a "ruling" or 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.

From my perspective, there may be two grounds for denial of potential significance.

Section 87(2)(d) of the Freedom of Information Law permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and 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.).

In my view, the nature of the records submitted and the area of commerce in which the firm submitting the records is involved would determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of the firm. Therefore, the proper assertion of section 87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the firm that submitted the records. In short, to the extent that disclosure of the records would cause substantial injury to the firm's competitive position, I believe that section 87(2)(d) could properly be asserted as a basis for withholding records.

The other provision of possible significance is section 87(2)(b), which enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Further, section 89(2)(b) provides examples of unwarranted invasions of personal privacy, the first of which includes reference to "credit histories". I point out, however, that 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 not specifically relevant to the issue, Article 6-A of the Public Officers Law, the Personal Privacy Protection Law, when read in conjunction with the Freedom of Information Law, in my opinion, makes it clear that the protection of privacy 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, insofar as the records in question pertain to entities rather than natural persons, I do not believe that section 87(2)(b) could appropriately be asserted as a basis for denial. If, however, the applications contain personal financial information concerning a natural person, rather than an entity, it is likely that the information pertaining to that person could be withheld as an unwarranted invasion of personal privacy.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Director, Orange County Industrial Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6271

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 26, 1990

Mr. Robert H. Davison
[redacted]

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Davison:

I have received your letter of September 6 in which you requested clarification concerning an opinion addressed to you on August 30.

You referred to section 89(3) of the Freedom of Information Law, under which an applicant may seek a certification in which an agency would assert that it does not have possession of a requested record or that the record cannot be found after having made a diligent search. You have asked what form a certification may take when an agency responds.

First, in addition to section 89(3) of the Freedom of Information Law, the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Law, require the designation of a "records access officer". The records access officer has the duty of coordinating an agency's response to requests. Among the responsibilities of the records access officer is the requirement that the officer assure that agency personnel:

> "(6) Upon failure to locate records, certify that:
>
> (i) the agency is not the custodian for such records; or
>
> (ii) the records of which the agency is a custodian cannot be found after diligent search" [21 NYCRR section 1401.2(b)(6)].

Second, in terms of the form of a certification, I believe that it may be a relatively simple assertion. For example, a records access officer or person acting on his or her behalf might write: "I hereby certify that the record sought is not maintained by this agency". Alternatively, a certification might take the form of an affidavit in which an agency official makes the appropriate assertion in conjunction with section 89(3) of the Freedom of Information Law and the regulations cited earlier.

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-6272

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 27, 1990

Dr. John Sulich, 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 Dr. Sulich:

I have received your letter of September 5, as well as the materials attached to it.

In brief, you wrote that you received notices of code violations from the Village of Johnson City, which were later demonstrated to have been without merit. The notices were apparently issued following complaints directed to the Village. It is your view that you have the right under the Freedom of Information Law to obtain the names of those who made the complaints.

In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Assuming that a written complaint has been forwarded to the Village or that a Village employee prepared a record concerning the complaint, I believe that section 87(2)(b) of the Freedom of Information Law would be relevant. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

Second, 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, I believe that the entire complaint could likely be withheld.

You also questioned the Village's compliance with the Freedom of Information Law and asked how many requests have been received by the Village and whether the Village complied within the appropriate time limits. I point out that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. There is no requirement in the Law that agencies report to the Committee concerning the number or nature of requests that it receives, or its level of compliance. In short, this office does not maintain the kind of information to which you referred.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and the role of this office.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Village of Johnson City

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6273

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 27, 1990

Mr. LaRoi M. Lawton
[redacted]

The staff of the Committee on Open 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 August 24, which, for reasons unknown, did not reach this office until September 11.

According to your letter, a request was made for records of the New York City Police Department over a year ago. Certain aspects of the request were approved, and you were asked to send 75 cents for reproduction costs. You sent the fee while you were incarcerated, but you never received the documents, despite having forwarded letters on the subject to the records access officer.

You have requested assistance in the matter. In this regard, I offer the following comments.

First, since the request was made while you were incarcerated, it is possible that the records were sent to the facility. As such, it is suggested that you write the facility superintendent in an effort to determine whether the records might have been sent to the facility.

Second, assuming that the records were not sent to the facility but remain at the Department, since you remitted the appropriate fee but have not received the records, I believe that you could consider the request to have been denied. In that circumstance, you would have the right to appeal pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

For your information, the person designated to determine appeals at the Department is Ms. Eileen D. Millett, Assistant Deputy Commissioner.

In an effort to encourage compliance, copies of this letter will be forwarded to Ms. Millett and to the records access officer, Sgt. John G. Sultana.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eileen D. Millett
Sgt. John G. Sultana

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6274

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 27, 1990

Mr. Ilie Marinesco
89-T-0539
Mid-State Correctional Facility
P.O. Box 216
Marcy, NY 13403-0216

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Marinesco:

I have received your recent letter in which you described a series of difficulties in your attempts to gain access to records of the Department of Correctional Services. The problems have involved delays or failures to respond to requests, and you referred specifically to denials of requests for Department "directives".

In this regard, I offer the following comments.

First, the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that requests for records kept at a correctional facility should be made to the facility superintendent or his designeed. Further, section 89(3) of the Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Second, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests. Section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

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.

Fourth, with respect to the directives, I direct your attention to section 87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

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 could 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.

A directive would in my view be available on the ground that it constitutes agency policy, unless a different ground for denial applies. Further, having contacted the Department, I was informed that certain directives, such as those classified for "A" distribution, are generally available under the Freedom of Information Law. Others having different classifications may involve security at a facility and, therefore, might justifiably be denied under section 87(2)(f). That provision permits an agency to withhold records when disclosure would "endanger the life or safety of any person".

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-1822
FOIL-AO-6275

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 27, 1990

Mr. Alexander Rogers
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rogers:

I have received your letter of September 10 and appreciate your kind words.

You have raised the following questions:

> "#1 Is there a Statute of Limitations regulation, as to how long after a meeting is held, can information be requested?
>
> #2 In regard to calling an 'Executive, meeting, can the Chairman of a regular Town Board Meeting, at the end of such a meeting, say, 'We will now go into Executive Session...' and proceed with a closed meeting?"

In this regard, I offer the following comments.

With respect to your first question, I am not entirely sure of what you mean. If the issue involves records generally, there is no limitation concerning the ability to request existing records, irrespective of the age of records or when they might have been prepared. I point out that 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."

As such, so long as an agency maintains records, the records are subject to rights conferred by the Freedom of Information Law. Further, 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 your question involves minutes of meetings, the Open Meetings Law provides guidance. 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 the 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, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Minutes of executive sessions reflective of action taken, the date and the vote must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. I point out that if a public body conducts an executive session and merely engages in a discussion but takes no action, there is no requirement that minutes of the executive session be prepared.

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. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes 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.

With regard to the second area of inquiry, the Open Meetings Law prescribes a procedure that must be accomplished during an open meeting before an executive session may be conducted. Specifically, section 105(1) of the 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..."

Moreover, 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) specify and limit the subjects that may properly be discussed in an executive session.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board, Town of Deerfield

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6276

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 2, 1990

Mr. Keith J. Larsen
Comps, Inc.
84-23 108th Street
Richmond Hill, NY 11418

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Larsen:

I have received your letter of September 11, as well as the materials attached to it.

You have requested an advisory opinion concerning a denial of a request by the Town of Islip. The records that were withheld involve real property information maintained on computer tape. The denial was based upon a contention that disclosure would constitute "an unwarranted invasion of personal privacy".

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all records of an agency, such as the Town, 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 inventory records, such as computer tapes or property record cards that are "kept" or "filed" by the Town, 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, I do not believe that any ground for denial listed in the Freedom of Information Law could appropriately be asserted to withhold the records in which you are interested. 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, index cards containing a variety of information concerning specific parcels of real property 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].

Those cards would be "records" subject to the requirements of the Freedom of Information law, and based upon the Freedom of Information Law and judicial decisions involving records kept by assessors, I believe that they would be accessible.

Lastly, in Szikszay v. Buelow [107 Misc. 2d 886, 436 NYS 2d 558 (1981)] the applicant sought assessment information as well as tax maps. The assessment information existed in computer tape format. The court referred to section 87(2)(b) of the Freedom of Information Law, the provision concerning unwarranted invasions of personal privacy, as well as section 89(2)(b)(iii) (id. at 558), which states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes". Notwithstanding those provisions, the court granted access to the computer tapes and held that:

> "In view of the history of public access to assessment records and the continual availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.L.R.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted'" (id.).

The Court also found that:

> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner's purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy. It is therefore improper for respondent to deny petitioner's request for copies of the County assessment rolls in computer tape format" (id.).

I point out, too, that the same conclusion was reached by another court in an unreported decision (Real Estate Data v. Nassau County and Abe Seldin, Chairman, Board of Assessors, Sup. Ct., Nassau Cty., September 18, 1981).

In view of the foregoing, I believe that assessment information that is now stored on a computer tape or in some other format is available to anyone, even if an applicant seeks to use the information for commercial purposes.

In an effort to share my views and information concerning the judicial interpretation of the Freedom of Information Law with the Town, a copy of this opinion will be sent to Mr. Vetri, the Town's appeals officer.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce P. Vetri

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6277

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 2, 1990

Mr. Bruce W. Myers
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Myers:

I have received your letter of September 14 in which you requested assistance.

According to your correspondence, you sought information from the Village of Johnson City concerning the "applicable salary and and/or stipend" of a particular Village employee. In the initial response to the request, you were given "a 1990-91 budget with salaries by classification, not by individual". The Clerk agreed with your contention that the record made available was not the record that you requested. You discussed the matter with her and submitted a second request. As of the date of your letter, you received no further response. You asked whether "this is a federal or state concern or whether it is a civil or criminal matter".

In this regard, I offer the following comments.

First, the applicable statute under the circumstances is the New York Freedom of Information Law, a state law. If litigation is commenced under the Freedom of Information Law, such an action would involve a "civil matter" that would be brought under Article 78 of the Civil Practice Law and Rules.

Second, I have contacted the Village Clerk on your behalf, and I believe that the matter will have been resolved by the time you receive this letter and that the information sought will have been made available.

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.

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". 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].

In my view, records involving salaries of or payments to public employees are clearly relevant to the performance of their duties. As such, I believe that the information sought must be disclosed.

Lastly, with regard to salary information, one of the few instances in which an agency is required to maintain a record involves payroll information. Specifically, section 87(3) of the Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

Therefore, I believe that the Village must maintain and make available a payroll record that includes the names and salaries of all Village officers or employees.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Constance Carr, Village Clerk/Freedom of Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6228

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 2, 1990

Mr. Lester B. Herzog
Attorney and Counselor at Law
1729 East 15th Street
Brooklyn, New York 11229

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Herzog:

I have received your letter of September 10 in which you requested a "decision" concerning rights of access to records of "911" calls maintained by the New York City Police Department. You wrote that the Department "has taken the position that in order to received a copy of an actual segment of the voice tape, they require a subpoena signed by a judge." You added that the tapes are ordinarily maintained for only 90 days.

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 render a "decision" that is binding, nor can it compel an agency to grant or deny access to records.

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.

Under the circumstances, when the records exist, several grounds for denial may be relevant.

One such ground for denial might be section 87(2)(b) of the Freedom of Information law, which permits an agency to withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy." It is possible that recordings might be withheld under the cited provision, for there might be privacy considerations concerning those identified in the records.

Another ground for denial of possible relevance 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."

The language quoted above indicates that it is based largely upon potentially harmful effects of disclosure. From my perspective, it is questionable whether a 911 tape recording could be considered a record "compiled for law enforcement purposes," for it might be viewed as a record compiled in the ordinary course of business. Assuming, however, that section 87(2)(e) would be application, its assertion would be limited to the capacity to withhold in conjunction with the harmful effects described in subparagraphs (i) through (iv) of the provision.

Also of possible significance is section 87(2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Since I am unfamiliar with the events to which the transmissions relate or the effects of their disclosure, the applicability of section 87(2)(f) is conjectural.

A final ground for denial of possible 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. Transmissions between a Police Department dispatcher and a police officer, for example, would in my view constitute intra-agency materials that would be available or deniable depending upon the nature and content of the communications.

To the extent that the transmissions in question could have been or were heard by members of the public while listening to the police scanners, for example, it is doubtful in my opinion that records reflective of those transmissions could justifiably be withheld [see Buffalo Broadcasting Co., Inc. v. City of Buffalo, 125 AD 2d 983 (1987)].

Lastly, the foregoing comments should be viewed as being applicable only to records maintained by New York City. New provisions of the County Law, which applies to counties outside of New York City, exempt records of 911 calls from disclosure. Specifically, section 308(5) of the County Law states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Sgt. John G. Sultana
Eileen D. Millet

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6279

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 2, 1990

[redacted]

The staff of the Committee on 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]

As you are aware, I have received your letter of September 10 and the materials attached to it.

Your inquiry pertains to a report of the Croton-Harmon School District's investigation of your complaint concerning the activities of a school psychologist in relation to your daughter. Although the Superintendent agreed to provide a copy of the report, you wrote that he "refused to acknowledge" your right to the report under the Family Educational Rights and Privacy Act (FERPA). You enclosed copies of the relevant documentation and requested my views concerning the applicability of the FERPA.

In this regard, there have been numerous instances in which questions relating to student records have been raised by parents, as well as education administrators. Often those questions can be answered only by construing the provisions of the Freedom of Information Law, a New York State statute, in conjunction with the FERPA, a federal statute [20 U.S.C. section 1232g]. Under the circumstances, if only the Freedom of Information Law applies, I believe that rights of access would be limited. On the other hand, if the FERPA applies, I believe the record would be available to you as a parent of a student. It is noted that, in an effort to enhance my understanding of the FERPA and to better serve the public and education officials, I have had many conversations over the course of years with representatives of the FERPA office at the U.S. Department of Education in Washington, including discussions involving situations similar to that described in the materials that you forwarded.

By way of background, when applicable, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 FERPA pertains to education records containing information identifiable to students. The FERPA generally provides parents of students under the age of eighteen with rights of access to education records identifiable to their children. Concurrently, education records are generally confidential with respect to third parties, unless the parents of students consent to disclosure.

In my view, the key issue in terms of FERPA is whether the record in question constitutes an "education record." The regulations promulgated by the U.S. Department of Education pursuant to FERPA state in relevant part that:

> "'Education records' [a] the term means 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..."
> [3] [i] Records relating to an individual who is employed by an educational agency or institution, that -
> [A] Are made and maintained in the normal course of business;
> [B] Relate exclusively to the individual in that individual's capacity as an employee; and
> [C] Are not available for use for any other purpose" [34 CFR 99.3].

Based upon the foregoing, as a general matter, if the document in question is "directly related to a student," it is an "education record" that should be disclosed to you as the parent of the student.

A relevant factor under the circumstances is whether the record falls outside the scope of the definition of "education records" on the ground that it relates to a person employed by the District and was prepared "in the normal course of business." If the report was "made and maintained in the normal course of business," as is likely the case with respect to routine evaluations of teachers and other staff, for example, it would not, in my opinion, constitute an education record. However, if the preparation of the report was precipitated by your complaint, I do not believe that it could be characterized as having been made in the normal course of business. If my assumption is accurate, the report would constitute an "education record" subject to rights conferred by the FERPA.

A copy of this opinion will be forwarded to the Superintendent.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: David S. Siegel, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 1825
FOIL-AO- 6280

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1990

Mr. Joseph Marotta
Board Chairman
Community Board No. 1
111 Canal Street
Staten Island, NY 10304

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Marotta:

Your letter of September 14 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

The issue that you raised pertains to the election of officers by Community Board No. 1 in New York City, and you wrote that New York City Law Department recently determined that such an election cannot be conducted by "secret ballot". You added that the direction given by the Law Department "has caused consternation among [y]our members who feel their rights have, in some way, been compromised."

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 a community board, 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)].

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-6281

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1990

Mr. Michael S. Lazan
Bronx Legal Services
2605 Grand Concourse
Bronx, New York 10468

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Lazan:

I have received your letter of September 17 as well as the correspondence attached to it.

In brief, on behalf of Bronx Legal Services, you requested from the Triborough Bridge and Tunnel Authority ("TBTA") "any and all contracts, including leases, entered into" by TBTA and B.C.C. Associates, Inc. ("B.C.C."). You wrote that B.C.C.:

> "is a subcontractor responsible for counting and processing money collected at tolls operated by TBTA. A written contract explains the duties and rights regarding this work arrangement. In addition, upon information and belief, B.C.C. and TBTA have entered into a lease agreement in regard to premises used by B.C.C. for work operations."

Robert M. O'Brien, TBTA's Acting General Counsel, denied access to the records on the ground that they contain "confidential and proprietary information which the Authority cannot disclose".

You have sought advice concerning the "propriety" of your request, as well as the "possibility of an attorneys' fees award" should litigation be commenced.

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. I point out that the introductory language of section 87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record might contain both accessible and deniable information, and that an agency is obliged to review requested records to determine which portions, if any, may justifiably be withheld. Further, that phrase indicates that even if certain portions of a record could properly be withheld, the remainder must be disclosed.

Second, an assertion of confidentiality or that information is "proprietary" is, in my opinion and in view of judicial determinations, generally irrelevant. 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, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)].

Third, I believe that contracts, leases and similar documents reflective of agreements between agencies and those who supply goods or services to agencies pursuant to such agreements are generally available.

From my perspective, two of the grounds for denial may relate to the issue of rights of access to the records in question. One of those grounds would, in my opinion, be inapplicable. The propriety of asserting the other would be dependent upon a variety of factors.

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 of the bids 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, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. The cited decision involved bids and related documents. I believe, however, that it is implicit that the agreement itself had been made public or would be an accessible record.

The other situation where section 87(2)(c) has successfully been asserted to withhold records pertains 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 would have been eliminated, and I believe

that a contract or equivalent document indicating the identity of the parties, the terms of the agreement and the amount paid by an agency to a person or firm with whom the agency has established a contractual relationship is accessible under the Freedom of Information Law.

The other provision of potential significance is section 87(2)(d), which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and 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.).

In my view, the nature of records and the area of commerce in which a firm is involved would determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a firm. Therefore, the proper assertion of section 87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of a firm.

It is reiterated that agreements between agencies and the entities with which they contract are generally available, for none of the grounds for denial would ordinarily apply. If portions of the agreements in question would if disclose "cause substantial injury" to the competitive position of the contractor, those aspects of the records might properly be withheld. However, it is difficult to envision how information reflective of the amounts to be paid or the duties of the contractor or which describes the nature of a relationship between a governmental entity and a contractor could be characterized as proprietary.

Fourth, if a suit is initiated following the exhaustion of one's administrative remedies, section 89(4)(b) of the Freedom of Information Law indicates that the agency has the burden of proof. Further, based upon judicial interpretation of the Freedom of Information Law, an agency cannot merely assert grounds for denial and prevail should a judicial proceeding be commenced to review a denial. As stated by the Court of Appeals:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for in camera inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In another decision, the Court of Appeals found 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 and 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" [Capital Newspapers v. Burns, 67 NY 2d 562, 565-566 (1986)].

The Court also reiterated that:

> "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" (id. at 566).

As such, in meeting the burden of proof imposed by section 89(4)(b) of the Freedom of Information Law, an agency must demonstrate that the harmful effects described in the grounds for denial would arise by means of disclosure.

With respect to the possibility of an award of attorneys' fees, section 89(4)(c) of the Freedom of Information Law indicates that several criteria must be met. The petitioner must "substantially prevail", and the court must find that:

> "i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

As such, awards of attorneys' fees are considered on a case by case basis.

In an effort to enhance compliance with the Freedom of Information Law and obviate the need to engage in litigation, a copy of this opinion will be forwarded to Mr. O'Brien at the TBTA.

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: Robert M. O'Brien, Acting General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1826
FOIL-AO- 6282

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1990

Mr. Emil Murtha
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Murtha:

I have received your recent correspondence, which again deals with a request for records of the Village of Island Park. The request, which was made on August 27, pertains to minutes of a meeting of the Island Park Village Board of Trustees held on July 19. It is my understanding that Village officials contend that there is a waiting period of up to thirty days before a request must be answered.

The Village's stance appears to be based upon the decision rendered in Ficke v. Parente (Supreme Court, Nassau County, January 28, 1988). In that decision, it was found that "a 30-day waiting period is...specifically sanctioned by Statute," and the court cited "Public Officers Law [section] 95[1][a]" as the basis for its determination. As I have suggested in previous correspondence with the Village, section 95 of the Public Officers Law is part of the Personal Privacy Protection Law, rather than the Freedom of Information Law. Further, the Personal Privacy Protection law applies only to state agencies [see definition of "agency" in section 92(1), which excludes "any unit of local government" from the scope of the Personal Privacy Protection Law], and section 95 of that statute pertains to requests by individuals for records pertaining to themselves. Moreover, the reference in section 95(1) to "thirty business days" involves requests by the subjects of records to amend or correct records pertaining to them. In short, I believe that the court's reliance upon section 95 of the Public Officers Law was erroneous, for that statute is inapplicable to local governments and is separate and distinct from the Freedom of Information Law.

Direction concerning agencies' obligations to respond to requests in a timely manner is found in section 89(3) of the Freedom of Information Law, which states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with section 89(4)(a) of the Freedom of Information Law.

Based upon section 89(3), it is clear in my view that agencies are generally required to grant or deny access to records within five business days of the receipt of the request. If more time is needed, the agency must nonetheless respond within a reasonable time. What is considered a reasonable time may be dependent upon the volume of a request, the time needed to locate records, the necessity of reviewing records to determine rights of access, etc. Nevertheless, there is no reference in the Freedom of Information Law to a thirty day limitation before or within which a request must be honored. The only reference in the Freedom of Information Law to thirty days is in section 89(4)(a), which states that a person denied access to records may appeal within thirty days of the denial.

Lastly, since your request of August 27 involves minutes of a meeting, I direct your attention to the Open Meetings Law, which provides direction concerning minutes and the time within which they must be prepared and disclosed. Specifically, section 106 of that statute provides 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."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Minutes of executive sessions reflective of action taken, the date and the vote must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. I point out that if a public body conducts an executive session and merely engages in a discussion but takes no action, there is no requirement that minutes of the executive session be prepared.

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. IN the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes 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.

In an effort to enhance their understanding of open government laws and obviate the need to engage in litigation, copies of this opinion will be sent to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Ann M. Leonard, Clerk
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6283

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1990

Mr. Joseph M. Cotazino, Jr.
President
Orchard Park Neighborhood
Association, Inc.
P.O. Box 122
Voorheesville, New York 12186

Dear Mr. Cotazino:

I have received your letter of September 7, which reached this office on September 17.

You referred to a series of requests for records directed to the Department of Transportation, and you complained that the Department responded in "an untimely fashion." As such, you expressed the belief that "a formal reprimand, as well as any specific type of disciplinary action that the Committee on Open Government initiates for this type of violation is in order..."

In this regard, 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 disclose records or to take disciplinary action against agencies.

It is emphasized, however, that the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 letter will be sent to Barbara Clements, the Department's records access officer.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw
cc: Barbara Clements

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1827
FOIL-AO-6284

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1990

Ms. Beverly J. McPeak
[redacted]

The staff of the Committee on 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. McPeak:

I have received your letter of September 13, as well as a news article and a letter to the editor attached to it.

Both of the attachments relate to a limitation upon the capacity of the public to speak at meetings of the Solvay Village Board of Trustees. The news article also refers to questions raised, which were not answered, concerning certain officers' or employees' vacation accruals and hours of work reported to the State Retirement System.

In this regard, I offer the following comments and suggestions.

First, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, section 100). However, the Open Meetings Law is silent with respect to the issue of public participation. Consequently, if a public body does not want the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to permit public participation. If a public body does permit the public to speak, I believe that it may do so based upon rules that treat members of the public equally.

Further, although public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations," in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that such a rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

Second, in addition to the Open Meetings Law, the Freedom of Information Law serves as a useful vehicle for obtaining information from government. 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 need not create a record in response to a request for information. Further, while an agency is obliged to respond to requests for records, the Freedom of Information Law does not require that agency officials answer questions.

Since one of the issues appears to involve the attendance of public employees, I point out that the Freedom of Information Law, based upon its judicial interpretation, requires that attendance records be disclosed.

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.

Although two of the grounds for denial relate to time and leave or attendance records, based upon the language of the Law and its judicial interpretation, again, 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, 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.

Attendance records could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning the use or accrual 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 to the extent that disclosure would constitute "an unwarranted invasion 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); 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 91978); 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].

Moreover, in a decision dealing with a request for records indicating the dates of sick leave claimed by a particular public employee 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)."

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 sum, subject to the qualifications described above, I believe that time and leave records pertaining to 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:jm

cc: Board of Trustees, Village of Solvay

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6285

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 4, 1990

Mr. Hyman Strell
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Strell:

I have received your letter of September 13, as well as the correspondence attached to it.

The materials relate to a request for the name of a person who apparently submitted a complaint against you. The request was denied, by the Deputy Town Attorney, who wrote that: "In accordance with Public Officers Law Art. 6, Section 87(2)(e), it is the Town's policy not to reveal the names of the complainants in enforcement cases." You have asked whether it is true that "town policy" can override the Freedom of Information Law.

In this regard, I offer the following comments.

First, I do not believe that a policy adopted by a town can conflict with or abridge rights conferred by a statute, such as the Freedom of Information Law.

Second, Article 6 of the Public Officers Law is the Freedom of Information Law, and I believe that the Town's denial of the request was likely appropriate.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 a written complaint has been forwarded to the Town or that a Town employee prepared a record concerning the complaint, I believe that section 87(2)(b) of the Freedom of Information Law would be relevant. That provision 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, I believe that the entire complaint could likely be withheld.

The provision cited by the Town's attorney, section 87(2)(e), permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques or procedures."

The provision quoted above generally pertains to records concerning criminal law enforcement. I point out that the judicial interpretation of the Freedom of Information Law suggests that section 87(2)(e) would not be applicable in conjunction with building code or zoning enforcement [see Young v. Town of Huntington, 388 NYS 2d 978 (1976)]. If the complaint related to criminal activity, the name of the complainant could, in my view, likely be withheld under section 87(2)(e)(iii); if it did not pertain to criminal activity, for reasons expressed earlier, I believe that it could be withheld as an unwarranted invasion of personal privacy pursuant to section 87(2)(b) of the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6286

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 4, 1990

Mr. Leroy C. Pierce
87-C-0077
135 State Street
Auburn, New York 13021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pierce:

I have received your letter of September 13.

You have asked whether, under the Freedom of Information Law, you can obtain mental health records pertaining to yourself from the facilities that might have treated you and from your correctional facility.

In this regard, I offer the following comments.

First, as suggested in a letter to you dated May 21, clinical records pertaining to patients at mental health facilities are generally confidential pursuant to section 33.13 of the Mental Hygiene Law. Therefore, those records would fall outside the scope of the Freedom of Information Law [see section 87(2)(a)]. 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 authroized to act on behalf of a patient to request inspection or copies of mental health records pertaining to him or her fromt he mental health facility that maintains the records. While the law does not specify to whom such a request should be directed, the director of a mental health 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 effetive, section 18 of the Public Health Law also went into effect. That statute generally pro-

vides 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

With respect to mental health records maintained at a correctional facility, it is my understanding that the mental health "satellite units" that operate within state correctional facilities 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 or Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, New York 12229. I believe that requests for records maintained by other mental health facilities should be directed to those facilities.

I point out that under section 33.16, there are certain limitations on rights of access.

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-6287

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 4, 1990

Mr. Perry Lee Tillman
89-A-5230 I-6-30
Box 500
Elmira, NY 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. Tillman:

I have received your letter of September 14, in which you referred to an opinion sent to you on September 5.

In brief, you wrote that you signed a "power of attorney" authorizing your mother to obtain records on your behalf. Nevertheless, you wrote that the Saratoga County District Attorney told your mother that she would need a court order to obtain records.

In this regard, I offer the following comments.

As suggested in my earlier letter to you, the Freedom of Information Law provides broad rights of access, and an agency may withhold records only in accordance with the grounds for denial appearing in paragraphs (a) through (i) of section 87(2) of the Law. I am unfamiliar with the records in which you are interested, and, therefore, I am unaware of the extent to which the records sought would be available under the Freedom of Information Law. However, to the extent that they would be available to you, with a power of attorney, I believe that they would be equally available to the person that you have authorized to act on your behalf. Stated differently, with a power of attorney, I believe that your mother should be able to obtain records under the Freedom of Information Law to the same extent as you could obtain them.

Further, as a general matter, when a request for records under the Freedom of Information Law is denied, an applicant 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."

In an effort to assist you, copies of this letter and the opinion rendered on September 5 will be forwarded to the District Attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Wait, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6288

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 4, 1990

Mr. Thomas P. Malatino
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Malatino:

I have received your letter of September 16, which reached this office on September 20. You have complained that the New York State Department of Insurance has decided "to ignore the Freedom of Information Law".

By way of background, you wrote that you were involved in an automobile accident in 1989 and you received periodic payments of "No-Fault Income" from your insurance carrier, Metropolitan Property and Casualty. Metropolitan stopped your checks and you contacted that firm and were informed that the checks were stopped because you had returned to work. Notwithstanding that contention, you indicated that various documentation indicate that you were in treatment for problems resulting from the accident. Thereafter, you complained to the Department of Insurance, and the complaint was handled by Mr. William Niezgoda. He investigated and determined that Metropolitan was justified in its action because of what he had seen in its file. You indicated that Mr. Niezgoda promised Metropolitan that various records maintained by Metropolitan would be viewed but would not be copied and maintained by the Department. Consequently, when you requested records from the Department under the Freedom of Information Law, the records in which you were particularly interested were not included in the file. You have since attempted to obtain the records without success. You have asked how the information can be withheld in this way.

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."

As such, the Freedom of Information Law includes within its scope any records kept, held, filed, produced or reproduced by, with or for and agency. The Freedom of Information Law, however, does not extend to records not maintained by an agency, even though records might have been reviewed by an agency official.

Second, section 89(3) of the Freedom of Information Law states in part that an agency is not required to "prepare any record not possessed or maintained..." by the agency. Under the circumstances, if the Department of Insurance does not maintain the records in which you are interested, I do not believe that the Freedom of Information Law would be applicable or that it could be used to obtain records from Metropolitan.

Third, I have discussed the matter with Mr. Niezgoda. He informed me that the practice in which he engaged, whereby he reviewed records but did not prepare copies to be maintained by the Department, is not uncommon or unusual. He also indicated that, to the best of his knowledge, the Department has made available all of the records that it maintains that fell within the scope of your request.

I regret that I cannot be of greater 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-6289

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 5, 1990

Mr. John J. Sheehan
J.J. Sheehan Adjusters, Inc.
Post Office Box 604
Binghamton, New York 13902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sheehan:

I have received your letter of September 14 in which you referred to a response to a request by Chief Inspector Francis A. DeFrancesco of the Division of State Police.

Specifically, Inspector DeFrancesco wrote that requested records could be denied pursuant to Section 160.50 of the Criminal Procedure Law and indicated that "[i]n essence, the statute prohibits releasing records, etc., relating to cases that were found in favor of the person upon whom an action was commenced." You wrote that you "never heard of such a reason for denial" and asked for my comments.

In this regard, the provision cited by Inspector DeFrancesco is entitled "Order upon termination of criminal action in favor the the accused." Under that statute, if a person is charged in a criminal action or proceeding, and the charge is dismissed in favor of the accused, an order is generally made to seal records pertaining to the event. Section 160.50(1)(c) of the Criminal Procedure Law states in relevant part that, upon the termination of a criminal action or proceeding in favor of the accused, the court:

> "shall enter an order...directing that... all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the

> arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office be sealed and not made available to any person or public or private agency."

As you may be aware, the first ground for denial in the Freedom of Information Law pertains to records that "are specifically exempted from disclosure by state or federal statute." Therefore, when records are sealed pursuant to section 160.50 of the Criminal Procedure Law, they are exempted from disclosure by statute and outside the scope of rights conferred by the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of Inspector DeFrancesco's response.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
cc: Francis A. DeFrancesco, Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6290

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 5, 1990

Dr. John Sulich, Jr.
[redacted]

Dear Dr. Sulich:

I have received a letter from Assemblyman Richard H. Miller, a copy of which is attached, in which he referred to unreasonable delays in responding to requests made under the Freedom of Information Law. He asked that I assist you in expediting a response to your request to the Village of Johnson City.

In this regard, the Freedom of Information Law provides direction concerning the time within which an agency must respond to a request. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 assist you and others, a copy of this letter will be forwarded to the Village's records access officer, Ms. Constance Carr.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosure

cc: Hon. Richard H. Miller
Constance Carr

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6291

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 12, 1990

Mr. Wilfredo Ruiz
#88-B-0328, SHU-B-3
Southport Correctional Facility
P.O. Box 2000
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. Ruiz:

I have received your letter in which you raised questions concerning the procedure for requesting inmate records.

In this regard, 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 or his designee. 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 and identify requested records.

With respect to the use of a form, the Freedom of Information Law makes no mention of a particular form that must be used when making a request. Accordingly, it has been consistently advised that any written request that reasonably describes the records sought should suffice.

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-6292

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 12, 1990

Mr. David Davis
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Davis:

As you are aware, I have received your letter of September 19, as well as the correspondence attached to it.

According to your letter, Dave Fields, Associate Dean and Records Access Officer at the City University of New York Law School at Queens College "is alleging that the reports sent by the admission office to the ABA accreditation committee in the years 1983 through 1990 may be exempt, because the Law School depends upon the ABA for accreditation." Dean Fields appears to have referred to the reports in a letter to you dated July 25. You requested a variety of records, including the reports in question, which are identified in item 3 of Dean Fields' letter. Later in the letter, he referred to items 1 thorugh 4 of the request and indicated that you could "inspect the statistical or factual tabulations or data contained in the reports..." You have asked whether the reports sent to the ABA accreditation committee are accessible 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, on the basis of Dean Fields' remarks, due to the allusion to "statistical or factual tabulations or data," it appears that he has determined that rights of access to the report are governed by section 87(2)(g), which pertains to inter-agency and intra-agency materials." Specifically, that provision enables an agency, such as CUNY, 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..."

However, the application of section 87(2)(g) is limited to communications within or between agencies. 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."

Again, I believe that CUNY is clearly an agency; the ABA, however, is not a state or municipal entity, nor is it a governmental entity. If that is so, communications between CUNY and the ABA accreditation committee would not fall within the scope of section 87(2)(g) of the Freedom of Information Law. Further, it does not appear that any of the remaining grounds for denial in the Freedom of Information Law could appropriately be asserted.

In short, based upon my understanding of the matter, the reports in question would be available under the Freedom of Information Law, for none of the grounds for denial would apply.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Dean Fields

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6293

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 15, 1990

Mr. Michael M. Shelton
Orleans Parish Prison
F# 474939 [redacted]
C-1 Cell 3# Right Side
531 S. Broad Street
New Orleans, LA 70119

Dear Mr. Shelton:

I have received your letter of September 21 in which you requested assistance in obtaining a transcript from the court in which you were convicted.

In this regard, the Committee on Open Gvoernment is authorized to advise with respect to the Freedom of Information Law, which is applicable 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."

Based upon the foregoing, the Freedom of Information Law does not apply to the courts or court records.

While the Freedom of Information Law is inapplicable, other provisions of law often grant substantial rights of access to court records (see e.g., Judiciary Law, section 255). If you have not already done so, it is suggested that your request be directed to the clerk of the court in which the proceeding was conducted or that you discuss the matter with your attorney.

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

PPPL-AO-
FOIL-AO-6294

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 16, 1990

Ms. _____
c/o Patricia W. Johnson, Assistant Counsel
Commission on Quality of Care for the
Mentally Disabled
99 Washington Avenue, Suite 1002
Albany, New York 12210

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Ms. _____:

As you are aware, Ms. Johnson has forwarded correspondence to this office concerning a request for records directed to the Office of Mental Health (OMH).

By way of background, it is my understanding that you requested clinical and/or medical records pertaining to yourself from the New York Hospital. Due to its refusal to fully comply with your request, you sought review of the denial, apparently in accordance with section 33.16(c)(4) of the Mental Hygiene Law. Following the appeal, the clinical record access review committee, according to Marc Madia, an attorney for OMH, granted access to the records.

Ms. Johnson indicated that, having discussed the matter with you, one of the issues that you raised involves your right to obtain a letter written on behalf of New York Hospital concerning your request for review of its initial denial of your request.

In this regard, I offer the following comments.

First, when it is applicable, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 in the Freedom of Information Law, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". Among the statutes that exempt records from disclosure is section 33.13 of the Mental Hygiene Law, which in subdivision (a) states that:

> "A clinical record for each patient or client shall be maintained at each facility licensed or operated by the office of mental health or the office of mental retardation and developmental disabilities, hereinafter referred to as the offices. The record shall contain information on all matters relating to the admission, legal status, care, and treatment of the patient or client and shall include all pertinent documents relating to the patient or client. The commissioners of such offices, by regulation, each shall determine the scope and method of recording information, including data pertaining to admission, legal matters affecting the patient or client, records and notation of course of care and treatment, therapies, restrictions on patient's or client's rights, periodic examinations, and such other information as he or she may require."

In view of the breadth of the language quoted above, it appears that the letter written on behalf of New York Hospital concerning "restrictions on patient's or client's rights", among other items are generally confidential pursuant to section 33.13. If that is so, the Freedom of Information Law would be inapplicable, for the letter would be exempted from disclosure by statute.

While section 33.16 of Mental Hygiene Law generally provides rights of access to clinical records to a "qualified person", such as the subject of the records, the definition of "clinical record" in section 33.16(a)(2) suggests that records forwarded to a clinical record access review committee are outside the scope of rights of access conferred by that provision. The definition of "clinical records" in section 33.16(a)(2) includes "any information concerning or relating to the examination of an identifiable patient or client...except data disclosed... to...other persons...". However, that provision specifies that: "For purposes of this subdivision, 'disclosure to any other person' shall not include disclosures made...to the committee...pursuant to the provisions of this section...".

Paragraph 3 of section 33.16(a) defines "committee" to mean "a clinical record access review committee appointed pursuant to this section". Therefore, as I interpret the provisions discussed above, the letter in question would be a clinical record exempted from disclosure pursuant to section 33.13, but it would not be a clinical record accessible to a patient or client under section 33.16. If my interpretation is accurate, the letter would be exempted from disclosure under section 87(2)(a) of the Freedom of Information Law.

The other issue, according to Ms. Johnson involves "the release of OMH's final agency determinations in regards to other complainants of New York Hospital with personally identifying information deleted."

In my view, rights of access to those records would be dependent upon the nature and content of the complaints leading to determinations. One of the grounds for denial in 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". Section 89(2)(a) of the Freedom of Information Law provides additional guidance, for it provides that an agency may delete identifying details from "record otherwise available" under that statute in order to protect against 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. Further, section 89(2)(b) contains five examples of unwarranted invasions of personal privacy, the first two and last two of which include:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility...
>
> 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."

Assuming that records, such as complaints or the ensuing determinations are otherwise available under the Freedom of Information Law, I believe that those records should be disclosed, following the deletion of identifying details. 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, for example, a visitor to New York Hospital complained that the hospital was unsanitary or that the food in the cafeteria was poor, I believe that the Freedom of Information Law would apply, and that appropriate deletions from records could be made to protect against an unwarranted invasion of personal privacy.

On the other hand, however, if the records involve a client or patient in a facility and contain information pertaining to that person's treatment and care, such records might fall within the scope of clinical records under section 33.13 of the Mental Hygiene Law. In my view, insofar as the records fall within the scope of that statute, I believe that they would be confidential in their entirety, and that the OMH would not be obliged to make the records available after having deleted identifying details.

In a case involving access to medical records that were exempted from disclosure under the Public Health Law, it was contended that the records should be disclosed following the deletion of identifying details. In rejecting that contention, the Court of Appeals haed that:

> "If there were doubt as to the significance to be attached for present purposes to this statutory design, all doubt is removed when attention is focused on the language of section 89 (subd. 2, par. [a]) (the paragraph which makes provision for the use of deletion). That paragraph explicitly is made applicable to the deletion of identifying details or withholding 'of records otherwise available' under the statute to prevent unwarranted invasions of personal privacy. Thus, provision is made for deletion from records that would be open to public

> disclosure but for the fact that their disclosure (without deletion) would constitute an unwarranted invasion of personal privacy. What is intended and accomplished by subdivision 2 of section 89 is provision of a means by which the single obstacle to disclosure -the invasion of personal privacy-may be overcome, i.e., by deleting identifying details. This concept and operating principle of selective deletion can have no application, however, to the 29 medical records sought by petitioner here. They are not 'otherwise available' inasmuch as they are 'specifically exempted from disclosure by state or federal statute' (section 87, subd. 2, par. [a]) wholly without reference to invasion of privacy" [Short v. Nassau Medical Center, 57 NY 2d 399, 405 (1982)].

Lastly, I have discussed the matter with the records access officer at OMH. Assuming that we considered the same request, I offer the following remarks.

It appears initially that one of your requests was not answered because neither your name nor your address was included in or with the correspondence.

Further, the request attached to the letter sent to me by Ms. Johnson in some respects was so vague or open-ended that it would likely fail to meet the legal standard for requesting records. According to both sections 89(3) of the Freedom of Information Law and 95(1) of the Personal Privacy Protection Law, an applicant must "reasonably describe" the records sought. Therefore, a request must contain sufficient detail to enable agency officials to locate and identify records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. A request for "any complaints against New York Hospital" or for "any investigations, inspections and/or evaluations of New York Hospital" without limitation as to time or subject matter likely would not meet the requirement that the records sought be reasonably described. Therefore, in the future, it is suggested that additional detail be included in requests.

Also, your request appears to have been made under the Freedom of Information Law and the Personal Privacy Protection Law. Here I point out that, in terms of rights of access, the Personal Privacy Protection Law, section 95, is limited to requests by a person (a "data subject") for records pertaining to

himself or herself. It is also noted that there are exemptions from rights conferred by section 95(1) of the Personal Privacy Protection Law. Of possible relevance to your inquiry is section 95(6), which states in part that:

> "Nothing in this section shall require an agency to provide a data subject with access to:
>
> (a) personal information to which he or she is specifically prohibited by statute from gaining access;
>
> (b) patient records concerning mental disability or medical records where such access is not otherwise required by law..."

Therefore, while a "qualified person", the subject of clinical mental health records, might enjoy rights of access to those records, that person's rights would not be conferred by either the Freedom of Information Law or the Personal Privacy Protection Law, but rather by section 33.16 of the Mental Hygiene Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Johnson
Marc Madia
Robert Spoor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1295

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 16, 1990

Mr. Frank C. Quinn
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Quinn:

I have received your letter of September 22.

According to your letter, the Mayor of the Village of Manorhaven "is possibly withholding correspondence (letters) which are directed to her and her office as Mayor, from some and possibly all four trustees". You have asked whether the Mayor "is within her rights to do this".

In this regard, it is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which generally pertains to requests for records by the public and an agency's responsibilities in responding to those requests. Therefore, it is unclear whether the issue raised directly involves the Freedom of Information Law. However, I offer the following comments.

First, the Freedom of Information Law pertains 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."

In view of the breadth of the definition, I believe that all letters or other correspondence addressed to or prepared by the Mayor in her capacity as Mayor constitute "records" that fall within the scope of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Third, although the Mayor or other Village officer or employee might have physical possession of records, section 4-402 of the Village Law states in part that "subject to the direction and control of mayor", the clerk shall "have custody of the corporate seal, books, records and papers of the village and all the official reports and communications of the board of trustees". Further, section 4-412 of the Village Law provides in part that the board of trustees:

> "shall have management of village property and finances, may take all measures and do all acts, by local law, not inconsistent with the provisions of the constitution, and not inconsistent with a general law except as authorized by the municipal home rule law, which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of property, the safety, health, comfort, and general welfare of its inhabitants, the protection of their property, the preservation of peace and good order..."

In sum, even if records are physically kept by the Mayor, I believe that the records are subject to rights conferred by the Freedom of Information Law and to management by the Board of Trustees.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Arleen Musselwhite, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6296

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 16, 1990

Mr. Bernard Hanft
Attorney at Law
103-25 68th Avenue
Forest Hills, New York 11375

The staff of the Committee 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. Hanft:

I have received your letter of September 20, as well as the materials attached to it. In accordance with the materials, you have requested advisory opinions on three subjects, each of which concerns the duties of the Office of Court Administration (OCA) regarding the disclosure of information.

Among the enclosures is a copy of a letter to John Eiseman, Deputy Counsel at OCA, in which you wrote that you discussed "the mechanics of processing" advisory opinions with me and that I would be "willing to follow the following procedure," specifically that:

> "Within 15 days from the date of mailing of the Advisory Opinion Requests, you [Mr. Eiseman] would send your answer. [I] would, issue [an] Advisory Opinion, thereafter. It is understood that there is nothing mandatory about this. The objective is to make sure that you [Mr. Eiseman] have time to present your view."

In this regard, while I recall having a brief discussion with you, I do not recollect having discussed the specific points that are quoted above. As a general matter, however, I prepare advisory opinions at the request of any person, so long as the issues fall within the scope of the authority of this office and do

not involve an issue known to be the subject of litigation arising under a statute within the Committee's advisory jurisdiction. Advisory opinions are generally answered in the chronological order in which they are received. Further, as a matter of routine and fairness, copies of opinions are forwarded to the agency that is the subject of an inquiry. On receipt of an opinion, an agency may review it and accord it whatever weight the agency deems appropriate. There is no requirement that an agency respond to an advisory opinion.

The first request for an advisory opinion involves whether records of the Bronx Housing Court are subject to the Freedom of Information Law. In this regard, the Freedom of Information Law is applicable to agency records, and 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."

Therefore, as a general matter, it is my view that courts and court records fall beyond the scope of the Freedom of Information Law.

Reference to housing court in New York City appears in Article I of the New York City Civil Court Act ("CCA"). Section 102 of the CCA states in part that:

> "The civil court of the City of New York is hereby establisehd as a single city-wide court, as provided by sections one and fifteen of article six of the constitution; it shall be part of the unified court system for the state, and a court of record with such power and jurisdiction as are herein or elsewhere provided by law."

Further, section 110(a) of the CCA states in relevant part that: "A part of the court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards..." In addition, section 109 of the CCA provides that there "shall be a chief clerk of the court," and that the chief clerk and "such other non-judicial personnel as shall be authorized by rule or order of court shall each have power to administer oaths, take acknowledgements and sign the process or mandate of the court."

Based upon the foregoing, housing court is part of the civil court of New York City, which is a "court of record." If that is so, it is my view that housing court, and the records maintained by a clerk for the court, are outside the scope of the Freedom of Information Law.

Even if the Freedom of Information Law is considered to be applicable, I offer the following comments in the context of your request. First, as suggested by Jonathan Luppman, Deputy Chief Administrator at OCA, the Freedom of Information Law pertains to existing records, and section 89(3) of that statute states in part that an entity subject to its provisions need not create a record in response to a request. In several instances, your correspondence seeks to elicit information or answers to questions. The Freedom of Information Law, in my opinion, requires that agencies respond to requests for existing records and disclose records to the extent required by law; it does not require that agency officials answer questions or prepare records in order to satisfy a request for information. Further, 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 staff to locate and identify records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. I point out that whether a request reasonably describes records may be dependent in part upon the nature of an agency's filing or record-keeping system. In terms of one aspect of your request, for example, it may be all but impossible to locate and identify "number of cases, with titles and index numbers, which were affected by the disrepair of computers" during a certain period. Moreover, there may be no existing record that contains the information sought.

The second request for an advisory opinion involves access to records involving the appointment of temporary acting supreme court judges.

I am unfamiliar with the nature or content of any such records that fall within the ambit of your request. Assuming that such records exist, that they can be found and that the Freedom of Information Law is applicable, it would appear that two of the grounds for denial appearing in the Freedom of Information Law would be relevant.

As indicated in the response to the request, one of the grounds for denial of likely significance 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, 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. Further, based upon section 87(2)(g), it has been held that inter-agency or intra-agency materials that are "predecisional" and which consist of opinions or recommendations may be withheld [see Kheel v. Ravitch, 62 NY 2d 1 (1984); 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); and Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied, (1979)].

The other ground for denial of likely relevance 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." I point out that section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy which in my view illustrate several among numerous conceivable instances in which records or portions of records may be withheld based upon considerations of personal privacy.

The first example of an unwarranted invasion of personal privacy alludes to "personal references of applicants for employment" [section 89(2)(b)(i)]. While records involving the assignment of judges do not involve "applicants for employment,"

section 89(2)(b)(i) appears to indicate an intent to enable an agency to withhold analogous records, such opinions expressed by teachers, employers, colleagues or others concerning an individual's capacity to perform in a position.

From my perspective, privacy considerations may arise with respect to persons offering subjective commentary, such as opinions or recommendations, regarding a judge's performance or capabilities, and with respect to the judges who are the subject of those commentaries. In short, it appears that the kinds of records described in the preceding paragraphs might, if disclosed, constitute an unwarranted invasion of personal privacy.

The remaining request for an advisory opinion involves access to time sheets of a public employee. Having discussed the matter with Mr. Eiseman, I believe that the records sought, with certain deletions made to protect against an unwarranted invasion of personal privacy, will soon be made available to you.

Mr. Eiseman also expressed the belief that the Office of Court Administration has complied with the Freedom of Information Law with respect to numerous other requests that you have made.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: John Eiseman
Jonathan Lippman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6297

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 17, 1990

Mr. Peter Andreu
82-A-6090
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. Andreu:

I have received your letter of September 25 in which you requested information concerning the Freedom of Information Law, particularly as it pertains to law enforcement agencies.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains 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 pertains to records maintained by a police department or an office of a district attorney, for example. Further, section 86(4) 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."

Therefore, documentary materials, as well as photographs maintained an agency, are subject to rights of access conferred by the Freedom of Information Law.

Second, a request should be directed to the "records access officer" at the agency that you believe maintains the records. The records access officer has the duty of coordinating an agency's response to requests. Further, 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 and identify 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. Since I am unfamiliar with the contents of the records in which you may be interested, or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example, even when you are aware of the identity of such a person or persons [see Hawkins v. Kurlander, 98 AD 2d 14 (1983)].

Perhaps the most relevant provision concerning access to 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). Particularly significant under the circumstances is section 87(2)(e)(iii), for it relates to confidential information relating to a criminal investigation [see Moore v. Santucci, 543 NYS 2d 103 (1989)]. Moore also indicates that records which might otherwise be withheld that have been introduced in a public proceeding, such as a trial, must be disclosed.

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.

Records prepared by employees of a law enforcement agency, such as a police department, or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

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-6298

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 17, 1990

Mr. Raymond A. Clifford
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Clifford:

I have received your letter of September 11, which relates to a "CETA Participant Complaint".

You directed requests for records to the New York City Board of Education and the Department of Probation for various records, some of which might have been prepared as early as 1975. Both agencies acknowledged the receipt of your requests and indicated that additional time would be needed to locate the records. You asked that I comment on those responses.

In this regard, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

Lastly, I point out that the Freedom of Information Law pertains to existing records, and that section 89(3) also states that an agency need not create a record in response to a request. Since some of the records sought pertain to events that occurred more than a decade ago, it is possible that they may no longer exist.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John R. Nolan
Susan L. Gordon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6299

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 17, 1990

Mr. Terry Williams
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Williams:

I have received your letter of September 24 in which you requested information concerning the Freedom of Information Law, particularly as it pertains to law enforcement agencies.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains 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 pertains to records maintained by a police department or an office of a district attorney, for example. Further, section 86(4) 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."

Therefore, documentary materials, as well as photographs maintained an agency, are subject to rights of access conferred by the Freedom of Information Law.

Second, a request should be directed to the "records access officer" at the agency that you believe maintains the records. The records access officer has the duty of coordinating an agency's response to requests. Further, 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 and identify 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. Since I am unfamiliar with the contents of the records in which you may be interested, or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example, even when you are aware of the identity of such a person or persons [see Hawkins v. Kurlander, 98 AD 2d 14 (1983)].

Perhaps the most relevant provision concerning access to 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). Particularly significant under the circumstances is section 87(2)(e)(iii), for it relates to confidential information relating to a criminal investigation [see Moore v. Santucci, 543 NYS 2d 103 (1989)]. Moore also indicates that records which might otherwise be withheld that have been introduced in a public proceeding, such as a trial, must be disclosed.

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.

Records prepared by employees of a law enforcement agency, such as a police department, or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

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-6300

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 18, 1990

Mr. Alejandro Perez
89-A-6711
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601

Dear Mr. Perez:

I have received your letter of October 12 in which you wrote that several requests for records of the Drug Enforcement Administration have not been answered.

In this regard, it is emphasized that the jurisdiction of the Committee on Open Government involves the New York Freedom of Information Law. The Freedom of Information Law pertains 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 upon the foregoing, as a general matter, the Freedom of Information Law is applicable to records maintained by entities of state and local government in New York. The Drug Enforcement Administration is a federal agency that is is not subject to the New York Freedom of Information Law.

I believe, however, that the agency in question is subject to the federal Freedom of Information Act. Further, according to a federal directory, the chief of the Freedom of Information Section for the Drug Enforcement Administration is located at Room W-6268 LP-2, Washington DC 20537. It might be worthwhile to write that office in an effort to obtain a response to your request.

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-6301

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 22, 1990

Ms. Ethel Sheffer
Mr. Michael O'Connor
Mr. John Kowel
Co-Chairs, Penn Yards Committee
Community Board Seven
250 West 87th Street
New York, New York 10024

The staff of the Committee on 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. Sheffer, Messrs. O'Connor and Kowel:

I have received your letter dated October 1, which reached this office on October 10.

Your inquiry concerns the propriety of a denial of a request for "Drafts of the Restrictive Declaration for the proposed Trump City Project" and related areas by the New York City Department of City Planning. According to the materials attached to your letter, various records were initially requested on September 19 and were denied by Luis A. Falcon on September 27.

You appealed the denial on September 28, and the appeal specified that the request involved:

> "(a) the current draft of the restrictive declaration;
> (b) all prior drafts of that document which have been disclosed to or negotiated with the Trump Organization or anyone else outside the Department; and
> (c) all correspondence to date with or from any person or organization relating to any of the foregoing."

Mr. William Valletta, Counsel to the Department, affirmed the denial, stating that:

> "...these documents are exempt from disclosure pursuant either to subdivision 2(c) or 2(g) of Section 87 of the Public Officers Law. Please note that we do not claim that Subdivision (2)(g) exempts from disclosure all of the requested material, but only that sought in item (c) of your September 19, 1990, records access request."

Further, Mr. Valletta cited and appears to have relied upon certain advisory opinions rendered by this office.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

It is emphasized that the introductory language of section 87(2) of the Law refers to the capacity to withhold "records or portions thereof" that fall within the scope of one or more of the grounds for denial that follow. Based upon the language quoted in the preceding sentence, it is clear in my opinion that single record or report, for example, might be both accessible or deniable in part. Further, in view of that phrase, I believe that an agency is obliged to review records sought in their entirety to determine which portions, if any, might justifiably be withheld.

Second, as suggested by Mr. Valletta, it appears that two of the grounds for denial, paragraphs (c) and (g) of section 87(2), are relevant in attempting to determine rights of access to the records.

Section 87(2)(c) permits an agency to withhold records when disclosure "would impair present or imminent contract awards or collective bargaining negotiations". In my view, the key word in that provision is "impair" and the question, therefore, involves the extent to which disclosure would "impair" the negotiations between the Department of City Planning and the developer. As it relates to the impairment of "contract awards" section 87(2)(c) 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 or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure of the bids 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, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

The other situation in which section 87(2)(c) has successfully been asserted to withhold records pertains 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, 56 NY 2d 888 (1982)].

In both of the kinds of the situations described above, there is an inequality of knowledge. More specifically, in the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an appraisal would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

In two of the opinions rendered by this office that were cited by Mr. Valletta, the facts as I understood them also suggested that there was an inequality of knowledge between the agencies and the persons or firms with whom agencies were negotiating (note: Mr. Valletta referred to four opinions, one of which cites the number of an opinion that has never been prepared

and a date on which no opinion was prepared; the other reached no "conclusion" concerning rights of access, for it was unclear whether contract negotiations were ongoing). In both cases, it was apparent that negotiations were complex, for they involved several stages, and that agencies were negotiating with a number of parties. Part of the rationale for my opinion involved the contention by the agency that disclosure of particular documents relating to one party to the negotiations would reveal the agency's negotiating strategies and process to other parties involved in the negotiations. Because the records sought in those instances represented an agency's dealings with one among several parties in the negotiation process, disclosure likely would have impaired the process as a whole.

The situation that you have described, insofar as it involves the drafts of the restrictive declaration and the assertion of section 87(2)(c), appears to indicate an equality of know- ledge on the part of the Department and the developer, for the drafts have apparently been shared with the developer, the sole party with whom the Department is negotiating. If that is so, if records reflective of the process and the Department's negotiating stance or position have been shared with the developer, it is questionable and difficult in my opinion to envision how disclosure, at this juncture, would "impair present or imminent contract awards".

Further, assuming that the Department has in the past engaged in and completed analogous negotiations or procedures, even if some aspects of the records could justifiably be withheld, a blanket denial of the drafts would appear to be inappropriate. Those documents may contain what might be characterized as "boilerplate", provisions of an agreement that are typical and which do not substantially vary among similar agreements. The drafts might also include reference to issues upon which agreements have been reached and which are no longer being "negotiated". As such, even if some aspects of the drafts could properly be withheld, and I am not suggesting that is necessarily so, other aspects might be accessible under the Freedom of Information Law.

The other basis for denial offered by Mr. Valletta, 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..."

The provision quoted above pertains to communications by officials within an agency, and to communications between or among officials of two or more agencies. Further, the term "agency" is defined in section 86(3) of the Freedom of Information Law to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based upon the foregoing, I do not believe that a record prepared for the purpose of being disclosed to a person or entity other than a state or municipal agency would fall within the scope of section 87(2)(g). Similarly records received by an agency from a person not employed by an agency would fall beyond the scope of the exception.

Insofar as your request involves inter-agency or intra-agency materials, again, a blanket denial of those materials may be inappropriate, for the content of the materials determine the extent to which they may be withheld or must be disclosed. The language of section 87(2)(g) 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 exception 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.

In construing section 87(2)(g), 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)].

Further, in a discussion of section 87(2)(g), the Court of Appeals specified that the contents of intra-agency materials determined 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" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Lastly, as indicated at the outset, the Freedom of Information Law is based upon a presumption of access. Based upon the judicial interpretation of the Freedom of Information Law, an agency cannot merely assert grounds for denial and prevail should a judicial proceeding be commenced to review a denial. As stated by the Court of Appeals:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for in camera inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In another decision, the Court of Appeals found 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 and 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" [Capital Newspapers v. Burns, 67 NY 2d 562, 565-566 (1986)].

The Court also reiterated that:

> "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" (id. at 566).

As such, in meeting the burden of proof imposed by section 89(4)(b) of the Freedom of Information Law, an agency must demonstrate that the harmful effects described in the grounds for denial would arise by means of disclosure.

In an effort to enhance compliance with the Freedom of Information Law and obviate the necessity of engaging in litigation, a copy of this opinion will be forwarded to Mr. Valletta

I hope that I have 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 Valletta, Counsel ,

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6302

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 24, 1990

Mr. Joseph Poole
77-B-0619
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. Poole:

I have received your letter of September 28.

You wrote that you requested records from the New York City Police Department in July. Soon thereafter, you received a letter from the Department seeking additional information, presumably in an effort to attempt to locate the records. You forwarded the information but indicated that you have received no further response.

You have requested assistance in the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

For your information, the person designated to determine appeals at the Department is Susan R. Rosenberg, Assistant Commissioner for Civil Matters.

Second, the records sought pertain to events that occurred in 1975. It is questionable in my view, due to the substantial passage of time, whether the records continue to exist. I point out that the Freedom of Information Law pertains to existing records and that section 89(3) of the Law states in part that an agency need not create a record in response to a request.

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-6303

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 24, 1990

Mr. James Butler
90-A-2895
Drawer B
Stormville, NY 12582

Dear Mr. Butler:

I have received your letter of October 16 which reached this office today. The letter constitutes an appeal concerning requests for records of the New York City Police Department and the Office of the Queens County District Attorney. You indicated that requests were made to both of those agencies, but that neither had responded.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee cannot render a determination pursuant to an appeal, nor is it empowered to compel an agency to grant or deny access to records.

Since you wrote that your requests were not answered, I point out that the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

As such, an appeal is determined by a person or body in possession of the requested records rather than the Committee on Open Government. For your information, the person designated to determine appeals at the New York City Police Department is Susan R. Rosenberg, Assistant Commissioner for Civil Matters.

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-6304

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 25, 1990

Mr. Moses Padro
88-A-0879
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. Padro:

I have received your letter of October 1.

According to your letter, on August 27 you requested various records from the New York County District Attorney concerning your indictment and the indictments of your co-defendants. As of the date of your letter, you had received no response to the request.

You have requested assistance in the matter. In this regard, I offer the following comments.

First, I point out that a request made under the Freedom of Information Law should generally be made to an agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests. If you have not yet received a response to the request, is is suggested that you resubmit the request to the records access officer. I believe that the records access officer for the Office of the District Attorney in New York County is Mr. Gary Galperin.

Second, for future reference, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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, 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 am unfamiliar with the contents of the records in which you may be interested, or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies persons other than yourself, a confidential source or a witness, for example, even when you are aware of the identity of such a person or persons [see Hawkins v. Kurlander, 98 AD 2d 14 (1983)].

Perhaps the most relevant provision concerning access to 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). Particularly significant under the circumstances is section 87(2)(e)(iii), for it relates to confidential information relating to a criminal investigation [see Moore v. Santucci, 543 NYS 2d 103 (1989)]. Moore also indicates that records which might otherwise be withheld that have been introduced in a public proceeding, such as a trial, must be disclosed.

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.

Records prepared by employees of a law enforcement agency, such as a police department or a district attorney's office, or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

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-10305

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 26, 1990

Mr. Arthur Frazier
84-A-2707
Sullivan Correctional Facility
P.O. Box A.G.
Fallsburgh, NY 12733-0116

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Frazier:

I have received your letter of September 1, which reached this office recently. Please note that the letter was addressed to 126 Washington Avenue rather than 162 Washington Avenue.

According to your letter, you requested certain records from the Queens County District Attorney's Office. You were informed that the records would be made available upon payment of twenty-five cents per photocopy. You appealed and asked that the fee be waived. The appeal was denied. Thereafter, you wrote again and asked to be informed of the amount of the fee in order that you could send a check in that amount. However, you indicated that you have not received any response to that inquiry.

In this regard, I offer the following comments.

First, section 87(1)(b)(iii) of the Freedom of Information Law states generally that an agency may charge up to twenty-five cents per photocopy for duplicating records up to nine by fourteen inches.

Second, there is nothing in the Freedom of Information Law that pertains to the waiver of fees. Further, in a recent decision involving a request for a waiver of fees by an inmate who sought records from an office of a district attorney, it was held that an agency may assess a fee in accordance with the Freedom of Information Law, notwithstanding the inmate's status as an indigent person [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Therefore, irrespective of your status, I believe that the Office of the District Attorney is authorized by the Freedom of Information Law to charge for photocopying in accordance with section 87(1)(b)(iii) of the Freedom of Information Law.

Lastly, under the circumstances, it appears that a representative of the agency should have informed you of the amount of the fee for duplicating the records sought in order to enable you to remit the appropriate amount.

In an effort to encourage the agency to accept the fee and provide the records, a copy of this opinion will be forwarded to Mr. Burstein, the person who initially responded to your request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Ernest Burstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6306

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 26, 1990

Mr. Anthony Dixon
86-A-4087
135 State Street
P.O. Box 618
Auburn, NY 13024-9000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dixon:

I have received your letter, which reached this office on October 5.

You wrote that you seek to obtain information "on the exact day a person was incarcerated in a county jail in 1986 and his day of release". You also expressed interest "in knowing the day(s) he was produced for a court appearance within a set 8 day period". In addition, you asked that I review a sample letter or request that you attached to your letter.

In this regard, based upon your letter, it is assumed that the individual who is the subject of your request was incarcerated in a county jail outside of New York City and that his court appearances occurred during the period of his incarceration at the county jail. Based upon those assumptions, I direct your attention to section 500-f of the Correction Law, which states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what and by whom committed, how and when discharged, trade or occu-

> pation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the officer of the keeper."

It would appear that the information sought would be included in the daily record described above.

With respect to the proposed form of your request, I offer the following comments.

First, although you referred to the federal Freedom of Information Act, that act pertains only to records maintained by federal agencies. Rights of access to records maintained by state and local agencies in New York are governed by the Freedom of Information Law and other applicable state statutes.

Second, 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.

Third, pursuant to section 87(1)(b)(iii) of the Law, an agency may charge up to twenty-five cents per photocopy, unless a statute other than the Freedom of Information Law authorizes a different fee. Further, unless a statute authorizes a fee for searching for records, no such fee may be assessed under the Freedom of Information Law.

Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law and contains a sample letter of request that may be useful to you.

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-6307

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 27, 1990

Mr. Javier Osorio
88-A-2565
Mid-State Correctional Facility
Marcy, New York 13403-2500

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Osorio:

I have received your letter of October 2.

You wrote that you requested a particular record from the New York City Police Department on or about July 25. The receipt of the request was acknowledged, but you received no further response. As such, you appealed what you characterized as a "no-decision" on [your] request, but the appeal has not been answered.

You have asked for assistance in the matter. In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 encourage the Department to respond to your request promptly, a copy of this letter will be forwarded to its appeals officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Susan R. Rosenberg, Assistant Commissioner, Civil Matters

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6308

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1990

Mr. Bill Martin
[redacted]

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Martin:

I have received your letter of October 4, as well as the materials attached to it.

Your inquiry concerns requests for records directed to a variety of agencies and a court. The requests, as I understand the matter, pertain to events that occurred years ago. Although it appears that you might have been the subject of a complaint or allegation you were apparently never charged.

You have requested assistance in the matter. In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law is applicable to agency records, and 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 upon the foregoing, the Freedom of Information Law generally pertains to records maintained by entities of state and local government, including law enforcement agencies. However, the courts and court records fall outside the requirements of the Freedom of Information Law. Further, since your correspondence refers to a request for grand jury testimony, I point out that grand jury proceedings are secret in accordance with the provisions of 190.25 of the Criminal Procedure Law.

Second, the Freedom of Information Law, when applicable, pertains to existing records. Section 89(3) of that statute provides in part that an agency need not create a record in response to a request. Several responses to your requests indicate that the agencies in receipt of requests maintain no records falling within the scope of your requests, or that records had been destroyed. In short, if the records sought do not exist, the Freedom of Information Law, in my view, would not be applicable.

Third, you wrote that certain agencies "refuse to answer." It is unclear whether your assertion involves a failure to respond to requests made under the Freedom of Information Law, or a refusal to answer questions. In the case of the latter, the Freedom of Information Law does not require that agency officials provide information by responding to questions. As indicated above, the Freedom of Information Law pertains to existing records, and I believe that agencies are required to respond to requests for existing records in accordance with the direction provided in the Law. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

The remaining issue appears to involve access to police blotters. In this regard, 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.

Some police agencies 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. Nevertheless, I believe that blotter entries identifying persons arrested should generally be disclosed.

Although the Freedom of Information Law is based upon a presumption of access, several grounds for denial may be relevant concerning rights of access to police blotters and investigative materials. 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). Further, if a person has been charged with a crime, and the charges are later dismissed in favor of the accused, the records pertaining to the event may often be sealed pursuant to section 160.50 of the Criminal Procedure Law. In such cases, even though an investigation might have ended, the records relating to the investigation might nonetheless become confidential.

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, 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 records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Although the resolution of the issue is unclear, a police blotter as described in Sheehan might be characterized as a record prepared 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. For example, if an investigation has ended, disclosure would not interfere with the investigation. However, certain aspects of the records, such as those portions that identify confidential sources, might justifiably be withheld.

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.

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. If that is so, section 87(2)(g) could not, in my opinion, be asserted as a basis for denial. Investigative reports might include opinions or recommendations made by police officers. Those portions of the reports could, in my view, be withheld under section 87(2)(g).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Chief of Police, Village of Lyons
Steven R. Sirkin, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6309

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1990

Mr. Alexander Couret
88-A-9712
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. Couret:

I have received your letter of October 1, which reached this office on October 9.

Your inquiry concerns your ability to obtain copies of your pre-sentence reports. 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 the sentencing 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-6310

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1990

Mr. Stanley A. Schwartz
Attorney at Law
49 Charles Street
New York, New York 10014

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schwartz:

I have received your letter of October 31, as well as the materials attached to it.

Your inquiry pertains to the New York City Loft Board, which, according to your letter, conducts "administrative proceedings for harassment and/or diminution of services." You added that you have been "advised that the hearings and the Board's deliberations are open to the general public."

You have requested an advisory opinion concerning whether "the Board's harassment records and files are open for review by a non-party."

In this regard, I offer the following comments.

First, the attachment to your letter consists of "Regulations for Internal Board Procedures," and section III of those regulations pertains to meetings of the Board. In short, that provision indicates that meetings will be held in accordance with the Open Meetings Law, but that the Board may conduct executive sessions to the extent permitted by that statute. It also refers to public hearings conducted by the Board. Further, section IV pertains to minutes of meetings in a manner consistent with the Open Meetings Law and specifies that public hearings "shall be electronically recorded" and shall be available to the public.

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, insofar as the contents of records have been effectively disclosed or, for example, introduced as evidence or as exhibits during a meeting or hearing held open to the public, the records would be available, for none of the grounds for denial could be appropriately asserted. I point out that it has been held that a tape recording of an open meeting of a public body is a "record" [see Freedom of Information Law, section 86(4)] that must be disclosed [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978]. Similarly, in the context of a criminal proceeding where the issued involved records maintained by a district attorney, it has been held that "...while statements of the petitioner, his co-defendents and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL..., 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" [Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Also of possible significance is Herald Company v. Weisenberg [59 NY 2d 378 (1983)] in which the Court of Appeals held that administraive proceedings are presumptively open to the press and, by implication, the public. Since the proceeding at issue in that case was closed, the Court directed that the transcript of the hearing be disclosed after enabling the parties to have an opportunity to be heard concerning the possibility that aspects of the transcript might be withheld upon a showing of "compelling reasons."

Third, the foregoing should not be construed to suggest that all "records and files" in the areas of your interest must of necessity be disclosed. I am unfamiliar with the records maintained by the Board that may relate to its meetings or proceedings. However, some of those records, or perhaps portions of the records, might justifiably be withheld.

For instance, records submitted to the Board that are not reviewed, used or disclosed at its public proceedings might contain personal information identifiable to the parties or others, and it is possible that disclosure of some aspects of those records might constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, sections 87(2)(b) and 89(2)(b)].

There may also be communications between officials of the Loft Board, or between officials of that agency and other agencies, that are not disclosed at public proceedings but which 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 re- flective of opinion, advice, recommendation and the like could in my view be withheld. Internal memoranda that contain advice or recommendations would fall within the ambit of section 87(2)(g).

Also of possible significance is section 87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." When legal advice is given to the Board by its attorneys, records containing that advice would, in my view, be subject to the attorney-client privilege, so long as the privilege is not waived, which is embodied by statute in section 4503 of the Civil Practice Law and Rules. Insofar as the privilege applies, I believe that records would be confidential pursuant to section 4503 and, therefore, exempted from disclosure by statute under section 87(2)(a) of the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Counsel, New York City Loft Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1836
FOIL-AO-6311

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1990

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 October 3 in which you raised the following questions:

> "(1) May a public body, zoning board of appeals for instance, conduct a meeting with no one person designated as clerk to take minutes?
>
> (2) May a tape recorder be used in absence of a clerk?
>
> (3) Must the tape recording be reduced to a written form?
>
> (4) Must the tape recording be permanently retained and by whom if so?
>
> (5) What are the requirements to obtain a record (or recording) of the meeting?
>
> (6) May the tape recording be used as the official record of the meeting?"

In this regard, I offer the following comments.

To put the issues in perspective, the Open Meetings Law does not specify who must prepare minutes. However, the Open Meetings Law requires that public bodies prepare minutes in accordance with section 106 of the Law. That provision prescribes what might be characterized as minimum requirements concerning the contents of 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 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 need not consist of a verbatim account of what is stated at a meeting. Rather, at a minimum, minutes must in my opinion consist of a record or summary of all motions, proposals, resolutions, action taken, the date and the vote of the members of a public body.

I believe that it is common for a clerk or a public body to tape record meetings as an aid in the preparation of minutes. While a tape recording would likely contain the elements of minutes, minutes should in my opinion be reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, a municipality might need a permanent written record readily accessible to

municipal officials who must refer to or rely upon the minutes in the performance of their duties. I point out, too, that 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).

With respect to access, the Freedom of Information Law is applicable to all 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."

If the tape recordings are produced by and for a municipality, I believe that they would constitute "records" subject 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, NYLJ, December 27, 1978].

Lastly, it is noted 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 with the Commissioner's consent. Having contacted the Education Department, I have been informed that tape recordings of meetings must be retained for a period of four months after transcription and/or approval of minutes.

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-6312

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 30, 1990

Mr. George B.Kozol
American General Life Insurance
Company
P.O. Box 1456
Syracuse, New York 13201-1456

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kozol:

I have received your letter of October 5 in which you inquired concerning the extent to which "criminal histories of individuals" are available under the Freedom of Information Law. You referred to certain opinions on the matter in which inconsistent points of view were offered.

In this regard, by way of background, the central repository of criminal history information is the New York State Division of Criminal Justice Services (DCJS). It had been the contention of this office that conviction records, which are accessible from the courts in which the proceedings were conducted, should be accessible under the Freedom of Information Law from DCJS or a municipality, for example, that maintains those records. Nevertheless, in Capital Newspapers vs. Poklemba, (Supreme Court, Albany County, April 6, 1989), based upon a review of the legislative history of the statutes under which DCJS performs its duties, it was held that those statutes are intended to exempt criminal history records maintained by DCJS from public disclosure. As such, the database containing criminal history information was found to consist of records that are specifically exempted from disclosure by statute in conjunction with section 87(2)(a) of the Freedom of Information Law.

Further, although DCJS and law enforcement agencies share criminal history information, it is my understanding that those agencies abide by a "dissemination agreement" with DCJS in which the agencies agree to withhold criminal history information that is obtained from the DCJS database.

In short, while conviction records may be obtained directly from the courts where the convictions occurred, criminal history records maintained by or obtained from DCJS are, based upon the decision cited earlier, exempted from disclosure under section 87(2)(a) of the Freedom of Information Law.

Enclosed for your review is a copy of Capital Newspapers v. Poklemba.

I hope that 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-6313

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 30, 1990

Mr. Randolph D. Dotson
90-C-0704 S.H.U. B-17
P.O. Box 501
Attica, NY 14011-0501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dotson:

I have received your letter of October 2, which reached this office on October 10.

According to your letter, you have attempted to obtain your "P.K. card, chronological event sheet and Superintendent's hearing tapes and witnesses' testimony" from your facility. Nevertheless, you wrote that your requests have not been answered.

You have sought assistance in the matter. In this regard, I offer the following comments.

First, the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that a request for records kept at a correctional facility should be directed to the facility superintendent or his designee.

Second, the Freedom of Information Law provides direction concerning the time within which an agency must respond to a request. Specifically, section 89(3) of the Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

For future reference, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

Lastly, while I am unfamiliar with contents 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. Enclosed for your review is a copy of the Freedom of Information Law.

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-6314

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 30, 1990

Ms. Beth A. Osterman
[redacted]

The staff of the Committee on 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. Osterman:

I have received your correspondence, which reached this office on October 11.

As I understand the materials, you have directed a series of requests pursuant to the Freedom of Information Law to the district manager of VESID in Binghamton. You have sought from VESID "a copy of [your] file, a list of each item, and signed notarized statement this is [your] complete file". The requests have not been fulfilled, and you are seeking assistance in the matter.

In this regard, I offer the following comments.

First, I am unfamiliar with VESID and, therefore, it is unclear whether VESID is subject to the requirements of the Freedom of Information Law. It is emphasized 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."

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local government; it does not apply to private firms or to entities that are not instrumentalities of government. In short, if VESID is not an "agency", it is not required to comply with the Freedom of Information Law.

Second, assuming that VESID is an agency, I point out that the Freedom of Information Law provides direction concerning the time within which an agency must respond to a request. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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, the Freedom of Information Law generally pertains to existing records, and section 89(3) states in part that an agency need not create a record in response to a request. Therefore, if VESID is an agency but maintains no "list of each item" contained in your file, it would not be obliged to prepare such a list on your behalf. Further, although an agency is not required to prepare a "notarized statement" as you requested, section 89(3) also states that, when a copy of a record is made available, the agency shall "certify to the correctness of such copy if so requested".

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. Without knowledge of the contents of the records, I cannot advise with certainty as to rights of access. However, enclosed are copies of the Freedom of Information Law and "Your Right to Know", which describes the Law in detail.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Richard Andrus, District Manager, VESID

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1838
FOIL-AO-6315

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 30, 1990

Ms. Rosalie Peplow
Town Clerk
Town of Lloyd
Town Hall
12 Church Street
P.O. Box 897
Highland, NY 12528

The staff of the Committee on 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. Peplow:

I have received your letter of October 8 in which you wrote that the Town of Lloyd recently created a Board of Police Commissioners.

You asked how the Open Meetings Law applies to the Board concerning:

> "1. Notice of meetings and location.
>
> 2. Minute keeping and who is responsible for taking minutes.
>
> 3. Public access to these records or does this come under confidentiality of police records?"

In this regard, I offer the following comments.

First, section 150 of the Town law deals with the establishment of town police departments. Subdivision (2) of that provision states in relevant part that:

> "The town board of a town in which such a police department has been established at any time by resolution may establish a board of police

> commissioners for such town and appoint one or three police commissioners who shall at the time of their appointment and throughout their terms of office be owners of of record of real property in and electors of such town, and who shall serve without compensation, and at the pleasure of the town board. If the town board shall appoint only one such police commissioner, it shall in addition designate two members of the town board to serve as members of such police commission."

Based on the foregoing, a police commission is established by a town board and consists of three members.

Second, 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."

In my view, each of the conditions necessary to conclude that a police commission is a public body can be met. As indicated earlier, a police commission is an entity consisting of three members. It is required to conduct its business by means of a quorum pursuant to section 41 of the General Construction Law. A police commission clearly conducts public business and performs a governmental function for a public corporation, which, in this instance, is the Town. Further, the definition of "public body" includes not only a governing body, such as a town board; it also includes reference to any committee, subcommittee "or similar body of such body". Since a town police commission is a creation of a town board, I believe that it is a "similar body", and a public body subject to the Open Meetings Law in all respects.

Second, section 104 of the Open Meetings Law prescribes notice requirements applicable to public bodies and states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place should be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the Law states that:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example,

the Board has the capacity to hold its meetings in a first floor room that is accessible to handicapped persons rather than a second floor room, I believe that the meetings should be held in the room that is most likely to accommodate the needs of people with handicapping conditions.

Fourth, while the Open Meetings Laws does not specify the person responsible for preparing minutes, that statute 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). If no action is taken during an executive session, minutes of the executive session need not be prepared. 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.

Lastly, records of a Board of Police Commissioners are subject to rights conferred by 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.

I point out that the first ground for denial, section 87(2)(a), enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute is section 50-a of the Civil Rights Law. That statute, which pertains to police and correction officers, states in part in subdivision (1) that: "All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency...shall be considered confidential and not subject to inspection or review with the express written consent of such police officer...except as may be mandated by lawful court order." Further, in interpreting section 50-a of the Civil Rights Law, the Court of Appeals, the state's highest court, found that the purpose of section 50-a "was to prevent release of sensitive personnel records that could be used in litigation for the purposes of harassing or embarrassing correction officers" [Prisoners Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 193 (1988)]. I believe that the intent is the same with respect to personnel records concerning police officers.

In addition, although it has been held in several cases that a final determination indicating a finding of misconduct on the part of police officers is public [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); and Town of Woodstock v. Goodson-Todman Enterprises, Ltd. v. Town of Woodstock, 505 NYS 2d 540 (1986)], in situations in which charges or allegations have been dismissed, it has been advised that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to section 87(2)(b) 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

FPPL-AO-114
FOIL-AO-631b

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1990

Mr. Robert Rodonis
88-T-1543
P.O. Box 149
Attica, NY 14011

Dear Mr. Rodonis:

I have received your letter of October 9 in which you requested guidance concerning the Freedom of Information Law generally, and with respect to medical and "personal" records in particular.

In this regard, there are several statutes that may be relevant to your inquiry. The first, the Freedom of Information Law, is applicable to agency records, and section 86(3) of that statute defines the term "agency" broadly 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, municipal and state agencies are subject to the Freedom of Information Law. A private hospital, for example, would not be required to comply with 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. Since I am unfamiliar with the nature or contents of the records in which you are interested, I cannot offer specific guidance concerning the extent to which they are available under the Law. However, requests for records should be made to the "records

access officer" at the agency or agencies that you believe maintain the records that you are seeking. The records access officer has the duty of coordinating an agency's response to requests. If you are seeking records from the Department of Correctional Services, the regulations promulgated by that agency under the Freedom of Information Law indicate that a reguest for records kept at a correctional facility should be made to the facility superintendent or his designee. In addition, it is emphasized 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 (i.e., names, dates, descriptions of events, identification or indictment numbers, etc.) to enable agency officials to locate the records. A request for records pertaining to you, without more, would not likely meet the standard of reasonably describing the records sought.

Also of potential relevance is the Personal Privacy Protection Law, which is generally applicable to state agencies, and section 92(1) of the Personal Privacy Protection Law defines "agency" for the purposes of that statute to mean:

> "any state board, bureau, committee, commission, council, department, public authority,. public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based upon the foregoing, municipal agencies are not subject to the requirements of the Personal Privacy Protection Law.

Further, although section 95(1) of the Personal Privacy Protection Law generally grants rights of access to records to a person to whom the records pertain, section 95(7) provides that rights of access "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by section 92(8) to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of 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, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty-seven-a, eight hundred thirty-seven-b, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

As such, although the Personal Privacy Protection Law applies to records maintained by state agencies, such as the Department of Correctional Services, rights of access conferred by that law do not include records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement of persons in correctional facilities.

With respect to medical records maintained by an agency, 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.

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, including those maintained by hospitals or physicians, 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 can-

not be photocopied, unless otherwise provided by a statute other than the Freedom of Information Law. There is nothing in the Freedom of Information Law that pertains specifically to the waiver of 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 inability to pay."

I point out that there are no judicial decisions of which I am aware that deal with whether fees for medical records maintained by a correctional facility should be properly assessed under the Freedom of Information Law or 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

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations adopted by the Department of Correctional Services pursuant to 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

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1839
FOIL-AO-6317

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1990

Mr. Carmen A. Pallozzi, 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. Pallozzi:

I have received your correspondence of October 2, which reached this office on October 12.

The materials indicate that on September 6, your wife submitted a request to the records access officer of the Town of Queensbury for minutes of Town Board meetings held on April 2 and April 9. You added that you believe that at its meeting of April 9, the Board approved a resolution affecting real property that you own. Despite your request, you indicated that the resolution has not been disclosed to you.

You have requested assistance in the matter. In this regard, I offer the following comments.

First, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. It is noted that section 106 of that statute provides what might be characterized as minimum requirements concerning the contents of minutes. More specifically, the cited provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> "2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and the 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, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain, and that they must include resolutions or summaries of resolutions adopted by a public body.

Further, while the Open Meetings Law does not require that minutes be approved, it is recognized that many public bodies routinely, or as a matter of policy, review minutes prepared by a clerk, for example, and officially vote to approve them. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes are unapproved, 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.

Second, if, for example, the minutes merely summarize a resolution, I believe that the resolution would likely be available in its entirety under 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.

Although one of the grounds for denial may be relevant, due to its structure and specific language, that provision would require that a resolution be disclosed. 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. In my view, a resolution adopted by a public body constitutes a final agency determination that is accessible under section 87(2)(g)(iii) of the Freedom of Information Law.

Lastly, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my

opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 law, copies of this opinion will be forwarded to the records access officer and the Town Board.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer
Town Board, Town of Queensbury

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6316

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1990

Roy Esiason, Supervisor
Town of Granville
East Main Street
Granville, NY 12832

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Supervisor Esiason:

As you are aware, I have received your letter of October 12 and the materials attached to it.

By way of background, on September 24, you requested the following records from the Warren-Washington Industrial Development Agency (hereafter "the Agency"):

> "1) Ledger(s) that account for all money spent on the Adirondack Resource Recovery Associates Facility.
>
> 2) Ledger(s) that account for arbitrage income derived from the sale of the 1984 Bonds and how that money was disbursed.
>
> 3) The document that authorized the Foster-Wheeler loan of $1,500,000 to the Warren-Washington Industrial Development Agency."

The Director of the Agency responded on September 28, stating that:

> "(1) The Agency does not maintain ledgers which show the expenditures for the Adirondack Resource Recovery Project. Such records are maintained by the Trustee, The Bank of New York;

> (2) The Agency does not maintain ledgers that account for arbitrage income; and
>
> (3) The agency did not borrow money from Foster Wheeler Corporation and, specifically, the Agency did not borrow $1,500,000 from Foster Wheeler Corporation nor has it agreed to pay Foster Wheeler $1,500,000."

In view of that response, you submitted a second request in which you suggested that the Bank of New York maintains records for the Agency as its agent, and in which you sought "records" rather than "ledgers" pertaining to arbitrage income derived from the sale of bonds associated with the project referenced in the request. In addition, you alluded to a meeting held by the Washington County Board of Supervisors that you attended, as a member, during which the loan was discussed and an assertion made that documentation authorizing the loan would be made available to you. Nevertheless, the documentation has not been disclosed.

You have sought assistance in the matter. In this regard, I offer the following comments.

First, section 856 of the General Municipal Law describes the organization of industrial development agencies, and subdivision (2) of that provision states that such an agency "shall be a corporate governmental agency constituting a public benefit corporation". Based upon the definition of "agency" appearing in section 86(3) of the Freedom of Information Law, an industrial development agency is, in my view, clearly subject to the requirements of the Freedom of Information Law. Further, section 890-c of the General Municipal Law specifically established the "Counties of Warren and Washington Industrial Development Agency".

Second, the Freedom of Information Law pertains to agency records, and section 86(4) of that statute 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" subject to rights of access granted by the Law. 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.).

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).

I am unaware of any judicial decisions that deal with facts similar to those involving the first aspect of your request, where it is contended that records concerning a governmental entity, such as the Agency, are not maintained by the entity. In this instance, it was stated that certain records concerning "expenditures for the Adirondack Resource Recovery

Project" are maintained by a bank, rather than the Agency. However, the definition of "record" includes not only documents that are maintained by an agency; it refers to documents are that are "kept, held, filed, produced or reproduced by, with or for an agency." Under the circumstances, it appears that the records sought, although in the physical possession of a bank, are kept and produced for the Agency.

In my view, if the Agency's assertion is proper, that records involving financial transactions are not available because records are kept on its behalf by the bank rather than by the Agency, the public would have lesser rights of access to records pertaining to those transactions than with respect to records of other governmental entities due solely to the fact that the Agency uses a bank to maintain certain records. The absence of rights of access based upon the Agency's contention would effectively defeat the purpose of the Freedom of Information Law.

Although different from the instant situation, an analogy might be made between this case and the judicial interpretation of the Freedom of Information Law concerning records prepared by outside consultants retained by agencies. Even though consultants or consulting firms may be private entities rather than governmental entities, it has been found that the records prepared by those entities or firms for an agency should be treated as if they were prepared by an agency. As stated by the Court of Appeals:

> "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)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed in the same manner as a record prepared by the staff of an agency. I would contend that a consultant's report, information "produced for" an agency, would fall within the scope of the Freedom of Information Law even if it is in the physical possession of a consultant rather than the agency. Any other conclusion would, in my opinion, serve to negate the effect of the decision rendered by the Court of Appeals.

In the situation at hand, while a bank may maintain records concerning transactions in which the Agency is involved, it would appear that such records are kept, held and produced for the Agency. If that is so, the records would be subject to the Freedom of Information Law even though they may not be in the agency's physical possession. Further, assuming that documentation kept for the Agency by a bank constitutes "records", in response to a request for the records, I believe that the Agency would be obliged to acquire the records or copies in order to comply with the Freedom of Information Law.

Third, with regard to the remaining aspects of your request, viewing the Freedom of Information Law from an historical perspective, I point out that the Law as originally enacted required an applicant to seek "identifiable" records [see original Freedom of Information Law, section 88(6)]. That standard resulted in difficulty and, in some cases, impossibility, when applicants could not name or identify records with specificity. However, when the original Freedom of Information Law was repealed and replaced with the current statute, which became effective in 1978, the standard for making a request was altered. Under section 89(3) of the current Freedom of Information Law, an applicant must "reasonably describe" the records sought. Further, it has been held that a request reasonably describes the records when the agency can locate the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

As you did in your second letter, it is suggested that requests need not specify documents sought as "ledgers", for example. Often an agency might maintain records containing information equivalent to what might be characterized as a ledger, but which is not called a ledger by the agency. For instance, rather than referring to ledgers in item 1 of your request, a request might involve records reflective of monies spent on the Adirondack Resource Recovery Associates facility.

Fourth, assuming that an appropriate request is made and that the Agency can locate the records sought, I believe that the records would be available. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Ledgers, books of account and similar records reflective of the expenditure or receipt of public monies would constitute "intra-agency materials" falling within the scope of section 87(2)(g), which is one of the grounds for denial. However, due to the structure and specific language of that provision, it often provides significant rights of access. Section 87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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 opinion, the records described in this paragraph would likely consist solely of "statistical or factual tabulations or data" that would be available pursuant to section 87(2)(g)(i).

With respect to the request relating to the loan, your request involved the "document that authorized..." a loan. While the Director of the Agency indicated that the Agency did not borrow money from a particular firm, his remarks on the subject were not responsive to the request. Although I am unfamiliar with the issues, there might have been an authorization to borrow, but the loan might never have been made. If indeed there

was such authorization, and if there is a document that so indicates, I believe that it would be available as a final agency determination that must be disclosed pursuant to section 87(2)(g)(iii), even though the transaction might not have been consummated.

Further, if in response to a request, an agency indicates that it does not maintain the record sought, a certification to that effect may be requested pursuant to section 89(3) of the Freedom of Information Law. That provision states in relevant part that, upon request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". In addition, while I am not suggesting that it would be applicable, it is noted that section 89(8) of the Freedom of Information Law 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."

Lastly, in a decision cited earlier, the Court of Appeals discussed the scope and intent of the Freedom of Information Law and found that:

> "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).
>
> "...For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester-Rockland Newspapers, supra, at 579].

To be consistent with the intent of the Freedom of Information Law and its broad interpretation by the state's highest court, I believe that the Agency should give effect to the Law so as to "extend public accountability wherever and whenever feasible."

In an effort to enhance the understanding of the Freedom of Information Law, a copy of this opinion will be sent to the Director of the Agency.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Raymond Waterhouse, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6319

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1990

Ms. Georgette Gonzales-Snyder
Associate Director/Counsel
New York State Office for the Aging
2 Empire State Plaza
Albany, New York 12223

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Gonzales-Snyder:

I have received your recent letter, which concerns "the disclosure of names and address labels or lists of various persons and organizations maintained by the State Office for the Aging."

According to your letter:

> "The State Office for the Aging's general policy has been to disclose names and address labels or lists to any requester so long as they assure us that they will not be using such labels or lists for commercial or fund raising purposes in accordance with Sections 87(2)(b) and 89(2)(b)(iii) of the Public Officers Law."

You added, however, that a question concerning the policy has been raised by Victoria A. Graffeo, Chief Counsel to the Assembly Minority, who indicated that a regional office of the Assembly recently received campaign literature attached to a publication prepared by the Office for the Aging entitled "Aging News". One of the issues she raised involves the possibility that the Freedom of Information Law might have been violated by disclosing such a mailing list. Having reviewed the materials that you for-

warded, one page contains a message to "Older New Yorkers" suggesting that help be given to re-elect the Governor. A second page consists of a letter prepared by "Victory '90" which includes a request for volunteers.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all 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."

Based on the foregoing, mailing lists constitute "records" subject to the rights of access.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, there is only one ground for denial of possible relevance. Section 87(2)(b) 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 those examples states that an unwarranted invasion of personal privacy includes:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [section 89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal inconsistency in the Freedom of Information Law. As a general matter, the reasons for which a request is made or an applicant's potential use of records would be irrelevant, and it has been held that if records are accessible, they 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)]. However, due to the language of section 89(2)(b)(iii), the intended use of a list of names and addresses is relevant, and case law indicates that an agency can ask why a list of names and addresses has been requested [see Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980)].

In some instances, lists identify people; in others, lists identify entities; in some cases, lists might pertain to both persons and entities. Based upon the language of the Freedom of Information Law and its judicial interpretation, as well as the Personal Privacy Protection Law, the provisions pertaining to privacy apply to records that identify natural persons. As such, I believe that lists that identify entities, for example, would be available to anyone, irrespective of the intended use of records (see also, ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989).

Third, assuming that the mailing list in question was disclosed or requested under the Freedom of Information Law to a political committee, for example, I believe that, under the circumstances, it would have been available under the Law. The request unquestionably did not involve a commercial use. I point out that the phrase "fund-raising" as it appears in section 89(2)(b)(iii) of the Freedom of Information Law was considered by the Court of Appeals in Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Department [73 NY 2d 92 (1989)]. The agency in that case did not claim that the request, which was submitted by a not-for-profit corporation, was made for any commercial use. Rather, it was contended that the solicitation of membership dues constitutes a fund-raising activity. In upholding the agency's denial, the decision stated as follows:

> "We reject petitioner's argument - relying on [Matter of New York Teachers Pension Assn. v. Teachers' Retirement System, 71 AD 2d 250, 256, 422 NYS 2d 389; and New York Veteran Police Assn. v. New York City Police Dept., 92 AD 2d 772, 459 NYS 2d 770, supra] - that seeking membership dues to promote the aims of a nonprofit organization is different from directly soliciting contributions. It is the purpose of the solicitation which matters, not what it is called, the manner or form in which it is presented to the solicitees, or the incidental benefits available to those who make payment - as, for example, in the case before us, the receipt of the organization's bi-monthly newspaper or free legal advice in firearms licensing

> cases. If, as is unquestionably true here, dues received are intended to support the general activities of the organization and to further its over-all objectives, the solicitation activity is fund-raising" (id. 96, 97).

In my view, the Court's construction of the term "fund-raising" relates to efforts to solicit or raise money, for the language of the decision refers to "contributions", "payment" and "dues". While the materials attached to your letter involve an attempt to seek support and volunteers, there is no reference to any monetary contribution. If that is so, no "fund-raising" purpose was involved.

In sum, I believe that the policy of the Office for the Aging is consistent with the Freedom of Information Law. Further, if the list in question had been requested under the Freedom of Information Law for the purposes described herein and in conjunction with the purposes set forth in the materials attached to your letter, the Office for the Aging would have been obliged, in my opinion, to disclose it.

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-6320

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1990

Mr. Willie Wade
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Wade:

I have received your letter of October 8, which concerns a request for records directed to the Commission of Correction.

The request involved an incident report, and you were informed by the Commission's records access officer that the report had been "purged". You raised a series of questions concerning that action, but you indicated that you have not received responses to your satisfaction.

You asked that I investigate the matter. In this regard, I offer the following comments.

I have discussed the matter with the Commission's records access officer, Mr. Stephen DelGiacco. He informed me that the incident report in which you are interested was prepared years ago and has subsequently been destroyed. Although he could not indicate the exact date when the report in question was destroyed, he informed me that incident reports are generally kept for a period of two years and that the Commission disposes of those report pursuant to section 57.05 of the Arts and Cultural Affairs Law. That statute pertains to requirements concerning the preservation and disposal of records maintained by state agencies. In brief, the State Archives, a unit of the State Education Department, in consultation with agencies, prepares schedules which indicate minimum retention periods for particular classes of records. By means of the schedules, agencies can routinely and regularly dispose of records. Again, in this instance, the minimum retention period for the incident report had been reached and it was apparently destroyed in conjunction with the appropriate schedule and in accordance with law.

I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law specifies that an agency need not create a record in response to a request. Therefore, under the circumstances, since the incident report in which you are interested no longer exists, I do not believe that the Freedom of Information Law would be applicable.

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-6321

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 1, 1990

Mr. Leonard Hutcherson
88-B-0515
P.O. Box 51
Comstock, NY 12821

Dear Mr. Hutcherson:

I have received your letter of October 30 in which you requested copies of your "supervision history record" from this office.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice with respect to the Freedom of Information Law. The Committee does not maintain possession of records generally, such as inmates' supervision history records, nor is it empowered to compel an agency to grant or deny access to records. In short, this office cannot provide the records requested because this office does not possess those records.

As a general matter, a request for records should be directed to the agency that maintains the records in which you are interested. In this instance, the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that a request for records kept at a correctional facility may be made to the facility superintendent or his designee. Further, 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.

Lastly, assuming that records are available under the Freedom of Information Law, an applicant may inspect them at no charge. However, if copies are requested, an agency may charge up to twenty-five cents per photocopy [see Freedom of Information Law, section 87(1)(b)(iii)].

I hope that the foregoing clarifies your understanding of the use 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-6322

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 1, 1990

Mr. John Cortese
85-A-3014
Box 618
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 Mr. Cortese:

I have received your recent letter, which reached this office on October 15. You wrote that you have made a number of requests for records from "various agencies" and Prisoners' Legal Services. As of the date of your letter, you indicated that you have neither received replies to those requests nor denials of the requests.

Having reviewed the correspondence attached to your letter, you requested a disbursement form concerning the purchase of prescription eye glasses, as well as information concerning to you in conjunction with medical, mental health and dental records, as well as "all records of New York Division of Parole, and all records of criminal history, police departmental, or Federal Bureau of Investigation".

You have requested assistance in the matter. In this regard, I offer the following comments.

First, to put the issues in perspective, it is noted initially that the Freedom of Information Law pertains to agency records, and that 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."

Based upon the foregoing, the Freedom of Information Law applies to records maintained by entities of state and local government in New York. I do not believe that Prisoners' Legal Services is a governmental entity. Therefore, I do not believe that its records are subject to the requirements of the Freedom of Information Law.

Second, a request should be directed to the agency that maintains the records in which you are interested. 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 kept at a correctional facility should be made to the facility superintendent or his designee. Further, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain adequate detail to enable agency officials to locate and identify the requested records. Due to the breadth of certain aspects of your request, it is questionable whether those requests met the standard of reasonably describing the records sought. In addition, it is likely that requests for police department records or those of the Federal Bureau of Investigation should be directed to those agencies. It is also noted that the Federal Bureau of Investigation is not subject to the New York State Freedom of Information Law, but rather the federal Freedom of Information Act.

Third, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my

opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)]. As you may be aware, the person designated to determine appeals by the Department of Correctional Services is Counsel to the Department.

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 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 In- formation 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.

Further, it appears that the governing statute concerning access to medical records 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

Similarly, 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, New York 12229. I believe that requests for records maintained by other mental health facilities should be directed to those facilities. I point out that under section 33.16, there are certain limitations on rights of access.

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-6323

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 1, 1990

Ms. Doris R. Culver
[redacted]

The staff of the Committee on 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 October 11 in which you requested advice concerning the Freedom of Information Law.

In brief, your inquiry focuses on a request for records directed to the Town of Schodack for "any and all records or portions thereof pertaining to the property situate in the Town of Schodack, commonly known as the Kittle/Culver property..." In the request, you also asked that the records access officer indicate that records disclosed "are the complete records relating to this request."

Although various records, all of which were apparently maintained by the building inspector, were disclosed, your daughter questioned whether the response was complete. Ms. Buckbee, a Town employee, indicated that the file from the building inspector's office was the "only one we know of." You wrote, however, that you know of other records that the Town maintains and, therefore, withheld, and that you "have reason to believe that other records surely must exist in the Town..."

In this regard, I offer the following comments.

First, in my opinion, a problem may involve the breadth and generality of your request. Viewing the Freedom of Information Law from an historical perspective, I point out that the Law as originally enacted required an applicant to seek "identifiable" records [see original Freedom of Information Law, section 88(6)]. That standard resulted in difficulty and, in some cases, impossibility, when applicants could not name or

identify records with specificity. However, when the original Freedom of Information Law was repealed and replaced with the current statute, which became effective in 1978, the standard for making a request was altered. Under section 89(3) of the current Freedom of Information Law, an applicant must "reasonably describe" the records sought. Further, it has been held that a request reasonably describes the records when the agency can locate the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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 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).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as 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.

In the context of your request, it is possible that, due to its general nature, the person who responded knew of the existence and was able to locate only those records that were disclosed. Under the circumstances, if you believe or have knowledge that the Town maintains records other than those disclosed,

it is suggested that you submit a second request that contains more detail than the initial request. Such a request might include reference to names, dates, descriptions of events and other information that would be relevant to Town officials' capacity to locate the records in which you are interested. It is also suggested that you discuss the matter with the records access officer, who has the responsibility to coordinating the Town's response to requests and assisting you in identifying the records sought, if necessary [see 21 NYCRR Section 1401.2(b)].

Lastly, if in response to a request, an agency indicates that it does not maintain the record sought, a certification to that effect may be requested pursuant to section 89(3) of the Freedom of Information Law. That provision states in relevant part that, upon request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." In addition, while I am not suggesting that it would be applicable, it is noted that section 89(8) of the Freedom of Information Law 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."

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: Town Clerk, Town of Schodack

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6324

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 2, 1990

Mr. Kyle Davis
85-A-3056
Geen Haven Correctional Facility
Drawer B
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Davis:

I have received your letter of October 15 in which you wrote that requests made under the Freedom of Information Law to the Legal Aid Society have not been answered. You have requested assistance in the matter.

In this regard, I offer the following comments.

It is noted at the outset that the Freedom of Information Law pertains to records maintained by agencies. The term "agency" is 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."

It is my understanding the there are a variety of entities within New York that use the name "Legal Aid Society". Some are a part of the federal Legal Services Corporation, some may be private, not-for-profit corporations, and some may be parts of units of local government. While legal aid societies which are agency of

local government may be subject to the Freedom of Information Law, it appears that most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to the Law.

Since I am unfamiliar with the specific status of the Legal Aid Society in question, I cannot offer specific guidance regarding rights of access to its records. However, I would conjecture that it is a corporate entity separate and distinct from government, that it is not an "agency" subject to the Freedom of Information Law and that, therefore, the records in which you are interested is outside the scope of public rights of access.

In view of the foregoing, it is suggested that you discuss the matter 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-6325

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 2, 1990

Ms. Elizabeth Gonsiorek
[redacted]

Dear Ms. Gonsiorek:

I have received your letter of October 27 in which you asked "what kind of information is available under the FOI and the cost involved". You expressed particular interest concerning information that you may obtain "about a public school".

In this regard, your general inquiry, which involves what kind of information is available under the Freedom of Information Law, cannot be effectively answered due to the structure of the Law. Rather than specifying the records that are available, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, a school district is clearly an "agency" required to comply with the Freedom of Information Law.

With respect to fees, unless a statute other than the Freedom of Information Law specifically authorizes the assessment of a different fee, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing other records, i.e., those that cannot be photocopied. In addition, assuming that records are available under the Law, they may be inspected free of charge.

Enclosed for your consideration 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.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1843
FOIL-AO-6326

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 5, 1990

Mr. John McCarty
Superintendent
Brunswick Common School District
George Washington School
Menemsha 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. McCarty:

I have received your letter of October 17, as well as the materials attached to it. At the direction of the Board of Trustees of the Brunswick Common School District, you are seeking advice concerning two requsts made by Mr. Salvatore Clemente.

In the first letter, which is dated October 11, Mr. Clemente requested the following under the Freedom of Information Law:

> "1. List of active teachers with corresponding salaries and years of service.
>
> 2. List of aides with corresponding salaries, years of service and job description.
>
> 3. Superintendent's salary and years of service."

The second request, which is dated October 15, involves:

> "1. A copy of each teacher's job description.

> 2. List of benefits for each teacher, aides, superintendent and other school personnel. Who pays for these benefits and how much? (Please list by person.)
>
> 3. List of other school personnel with wages and years of experience.
>
> 4. Tuition amount for students outside the school district.
>
> 5. Copies of all School Board minutes and correspondence from June 1989 through present. This should include the report and/or facts which led to the decision regarding the salary increases for the teachers.
>
> 6. What are the guidelines for determining the need for a teacher's aide and who determines this?"

In this regard, I offer the following comments.

First, to put the matter in perspective, it is noted at the outset that, despite its title, the Freedom of Information Law is not a vehicle that requires agency officials to answer questions, provide interpretations or prepare records in response to requests. Rather, it is a statute that requires agencies to respond to requests for records. Further, the Freedom of Information Law is applicable to existing records, and an agency is not generally required to create or prepare records in response to a request. Section 89(3) of the Freedom of Information Law states in part that:

> "Nothing in this article shall be construed to require and entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

While government officials may answer your questions or prepare records in an effort to respond to questions, the Freedom of Information Law does not, in my opinion, require them to do so. Therefore, if, for example, there is no "list of teachers with corresponding salaries and years of service," I do not believe that the District would be obliged to prepare such a list in order to satisfy the request.

Second, of some significance concerning the information sought is paragraph (b) of subdivision three of section eighty-seven [87(3)(b)], for that provision represents an exception to the general rule that agencies need not create records. Specifically, 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..."

As such, various elements of Mr. Clemente's requests would be satisfied by disclosure of the payroll record required to be maintained and disclosed pursuant to section 87(3)(b) of the Freedom of Information Law. Further, while there may be no separate lists of teachers or aides and their salaries, all employees must be identified by name, title and salary in the payroll record.

Third, assuming that records sought under the Freedom of Information Law exist, 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.

In my view, two of the grounds for denial may be relevant to the records sought. However, due to the language of the Freedom of Information Law and its judicial interpretation, it appears that, perhaps with one exception, the records must be disclosed.

Since some of the records sought identify public employees, it is noted that 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". 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); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Powhida v. City of Albany, 147 AD 2d 236 (1989); 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].

In my view, records indicating job descriptions, years of service and the like would be available, for those kinds of records are clearly relevvant to the performance of public employees' duties. I point out that records of a more personal nature relating to attendance, records indicating the dates of sick leave claimed by a particular employee, have been found to be available under the Freedom of Information Law [see Capital Newspapers v. Burns, supra].

The other ground for denial of likely significance is section 87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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 records indicating the amount of tuition paid by students outside the District (without identifying details pertaining to students) would consist of factual information available under section 87(2)(g)(i). Guidelines, policies and similar records would in my opinion be available under section 87(2)(g)(iii).

With respect to benefits accorded to teachers and others, it is assumed that informaiton of that nature would be contained within employment contracts or collective bargaining agreements that would constitute public records.

Item 5 of the second request involves "school board minutes and correspondence" that would include a "report and/or facts which led to the decision regarding the salary increases for the teachers." While minutes of meetings are available, documents leading to a determination might include opinions and recommendations, and I believe that those portions of such records could be withheld under section 87(2)(g).

Lastly, with specific regard to minutes, 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

> 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 execurtive 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). If no action is taken, there is no requirement that minutes of an executive session be prepared. 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 (9175); 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, except in rare circumstances in which a statute permits or requires such a vote. Therefore, it is likely rare that a school board will have prepared minutes of its executive sessions.

In an effort to enhance his understanding of the issues, a copy of this opinion will be sent to Mr. Clemente.

I hope that 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: Salvatore Clemente

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6327

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 5, 1990

Mr. Perry Tillman
89-A-5230
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. Tillman:

I have received your recent letter, which reached this office on October 22.

You have requested advice concerning your unsuccessful efforts in obtaining records from the Saratoga County District Attorney, the Saratoga Springs Police Department, and apparently the court in which you were convicted.

In this regard, I offer the following comments.

First, since you referred to discovery as well as the Freedom of Information Law, I point out that although both are vehicles under which records might be disclosed, they are different. In general, records may be made available in discovery because of one's status as a litigant or defendant. A request under the Freedom of Information Law, however, may be made by any person, and rights accorded by that statute are conferred upon the public. One's status as a litigant has no bearing upon that person's rights as a member of the public when seeking records under the Freedom of Information Law [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Second, 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 upon the foregoing, the courts and court records, which may be available under other provisions of law, are not subject to the Freedom of Information Law. However, 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., Barrett v. Morgenthau, 74 NY 2d 907, (1989); Moore v. Santucci, 543 NYS 2d 103, 151 AD 2d 677 (1989); 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)]. In addition, it is clear that a municipal police department 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. Since I am unfamiliar with the contents of the records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 appli-

cable 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 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.

Records prepared by employees of a police department or the office of a district attorney, or records transmitted between those agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Next, you referred to a request to the Saratoga Springs Chief of Police in which you requested a "list of materials to which you are entitled as a matter of law". In this regard, the Freedom of Information Law pertains to existing records, and 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. Therefore, if no list exists, the agency would not be obliged to prepare such a list in response to a request made under the Freedom of Information Law.

Lastly, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests and appeals. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In

such a circumstance, I believe that the denial 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, 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, 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Wait, District Attorney
Kenneth E. King, Jr., Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1844
FOIL-AO- 6328

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 5, 1990

Harry S. Zappler, D.D.S.
[redacted]

The staff of the Committee on 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. Zappler:

I have received your letter of October 20, as well as the materials attached to it.

As I understand the matter, some time ago, you requested minutes of meetings of various committees of the Seneca County Legislature. Soon after the request was made, the County Administrator informed you that the person who would ordinarily disclose the minutes was on vacation. As of the date of your letter to this office, you had received no further response to the request. You also contended "no or insufficient meeting announcements" are given prior to meetings of the Board and its committees.

In this regard, I offer the following comments.

First, with respect to committees consisting of members of public bodies, by way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in section 102(2) to include:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as committees of the Board, would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total members of a body (see e.g., General Construction Law, section 41). As such, in the case of a committee consisting of three, for example, a quorum would be two.

Second, the Open Meetings Law pertains to all meetings of public bodies. Section 102(1) of the Law defines the term "meeting" as "the official convening of a public body for the purpose of conducting public business", and the state's highest court has held that any time a quorum of the members of a public body gathers for the purpose of discussing public business, such a gathering is a "meeting" subject to the Open Meetings Law,

whether or not there is an intent to take action and irrespective of the manner in which the gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd. 45 NY 2d 947 (1978)]. Consequently, in my view, with respect to the application of the Open Meetings Law, there is no distinction between a regular meeting, a special meeting or a work session, for example.

Third, with respect to notice of meetings, section 104 of the Open Meetings Law provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place should be given to the news media (at least two) and to the public by means of posting in one or more designated public locations, not less than seventy-two hours hours prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations. Further, the notice requirements apply equally to all public bodies, including the Board and the committees in question.

Fourth, with respect to minutes of meetings, 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, if during a meeting of a public body, including committees, there are motions, proposals, resolutions or votes taken, those activities must, in my opinion, be memorialized in minutes and generally must be available to the public.

Lastly, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests for records. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 Open Meetings Law, a copy of this opinion will be forwarded to Mr. Deming, the person to whom you directed your request.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Raymond K. Deming, Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6329

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 6, 1990

Mr. Richard Biller
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Biller:

I have received your letter of October 9, as well as the materials attached to it.

Your inquiry deals with requests directed to the New York City Department of Building concerning violations and related documentation relating to the use of air conditioners in the building where you reside. In an attempt to learn more of the matter, I contacted the Department of your behalf. According to Ms. Linda Stein, a major difficulty in responding to your requests involves the lack of clarity of the requests. She indicated that many records have been made available to you, that you have refused to view some records that were produced, that permits are required in some cases but not in others, and that in some instances, it may be all but impossible to locate records. She also expressed a willingness to disclose records if you could clearly indicate the records in which you are interested.

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 relevant part that an agency need not create a record in response to a request. Based upon my conversation with Ms. Stein, the Department does not maintain records concerning some aspects of your requests. If that is so, the Department would not be obliged by the Freedom of Information Law to prepare records in order to satisfy your request.

Second, section 89(3) of the Freedom of Information Law also 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 a 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 non-identifiability 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. According to Ms. Stein, the Department's record-keeping system might not enable officials to locate or retrieve some of the records in which you may be interested.

In sum, it is my view that the Department seeks to comply with the Freedom of Information law and is willing to disclose records that can be located to the extent required by law. It is suggested under the circumstances that you submit a new request, and that you attempt to clarify as directly and concisely as possible the records in which you are interested. Again, the problem appears to involve the agency's inability to ascertain specifically the records that you seek.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Linda Stein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6330

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 9, 1990

Ms. Norma Schmucker
[redacted]

The staff of the Committee on 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. Schmucker:

I have received your letter of October 20, as well as the materials attached to it.

Your inquiry involves requests made to the East Islip School District. One was made in September and involved a "warrant report". Another was made on October 12 and involved a "list of repairs and renovation projects being added to the budget". In response to the requests, you were advised that the District "will not have the information you requested for quite some time as our staff is short handed and the information has to be located".

In this regard, I offer the following comments.

First, as you may be aware, 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. It is unclear whether the information sought exists or existed in the form of a record or records at the time your requests were made. If no record or records falling within the scope of your request had been prepared, the Freedom of Information Law would not, in my view, require the District to create new records on your behalf.

Second, insofar as it pertains to existing records, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, section 89(3) states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael J. Capozzi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6331

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 9, 1990

Ms. Judy L. Bray
Clerk Treasurer
Village of Mohawk
Mohawk Municipal Building
28 Columbia Street
Mohawk, New York 13407

The staff of the Committee on 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. Bray:

I have received your letter of October 23. You indicated that Mayor Eisenhut of the Village of Mohawk requested an advisory opinion concerning access to building permits, "even if there is a pending case in court."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, it has consistently been advised that permits or licenses and similar, related kinds of records are available to the public, even though they identify particular individuals, firms or perhaps premises. From my perspective, various activities require permits or licenses due to some public interest in ensuring that individuals or entities are qualified to engage in certain activities, or meet certain standards, such as building codes. I believe that permits, licenses and similar records should be available, for they are intended to enable the public to know that an individual has met appropriate requirements to be

engaged in an activity that is regulated by government or in which the government has a significant interest. Further, I do not believe that any of the grounds for denial could appropriately be asserted to withhold building permits.

Third, with respect to records prepared in the ordinary course of business, rights conferred by the Freedom of Information Law are not altered by one's status as a litigant or potential litigant or because records may be related to litigation. As stated by the Court of Appeals, the state's highest court: "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, which is a disclosure device that may be used by litigants. Perhaps the most commonly used discovery mechanism is Article 31 of the Civil Practice Law and Rules (CPLR). 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 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public rights 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 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.'" [id. at 80].

Based upon the foregoing, I believe that the pendency of litigation would not affect rights of the public under the Freedom of Information Law to records that were prepared in the ordinary course of business, notwithstanding use of those records in 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6332

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 13, 1990

Mr. M.Y. Gray
[redacted]

Dear Mr. Gray:

Your letter of November 7 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to advise with respect to the Freedom of Information and Open Meetings Laws.

You have requested "forms" or instructions needed to use the Freedom of Information Law. In this regard, the Freedom of Information Law, section 89(3), and the regulations promulgated by the Committee (21 NYCRR 1401.5), which have the force of law and govern the procedural aspects of the Law, 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 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 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 a failure to use such a form 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.

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.

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-6333

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 13, 1990

Mr. Dwayne Gosso
DIN, 88-T-0506
Wende Correctional Facility
P.O. Box 1187
Alden, New York 14004

Dear Mr. Gosso:

I have received your letters of October 30 and November 7, both of which are addressed to Governor Cuomo and the Committee on Open Government.

In this regard, the Committee on Open Government is a unit of the Department of State that is authorized to provide advice concerning access to government records. It is noted that the Committee on Open Government does not maintain records generally. Further, this office cannot compel an agency to grant or deny access to records.

As I understand your first letter, you have a brother who is confined at a correctional facility who has the addresses of your mother and other family members, and it appears that you want to obtain those addresses. Here I point out that the Freedom of Information Law pertains 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."

It is unclear whether the facility, which is an agency, maintains the information sought. If it does not, the Freedom of Information Law does not apply. However, if your brother has the addresses in question, it is suggested that you write directly to him for the purpose of seeking the information.

Enclosed is a copy of "Your Right to Know," which describes the Freedom of Information Law in detail.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

Enclosure

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL AO - 115
FOIL AO-6334

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 14, 1990

Mr. M. Robinson
The Counsil for Civil Rights
158 Lyell Avenue
Rochester, New York 14608

The staff of the Committee on Open 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:

Your letter addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to advise with respectr to the Personal Privacy Protection Law and the Freedom of Information Law.

According to your letter, although you referred to the Personal Privacy Protection Law, you wrote that you made a request under the Freedom of Information Law for records relating to an investigation of the McCarthy Business Institute to Mr. Richard Haag of the Bureau of Proprietary School Supervision at the State Education Department. Requests were also made to the Department of Veterans Affairs and the Federal Information Center. You indicated further that you have not received appropriate responses to those requests.

In this regard, I offer the following comments.

First, a request made under the Personal Privacy Protection Law involves a situation in which an individual, a "data subject," seeks information pertaining to himself or herself from a New York State agency. Since your requests involve records pertaining to an entity, the McCarthy Business Institute, I do not believe that the Personal Privacy Protection Law would be applicable or relevant.

Second, the New York 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."

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government, including the State Education Department. The Department of Veterans Affairs and the Federal Information Center are federal agencies. Therefore, they are not subject to the State Freedom of Information Law. I believe, however, that they are required to comply with the federal Freedom of Information Act (5 U.S.C. section 552).

Third, I have contacted Mr. Haag on your behalf. In brief, I was informed that the Department has disclosed to you its records that fall within the scope of your requests, that Mr. Haag discussed your complaint with your attorney, and that the McCarthy Business Institute has closed.

If you could indicate which records you believe might have been withheld, perhaps I could provide guidance. However, under the circumstances, it does not appear that records were withheld. In addition, Mr. Haag suggested that you communicate with him if you believe that records have been withheld.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Mr. Haag

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6335

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 14, 1990

Ms. Colleen Cohen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Cohen:

I have received your letter of November 1 in which you questioned a policy adopted by the Board of Education of the Crown Point Central School District.

Attached to your letter is correspondence from the Superintendent who wrote that, pursuant to "Board Policy," "a separate application is required for each item requested" under the Freedom of Information Law. You asked that I provide the Superintendent with regulations and other materials that "will aid in expediting the process."

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law that limits the number of records that may be sought in a single request. Section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records requested. Further, in the leading decision on the matter, the Court of Appeals, the State's highest court, held that an applicant meets the standard of "reasonably describing" the records when the agency can locate and identify the records sought [see Konigsberg v. Couglin, 68 NY 2d 245 (1986)]. It is noted that in Konigsberg, the agency contended that the request failed to reasonably describe the records due to its breadth. However, agency personnel were able to locate approximately 2,300 pages of material, and the Court held that the requirement of reasonably describing the records was met, despite the volume of records falling within the scope of the request.

Based upon the foregoing, I do not believe that an agency by means of policy may require the submission of a "separate application for each item requested." Further, in my view, which is based upon the language of the Freedom of Information Law and its judicial interpretation, there is no limitation upon the scope of a request, so long as it reasonably describes the records sought.

Second, although it is unknown whether the ensuing remarks are pertinent, I point out that neither the Freedom of Information Law nor the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) make reference to any particular form or application to be used when requesting records. 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)]. 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 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 a failure to use such a form 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.

Enclosed are copies of the Freedom of Information Law, the Committee's regulations and "Your Right to Know," which describes the Law in detail. Copies of those materials and this opinion will be forwarded to the Superintendent.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

cc: Philip H. Dorn, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

F 6336

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 16, 1990

Mr. Leroy H. Bolder
85-A-0848
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. Bolder:

I have received your letter of October 9, which reached this office on October 22.

Your inquiry relates to requests for records pertaining to yourself from your correctional facility, as well as requests to correct certain records maintained by officials of the Division of Parole. You asked that this office "evaluate" your requests and offer an opinion concerning the subject matter of the requests.

In this regard, I offer the following comments.

The first request attached to your letter involves disciplinary action taken against you and criminal history records, and you asked that fees for copies be waived. It does not appear that you received a response to the request. Here I direct your attention to the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law, which specify that "personal history data" and the "DCJS" report, which is a criminal history record, is available to inmates. Requests should generally be made to the facility superintendent.

Further, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)]. As you may be aware, the person designated to determine appeals for the Department of Correctional Services is Counsel to the Department.

The second request attached to your letter involved records maintained by the Coordinator of Alternative Regressional Treatment. The correspondence indicates that arrangements would be made for you to obtain the records sought. Therefore, the issue appears to have been resolved.

The third request involves an attempt to correct or expunge certain records pertaining to you. The records in question appear to be maintained by the Senior Parole Officer at your facility, and an attorney for the Division of Parole wrote that

he instructed the parole officer to discuss the disputed items with you and to correct errors as appropriate. As such, that issue appears to have been resolved as well.

I point out that the Freedom of Information Law deals with the disclosure of records; it does not confer a right to amend or correct records. However, the regulations promulgated by the Department of Correctional Services, sections 5.50 to 5.54, contain procedures under which an inmate may challenge the accuracy of information contained in the personal history or correctional supervision history portions of inmate records. It is suggested that you review those provisions at your facility library.

Lastly, the Freedom of Information Law is silent with respect to fee waivers, and an agency may charge up to twenty-five cents per photocopy pursuant to section 87(1)(b)(iii) of the Law, notwithstanding an inmate's indigency [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

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 6337

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 20, 1990

Mr. Clyde Duncan
90-A-4963
Sing Sing Correctional Facility
354 Hunter Street
Ossining, New York 10562-5442

Dear Mr. Duncan:

I have received your recent letter in which you appealed a denial of access to records by the Office of the Public Defender of Rockland County.

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 cannot compel an agency to grant or deny access to records, nor is it empowered to render a determination on an appeal.

The provisions concerning an appeal are found in section 89(4)(a) of the Freedom of Information Law which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to 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 record sought."

As such, an apeal may be made to the head or governing body of an agency or that person or body's designee, rather than to the Committee on Open Government.

It is noted, however, that the regulations promulgated by the Committee on Open Government require that a letter of denial must inform an applicant of the right to appeal, which apparently did not occur in this instance [see 21 NYCRR section 1401.7(b); also Barrett v. Morgenthau, 74 NY 2d 907 (1990)].

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 6338

152 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 26, 1990

Mr. Dana S. Day
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Day:

As you are aware, I have received your letter of October 25. Please accept my apologies for the delay in response.

You inquiry concerns rights of access to records indicating actual earnings of employees of the Town of Milton. You added that you requested copies of "W-2's" following the deletion of "confidential information," but that your request was denied.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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.

Second, 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." 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].

With respect to W-2 forms, I believe that portions of those forms could justifiably be withheld as an unwarranted invasion of personal privacy, such as employees' social security numbers, home addresses and net earnings. However, those portions identifying a public employee and that person's gross wages, would, in my opinion, be accessible, for those items are clearly relevant to the performance of one's official duties. As such, in response to a request for those records, I believe that an agency would be obliged to make copies, from which various portions of the records could be deleted to protect against an unwarranted invasion of personal privacy.

In similar situations, in an effort to simplify the process of complying, it has been suggested to agency officials that a stencil could be made and placed over the forms so that only gross wages and the names of employees appear when photocopies are made.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Town Clerk, Town of Milton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6339
OML-AO-1849

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 26, 1990

Hon. Vernon Benjamin
Supervisor
Town of Saugerties
Town Hall
Saugerties, New York 12477

<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 Supervisory Benjamin:

I have received your thoughtful letter of October 21. Please accept my apologies for the delay in response.

You have raised a series of questions regarding events that have occurred in the Town of Saugerties.

The first involved a situation in which you sought the opinions of Board members prior to an agreement to delay the initiation of litigation, and you indicated that you assumed responsibility for the delay. However, you wrote that:

> "After the meeting, over beers at a local bar, the four other members of the board (with me absent) agreed to ask the town attorney to proceed with the filing. The next day, a letter was dated from the town attorney asking what direction the town board wanted him to go on the issue of filing the petition (he already knew that he was not to file, unless there was a statutory deadline problem, as a result of my actions). On the following day, a letter was dated and signed by the four

> board members, with a blank line presumably for my signature; this letter was not delivered to the attorney until six days later. I did not see the letter before the attorney did, nor was I given an opportunity to sign or to review the matter; a copy was left on my desk on the same day."

In conjunction with the foregoing, you asked whether you "acted correctly" in delaying the suit; whether seeking the opinions of Board members was appropriate; and whether there is a mechanism for seeking opinions "outside a formal town board meeting, executive session or otherwise."

The second involves your authority as supervisor vis a vis that of the Board. You wrote that your predecessor "rarely made decisions without consulting the board, first, usually be telephone but also by scheduling meetings with little or no notice. You have sought to make certain administrative decisions independently.

In this regard, you raised the following questions:

> "Can the town supervisor make decisions by calling around to the individual board members and getting their approvals?
>
> "Can I bring them in for informal meetings to fill them in on my activities or on other administrative activities within the government?
>
> "Would you please provide the details as to the proper way to go about scheduling a meeting, including notification requirements or recommendations? (We have a daily newspaper, a daily 'Saugerties News' spot on the local radio station, two additional radio stations, and two weeklies that cover Saugerties news.)
>
> "What is the town clerk's role in scheduling meetings?"

The third situation involves the preparation of the budget, and you raised the following issues:

> "Granted, some aspects of the budget (salaries, for instance, or specialized police costs) are executive session material by nature, but aren't we able to treat the entire tentative budget as a nonlegal document and therefore intra-agency by nature?
>
> "Are we acting properly in our review of the tentative budget? If it is treated as intra-agency or executive session by nature, do we have to publicize, meet, and then go into executive session?"

In my view, there are certain common principles that likely are applicable to each of the three situations that you described.

However, it is noted initially that the Committee on Open Government is authorized to advise with respect to the Open Meetings Law and the Freedom of Information Law. Whether you may make decisions unilaterally as town supervisor or whether certain actions may be taken only by the Town Board represent issues that arise under the Town Law. It is suggested that you review section 29 of the Town Law, which pertains to the powers and duties of the supervisor, as well as section 64, which is entitled "General powers of town boards."

Second, it is is emphasized that 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)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "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 dealt with the characterization of meetings as "informal," stating 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.)

Based upon the direction given by the courts, if a majority of the Board gathers to discuss Town business, in their capacities as Board members, any such gathering, in my opinion, would have constituted a "meeting" subject to the Open Meetings Law.

Third, 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 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. Therefore, it is reiterated that notice must be provided prior to all meetings, regardless of whether the meetings are considered formal or otherwise. The duty to provide notice under the Open Meetings Law is imposed upon public bodies, and there is no requirement of which I am aware that pertains to a clerk's responsibility to provide notice of meetings. I believe, however, that a town board, by resolution, could designate the clerk as the person responsible for providing notice.

Viewing the issue from a somewhat different vantage point, it is questionable in my opinion whether the Board could have voted or otherwise taken action during the gathering of four members you described, even though the four members represented a majority of the Board, without first informing all of the members that a meeting would be held. Here I direct your attention to section 41 of the General Construction Law, which, since 1909, has imposed certain requirements concerning a quorum upon public bodies. 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 of 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."

I believe that the provision quoted above permits a public body to perform and exercise its duties only at a meeting conducted by a quorum of the body, a majority of its total membership, and only by means of an affirmative vote of a majority of its total membership. Although a majority of the membership of the Board

was present at the gathering in question, an additional condition, in my opinion, is that "reasonable notice" of a meeting must be given to all of the members. Stated differently, under section 41 of the General Construction Law, a public body may carry out its powers and duties only at a meeting held upon reasonable notice to all the members. Absent such a requirement, the members of a public body constituting a majority might effectively preclude other members from participating in the body's deliberative process, thereby negating the capacity of those members to offer their points of view.

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 or a meeting held by means of a telephone conference, would in my opinion violate the Law.

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.

Further, the legislative declaration of the Open Meetings Law, section 100, 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 sum, while I believe that Board members may consult with one another by phone, I do not believe that the Board could validly conduct meetings by means of telephone conferences or make collective determinations by means of telephonic communications.

With respect to a discussion of 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)]. 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 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" (id. at 841).

Moreover, with regard 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 the 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, to be discussed during the executive session.

> Only through such an identification will the purpose 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," for example, is inadequate. As indicated in the decision cited above, the motion should refer to the particular lawsuit under discussion.

Fourth, the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are not necessarily consistent. Your comments concerning the tentative budget appear to be based upon an assumption that it consists of intra-agency material that can be withheld and that, therefore, a discussion relating to that record may be held in executive session. If those are your assumptions, I respectfully disagree based upon the ensuing analysis.

The application of the Freedom of Information Law is expansive, for it pertains 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."

Based upon the foregoing, any documentation or information "in any physical form whatsoever" that is "kept, held, filed, produced or reproduced by, with or for" an agency, such as a town, would constitute a "record" subject to rights conferred by the Law. I point out, too, that the definition of "record" has been construed by the State's highest court as broadly 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)].

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 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. The phrase quoted in the preceding sentence indicates that a single record might contain both accessible and deniable information. That phrase, in my view, imposes an obligation upon agency officials to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

While a tentative budget could be characterized as "intra-agency materials" falling with the scope of section 87(2)(g) of the Freedom of Information Law, due to the structure of that provision, the contents of those materials determine the extent to which they must be disclosed or may be withheld.

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 ground for denial may properly 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.

The Court of Appeals in Xerox Corporation v. Town of Webster, specified that the contents of inter-agency or intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principal may be exempt form 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" [65 NY 2d 131 at 133 (1985)].

Therefore, insofar as a tentative budget consists of "statistical or factual tabulations or data," I believe that it would be available. Other aspects of that document, such as opinions explaining the need for an appropriation, could in my opinion be withheld.

Lastly, as suggested earlier, if a quorum of the Board gathers to discuss the budget, such a gathering would, in my opinion, constitute a "meeting" subject to the Open Meetings Law in all respects. Like the Freedom of Information Law, 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 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.

Most issues involving the preparation of a budget or the expenditure of public monies must, in my opinion, be discussed in public, for none of the grounds for entry into an executive session would be applicable.

Of possible significance, however, is section 105(1)(f), which permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

While issues relative to a budget might have an impact upon personnel, those issues often relate to personnel by department or as a group, for example, or the function of a position. To the extent that discussions of the budget involve considerations of policy relative to the expenditures of public moneys, I do not believe that there would be any legal basis for entering into an executive session [see e.g., Orange County Publications v. City of Middletown, the Common Council of the City of Middletown, Sup. Ct., Orange Cty., December 6, 1978; Orange County Publications v. County of Orange, Legislature of the County of Orange and the Rules, Enactments and Intergovernmental Relations Committee of the County Legislature, Sup. Ct., Orange Cty., October 26, 1983.

On the other hand, to the extent that a discussion focuses upon a particular person in terms of that person's performance (i.e., whether that person performed well or poorly and merited an increase or a cut in salary), that portion of the meeting could, in my view, be properly conducted during an executive session pursuant to section 105(1)(f).

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-6340

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 27, 1990

Mrs. Arlene D. Gerenstein
[redacted]

Dear Mrs. Gerenstein:

I have received your letter of November 19 in which you requested information relating to your husband, who is incarcerated, and his "sentence structure."

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not maintain records generally, such as those in which you are interested, nor is it empowered to compel an agency to grant or deny access to records.

As a general matter, a request for records should be directed to the agency in possession of the records. In the case of Department of Correctional Services, its regulations promulgated under the Freedom of Information Law indicate that a request for records kept at a correctional facility should be made to the facility superintendent or his designee. I point out further that section 89(3) of the Freedom of Information Law states 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.

Enclosed are copies of the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law and "Your Right to Know," which includes a sample letter of request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6341

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 27, 1990

Mr. Clyde Duncan
90-A-4963
Sing Sing Correctional Facility
354 Hunter Street
Ossining, New York 10562-5442

Dear Mr. Duncan:

I have received your recent letter in which you appealed a denial of access to records by the Department of Probation of Rockland County.

In this regard, as indicated in a recent letter to you, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee cannot compel an agency to grant or deny access to records, nor is it empowered to render a determination on an appeal.

The provisions concerning an appeal are found in section 89(4)(a) of the Freedom of Information Law which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to 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 record sought."

As such, an apeal may be made to the head or governing body of an agency or that person or body's designee, rather than to the Committee on Open Government.

It was also indicated, however, that the regulations promulgated by the Committee on Open Government require that a letter of denial must inform an applicant of the right to appeal, which apparently did not occur in this instance [see 21 NYCRR section 1401.7(b); also Barrett v. Morgenthau, 74 NY 2d 907 (1990)].

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-6342

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 27, 1990

Mr. Matthew Villano
80-A-4557
P.O. Box 338
Napanoch, New York 12458

Dear Mr. Villano:

I have received your letter of November 19 concerning a partial denial of access to records by the Office of the Queens County District Attorney. The denial to which you referred was rendered by Daniel McCarthy, who forwarded a copy of his determination to this office. You have appealed Mr. McCarthy's denial and requested that this office conduct "a complete investigation on this case..."

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to determine appeals or conduct what could be characterized as an investigation.

The provision concerning the right to appeal 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 record the reasons for further denial, or provide access to the record sought."

Having reviewed Mr. McCarthy's correspondence with you, it appears that you appealed to him following a denial by the records access officer. If that is so, I believe that you have exhausted your administrative remedies and may, should you choose to do so, bring a proceeding for review of Mr. McCarthy's determination under Article 78 of the Civil Practice Law and Rules in accordance with section 89(4)(b) of the Freedom of Information Law.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Daniel McCarthy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1634

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 28, 1990

Mr. W. Burton Richardson, Director
Monroe County Department of Social
Services
111 Westfall Road
Rochester, New York 14620

The staff of the Committee 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. Richardson:

As you are aware, I have received your letter of October 10. Please accept my apologies for the delay in response.

According to your letter, the Monroe County Department of Social Services is developing an "Elderly Data Base" in conjunction with the Community Coalition for Long Term Care (CCLTC) consisting of utilization and expenditure data pertaining to medical services provided under Medicare and Medicaid programs for persons 65 years and older. Although data identifiable to clients is confidential, questions have arisen concerning disclosure of the remaining data, particularly when one provider seeks information concerning another. Specifically, you raised the following questions:

> "1. Would a provider of medical services who asked for the reports of other providers have a right to receive them?
>
> 2. Would we be required under the Freedom of Information Law to provide copies of reports that give utilization or financial payment data of medical providers to anyone else if that provider did not want the information shared?

> 3. Would CCLTC or the Department of Social Services have a responsibility to notify providers if information about their facility was requested?"

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 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. The phrase quoted in the preceding sentence indicates that a single record or report, for example, may contain both accessible and deniable information. That phrase also imposes an obligation upon an agency 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 might properly be withheld, an agency may be required to disclose the remainder of the record.

Second, it has been held in a variety of contexts that records accessible under the Freedom of Information Law must be made equally available to any person, without regard to status or interested [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984); also Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Therefore, if data is available under the Law, one provider would have the right to obtain data pertaining to another provider. Moreover, the Court of Appeals, the State's highest court, has held that a promise of or request for confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may be appropriately asserted, records sought must be disclosed [see Washington Post v. NYS Insurance Department, 61 NY 2d 557, 567 (1984); also Johnson Newspaper Corp. v. Call, 115 AD 2d 335 (1985)].

Third, I believe that two of the grounds for denial are relevant to determinations concerning rights of access to the records in question. One of those provisions, however, due to its structure, would require disclosure. 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, 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. Under the circumstances, the information in question would apparently consist solely of statistical or factual data. Therefore, unless certain aspects of the data may be withheld under a different ground, I believe that the data must be disclosed.

The other ground for denial of potential significance is section 87(2)(d), which enables an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

Insofar as the data pertains to not-for-profit entities, it is doubtful in my view that section 87(2)(d) would apply, for I do not believe that those entities could be characterized as "commercial enterprises." Insofar as the data pertains to profit-making entities, the issue involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of those entities. If, for example, the data could be used to ascertain the value of an entity's property or involves significant financial information, it might be contended that certain of the data might, if disclosed, cause substantial injury to its competitive position.

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.).

In my view, the nature of the records and the area of commerce in which profit-making entities are involved would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of the firms. Therefore, the proper assertion of section 87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entities to which the records relate.

I point out, too, that in the event of challenge to a denial of access to records, the agency would have the burden of defending a denial in a judicial proceeding [see Freedom of Information Law, section 89(4)(b)]. Having discussed the matter with representatives of the State Departments of Health and Social Services, and in view of the records that those agencies maintain and disclose, it would be rare, in my opinion, that records could properly be withheld under section 87(2)(d).

Lastly, there is no requirement in the Freedom of Information law that providers be notified when a request for data about those providers has been made. This is not to suggest that they could not be notified, but rather that there is no requirement to do so. In some instances, if there is a possibility that section 87(2)(d) could be asserted, it may be worthwhile to contact a provider to attempt to ascertain the effects of disclosing the data in terms of the possibility of competitive harm.

I hope that 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-6344

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 3, 1990

Mr. John Brown
84-A-6723
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, New York 10990-0900

Dear Mr. Brown:

I have received your letter of November 24, which involves a request for records of the District Attorney of Bronx County.

According to your letter, your request made under the Freedom of Information Law was denied, but you were not given the name and address of the person to whom an appeal may be made. You have requested that information from this office.

In this regard, I offer the following comments.

First, the provision pertaining to the right to appeal a denial of access to records, section 89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I am unaware of whether the District Attorney determines appeals, or whether he has designated a person within his office to do so on his behalf. As such, it is suggested that your appeal to the District Attorney, specifying that if he does not

determine appeals, your appeal should be forwarded to the appropriate person. The address for the Office of the Bronx County District Attorney is 215 E. 161st Street, Bronx, New York 10451.

Second, it has been held that when an agency fails to inform an applicant of the availability of an administrative appeal, the applicant may be deemed to have exhausted his administrative remedies and may initiate a judicial proceeding for review of a denial [see Barrett v. Morgenthau, 74 NY 2d 907 (1989)].

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-0345

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 3, 1990

Mr. Leonard Finkel
[redacted]

Dear Mr. Finkel:

I have received your letter of November 26 in which you referred to a denial of a request that was affirmed on appeal by Laura D. Blackburne, Chair of the New York City Housing Authority.

By way of background, you wrote that you were not permitted to return to your job in May of 1988 and that the Authority "hired detectives" to talk with and follow you. You have sought guidance concerning "how to go to court or to some other authority to resolve the problem".

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. Insofar as your inquiry pertains to your request made under the Freedom of Information Law, since the request was denied on appeal, you have exhausted your administrative remedies. As such, if you choose to do so, pursuant to section 89(4)(b) of the Freedom of Information Law, you may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

With respect to other issues relating to the matter, it is suggested that you confer with your attorney or, if you belong to a union, with representatives of the union.

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-1634

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 4, 1990

Ms. Theresa Lonergan
[redacted]

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Ms. Lonergan:

I have received your letter of October 25 in which you raised issues concerning the extent to which a member of the public may inspect records under the Freedom of Information Law.

By means of example, you wrote that, in an effort to review records pertaining to a "given project", it may be difficult for a citizen to know the number or nature of vouchers issued in payment of the project, how many have been paid, or to whom monies have been paid. Further, in conjunction with a project, there may be bid or employment documents, requisition records, minutes and similar documentation relating to the project. In that kind of situation, you wrote that the public "cannot easily designate what it is they want by number, or anything else, without first inspecting the file". Consequently, you asked whether a member of the public is permitted to "examine or inspect from the file drawer, if that member of public is not intrusive, destructive, or otherwise out of order". Similarly, you questioned whether a person may inspect the records in the office that houses the file drawer or whether the appropriate public official is allowed to "bring you the file drawer".

In this regard, there is no unequivocal response that I can offer. While the Freedom of Information Law clearly requires an agency to permit a member of the public to inspect the kinds of records to which you referred, there may be a variety of considerations relevant to the issue. If, for example, all of the records concerning a particular project are kept in one file or file drawer, it would likely be efficient and easy for both the member of the public and the agency to enable the individual to inspect the contents of the file or file drawer. However, in

other instances, the file drawer might contain a variety of records, many of which do not pertain to the project (i.e., vouchers may be filed in chronological order rather than by project). Further, records concerning a project may be filed in a variety of locations within an office or offices of a municipality. In that circumstance, it may be inappropriate to permit a member of the public to browse through records in an effort to find those of interest. In addition, as you may be aware, the Local Government Records Law (Article 57-A, section 57.25) requires that local officials retain custody of records. In my view, while a municipal official is obliged to permit the public to inspect accessible records in order to comply with the Freedom of Information Law, reasonable steps may be taken to ensure that the agency maintains custody and control of its records.

In short, as suggested at the outset, the nature of a request, the location of records and the means by which records are filed have a bearing upon the issue that you raised.

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-6247

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 4, 1990

Mr. David 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 November 29, which pertains to the "free flow of information in both the state and federal government."

It is your view that the public would be better served if all state publications "were put on CD and distributed directly from each state agency to all state libraries" and that accessible records should be available in public libraries. You also contend that state officials generally do not comply with the Freedom of Information Law "unless there are compelling reasons to do so."

In this regard, first, having served as a delegate to the Governor's Conference on Library and Information Services, which occurred last week, several resolutions dealt with the issues with which you are concerned. The results of delegates' votes on the resolutions likely have not yet been tabulated. However, I believe that they will be tabulated shortly. If you would like to obtain copies of the resolutions that were approved, it is suggested that you write to Marian Crounse, Conference Director, Governor's Conference on Library and Information Services, Cultural Education Center, Room 10B47, Albany, New York 12230.

Second, despite the difficulties that you might have encountered, I believe that state agencies generally seek to comply with the Freedom of Information Law and engage in good faith efforts to do so. It is noted that some state agencies receive a great number of requests, many of which are voluminous.

Further, the fees acquired by state agencies are deposited in the General State Fund. Therefore, as an agency increasingly complies with the Freedom of Information Law, the greater is the drain on its resources. In an effort to enhance compliance, the Committee on Open Government has recommended that monies acquired through fees remain with the agencies. Those monies could be used to increase staff, use better equipment, improve records management, speed response time, etc. In short, we are attempting to improve the ability of agencies to comply with the Freedom of Information Law.

With respect to enforcement, the Committee has recognized that it is difficult to gain compliance when an agency is recalcitrant. Consequently, the Committee has recommended that courts be given broader authority to award attorneys' fees in judicial proceedings brought under the Freedom of Information Law.

The recommendations that I have described are included in the Committee's annual report to the Governor and the Legislature. Although we have not yet received printed copies of the report, I will send a copy to you upon receipt of the reports. It is anticipated that we will receive them by the end of this month.

Lastly, you requested a variety of information from this office. There is no list of records disclosed by the Committee on Open Government. As you are aware, the primary function of the Committee on Open Government is to advise; the Committee is not a repository of records. We do publish brochures dealing with the Freedom of Information, the Open Meetings and the Personal Privacy Protection Laws. The major ongoing product of the Committee on Open Government involves advisory opinions and hundreds of written opinions are prepared annually. The opinions are indexed by subject matter in an appendix to the annual report.

There are no figures or statistics that indicate the cost of administering the Freedom of Information Law statewide. Similarly, there are no records that tabulate the member of requests or denials. I point out that requests are often made informally. A request for minutes of a local government board might be made orally to the clerk who merely points to the minute book and offers it for inspection and copying. As such, there is likely no empirical method of ascertaining the number of requests. With respect to denials that "end up in court," another appendix to the annual report consists of summaries of all judicial decisions of which I am aware. New decisions are marked with an asterisk. In an average year, 30 to 35 cases are brought to court. There may, however, be unreported decisions of which we have no knowledge.

I regret that I cannot provide more specific data. However, I hope that I have been of assistance. Again, a copy of the annual report will be sent to you as soon as possible.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6348

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 5, 1990

Mr. Anthony Scott
86-C-1161
Collins Correctional Facility
Helmuth, NY 14079-0200

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Scott:

I have received your letter of October 24 and the materials attached to it. Please accept my apologies for the delay in response.

You have suggested that various requests for records have not been answered by officials at the Collins Correctional Facility. Further, the first attachment to your letter appears to be an appeal of a denial of access to records directed to the Committee on Open Government.

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 render a determination on appeal, nor is it authorized to compel an agency to grant or deny access to records.

Second, the provision dealing with the right to appeal in the Freedom of Information Law 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."

For your information, the person designated to determine appeals by the Department of Correctional Services is Counsel to the Department.

Other aspects of your correspondence involve requests made to the Division of Parole, and it appears that some of the difficulty that you have encountered might be the result of the "vagueness" of certain requests. Here 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 provide sufficient detail to enable agency officials to locate and identify records.

Lastly, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with section 89(4)(a) of the Freedom of Information Law. 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6349

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 5, 1990

Ms. Theresa Lonergan
[redacted]

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Ms. Lonergan:

I have received your letter of October 27.

According to your letter, you were informed by the director of Public Works in the Village of Ticonderoga that Bennett Road is "a deeded road". Thereafter, you requested a copy of the deed from Kay Otley, the Village Clerk and Records Access Officer. Although she marked your request "approved", she indicated that the record sought was not in her office. You repeated the request, specifying that "it is her responsibility to coordinate the request by canvassing other dept. heads and village offices as to whether or not it was in their possession". You wrote, however, that she refused to do so and asked whether it is her responsibility to engage in such efforts.

You also asked whether it is your "responsibility to inform the village that records retention regulations...exist, and that [you] ask them to pursue to course of finding out what these regulations are...".

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 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 reoords 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, if there is but one records access officer for a municipality, I believe that person has the duty of coordinating responses to requests for records maintained within any office at any location within the municipality.

Second, separate from the Freedom of Information Law are provisions found in the "Local Government Records Law" (Article 57-A of the Arts and Cultural Affairs Law). Section 57.19, which requires the establishment of a local government records management program, states in part that:

> "The governing body, and the chief executive official where one exists, shall promote and support a program for the orderly and efficient management of records, including the identification and appropriate administration of records with enduring value for historical or other research. Each local government shall have one officer who is designated as records management officer. This officer shall coordinate the development of an oversee such program and shall coordinate legal disposition, including destruction of obsolete records. In towns, the town clerk shall be the records management officer."

Further, section 57.25(1) states that:

> "It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of

> records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office. In towns, records no longer needed for the conduct of the business of the office shall be transferred to the custody of the town clerk for their safekeeping and ultimate disposal."

Subdivision (2) of section 57.25 states that public records cannot be destroyed without the consent of the Commissioner of Education. In turn, the Commissioner is authorized to develop schedules indicating minimum retention periods for particular categories of records. As such, local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached.

I believe that a retention schedule applicable to villages may be obtained from the State Education Department, State Archives and Records Administration, Cultural Education Center, Albany, NY 12230.

As you requested, copies of this response will be forwarded to the persons identified in your letter.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor, Village of Ticonderoga
Patrick Carney, Village Attorney
Stephen Boyce, Trustee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6350

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 5, 1990

Mr. Theodore D. Sklar
Mars, Sloane & Conlon
1770 Motor Parkway
Hauppauge, NY 11788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sklar:

I have received your letter of November 2, as well as the materials attached to it.

You wrote that you represent citizens who sought certain records from the Town of Brookhaven under the Freedom of Information Law. The forms attached to your letter indicate that the requests were made on August 16. Since the agencies in receipt of the requests failed to respond, appeals were made on October 16 to the Town Clerk, who has been designated as the appeals officer by the Town Board, on the ground that the requests were constructively denied. The Town clerk acknowledged the receipt of your appeal on October 19 and wrote that:

> "We are in receipt of your October 16, 1990 letter and are taking the liberty of making a copy available and referring same to the Law Department, represented by Randy Radje, for his review and appropriate response.
>
> "I trust that the respective agencies will respond in a reasonable time, consistent with the requirements of law."

That letter was followed by a response by Mr. Ratje stating that "your appeal has been denied on the grounds that you exceeded the thirty day appeal period".

Based upon the foregoing, your requested an advisory opinion concerning the following issues:

> "1. Please advise whether the decision finding that the appeal could not be heard because it purportedly exceeded the 30-day appeal period was correct. In our view, an agency's failure to respond in any fashion to a FOIL application, as in the matter at bar, is a continuing wrong and the 30-day period set forth in the Public Officer's Law has no application to such conduct. In our view, the FOIL Appeal's Officer should have directed the three Town agencies to consider and render a determination on the duly filed applications.
>
> 2. Please advise whether the FOIL Appeal's Officer for the Town of Brookhaven can delegate to the Department of Law the responsibility for rendering determinations on FOIL appeals.
>
> 3. If the FOIL appeal was duly rejected, please advise whether the applicants can refile their FOIL requests with the Town agencies.
>
> 4. If the applicants are precluded from refiling their FOIL requests, please advise whether any other person can file requests for the same information with the respective Town agencies.
>
> 5. Please advise whether the records described in the FOIL requests would be exempt from disclosure under the Freedom of Information Law.
>
> 6. Finally, please advise as to the circumstances under which attorney's fees and litigation costs can be awarded in an Article 78 proceeding challenging an agency's denial of access to information under the Freedom of Information Law."

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

Further, it is noted that a recent decision involved a situation somewhat similar to that presented. In that case, requests were made, but the agency engaged in continual delays and failed to grant or deny access to the records sought. When the applicant initiated a judicial proceeding, the agency contended that petitioner had failed to exhaust her administrative remedies. In a discussion of the matter, the decision states that:

> "The respondent contends that petitioner failed to appeal the denial of access to records with 30 days to the agency head as provided in Public Officers Law [section] 89(4)(a) and, therefore, may not bring this proceeding.
>
> "The petitioner alleges that Public Officers Law [section] 89(4)(a) is not applicable as petitioner's FOIL requests has never been decided by respondent as respondent's only correspondence in response to petitioner's application indicates only that the matter is under investigation.
>
> "While the papers, for both sides, in this proceeding fail to discuss the issue of constructive denial, it has been found that the failure of an agency to respond to a FOIL request, as provided for in Public Officers Law [section] 89(3), can be construed as a denial of said request. In the case of Mtr. Robertson v. Chairman, 122 Misc 2d 829, the court held the failure of the Division of Parole to respond within five days to a letter from petitioner requesting access to certain information contained in his parole records is properly construed as a denial of his request...
>
> "It, therefore, appears that respondent's failure in this particular proceeding to neither grant nor deny the petitioner's request may be construed as a denial of access that may be appealed to the agency head" (Bernstein v. City of New York, Supreme Court, New York County, NYLJ, November 7, 1990).

Based upon the decision cited above, I do not believe that the Town could validly have dismissed your appeal as untimely. On the contrary, I believe that the appeals officer was required to determine the appeal pursuant to section 89(4)(a) of the Freedom of Information Law.

Second, also in conjunction with section 89(4)(a), it is my view that the person designated to determine appeals by the governing body (in this case, the Town Board) is obliged to perform that function. While the Town Clerk as appeals officer may clearly confer with or seek the advice of others, I do not believe that he can delegate his authority if he has been designated as appeals officer.

Third, I know of nothing in the Freedom of Information Law that would, under the circumstances, preclude the applicants from "refiling" requests. Further, since records accessible under the Freedom of Information Law must be made equally available to any person, without regard to status or interest [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)], the records initially sought by the applicants could in my view be requested by any other person.

Fourth, with respect to rights of access to the records sought, the requests involved "any and all records pertaining to" certain residences, "including but not limited to" the following documents:

> "Applications for building permits, variances, certificates of occupancy or certificates of zoning compliance issues or applied for in connection with additions and/or alterations to the above-referenced residence; Copies of any inspection reports made in connection with such applications; Copies of any notices of violations, summonses, appearance tickets or correspondence in connection with additions and/or alterations to said structure; Any and all permits, variances, grants of the Zoning Board of Appeals, certificates of occupancy or certificates of zoning compliance issued for the above-reference residence."

I point out initially 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 and identify the records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. It is assumed that the addresses of the parcels that are the subjects of the requests would represent an adequate basis for locating a variety of records pertaining to those parcels.

Whether the address alone would be sufficient to locate "any and all records" relating to those parcels is conjectural and may be dependent in part upon the nature of an agency's filing or record-keeping systems. Insofar as the address does not enable the agency to locate records, the requests in my view would not have reasonably described the records sought.

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 opinion, the particular records described in the request would be available in great measure, if not in their entirety. Exceptions might involve portions of inspection reports or correspondence concerning alterations to structures. Of relevance in those situations 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. To the extent that reports or correspondence contain opinions or advice, for example, I believe that those portions of the records could be withheld.

Lastly, section 89(4)(c) describes the circumstances under which attorney's fees and other litigation costs may be awarded in a proceeding in which a denial of access is challenged. That provision states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Stanley Allen, Town Clerk
Randall J. Ratje, Law Clerk
David P. Fishbein. Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6351

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 6, 1990

Mr. Dennis E. Carner
87-A-3531
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. Carner:

I have received your letter of November 1 in which you asked whether you may obtain your personal medical records from your former physician pursuant to the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an agency, 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 includes within its scope records of entities of state and local government. Records maintained by a private physician or hospital, for example, would not be subject to the Freedom of Information Law.

Second, a different provision of law, section 18 of the Public Health Law, generally grants patients with rights of access to medical records pertaining to them that are maintained by physicians and other providers of medical treatment or care.

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 - Room 2517
Empire State Plaza
Albany, New York 12237

That office may be reached by phone at (518) 474-2383.

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-6352

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 6, 1990

Mr. Thomas A. James
[redacted]

Dear Mr. James:

I have received your letter of October 31 which pertains to a request made under the Freedom of Information Law to the Village of Johnson City. Although your request was made on October 17 and its receipt was acknowledged on October 24, you complained that you had not yet received the information sought.

In this regard, I contacted the Village on your behalf to learn of the status of your request. I was informed that you spoke with the newly elected Mayor and that the request was withdrawn. However, having received your request, for future reference, I offer the following comments.

First, most of the request involves an attempt to elicit information. Here I point out that 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. It is noted, 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. Therefore, if, for example, there are no records indicating the average number of calls

handled by the Police Department during a given period or which identify persons who participated in certain discussions, the Freedom of Information Law would not require Village officials to prepare new records on your behalf containing the information sought.

Second, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Constance Carr, Clerk/Freedom of Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6353

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 6, 1990

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 letter of October 31.

You wrote that you submitted a request for records pertaining to your case to the office of the district attorney that prosecuted. The request and the ensuing appeal were denied. Thereafter, you initiated an Article 78 proceeding that was dismissed for untimeliness. Your question is whether you may "still make a request for the same documents to start this proceeding over again".

In this regard, I know of nothing in the Freedom of Information Law that would preclude you from resubmitting a request. Further, in a situation that may have been somewhat similar to that described in your letter, although a petition was dismissed because it was not commenced in a timely manner, the court held that "while the Statute of Limitations may act as a bar to a particular proceeding under the Freedom of Information Law, a member of the public is not forever barred as a result from again seeking those same records under the applicable procedures" [Matter of Mitchell, Supreme Court, Nassau County, NYLJ, March 9, 1979).

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-0354

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 6, 1990

Mr. Phillip C. Kruk
Savona Faculty Association
Savona Central School
East Lamoka Avenue
Savona, NY 14879

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kruk:

I have received your letter concerning "actions taken recently by the Superintendent of Savona Central School".

The correspondence indicates that on September 27, you requested records "pertaining to the Employment Contract Amendment Certificate submitted by the Savona Superintendent of Schools regarding his salary for the 1990-91 school year". The receipt of your request was acknowledged on October 5, and you were informed that the request would be fulfilled on October 18. When you received the requested document, a copy of which was enclosed, various portions were blank, and you appear to have assumed that the blank copy was mistakenly provided.

As of the date of your letter to this office, you had not yet received the completed amendment to the contract. You asked that I comment with respect to the delay in responding to your request and the failure to provide the record sought.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 believe that a contract between the Superintendent and the District or the Board, or an amendment to such a contract, would be accessible under 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.

It is noted that 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.

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, the Superintendent's contract, like a collective bargaining agreement between a public employer and a public employee union, must be disclosed, for it is clearly relevant to the duties, terms and conditions relating to the employment of a public employee.

Lastly, another source of the salary of the Superintendent or any employee of an agency, involves a payroll list required to be compiled pursuant to section 87(3)(b) of the Freedom of Information Law. Section 89(3) of the Freedom of Information Law states in part that an agency generally need not create or prepare records. An exception to that principle involves records required to be maintained pursuant to section 87(3) of the Law, which states in part that:

"Each agency shall maintain...

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

If you had sought to review or copy the payroll record envisioned by section 87(3)(b), which must be "maintained", presumably on an ongoing basis, I do not believe that there would have been any valid rationale for a delay in providing access. Further, that record must make reference to the name and salary of every agency employee, including the Superintendent.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frederick A. Hall, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1858
FOIL-AO-0355

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 6, 1990

Mr. W. E. Scott
[redacted]

The staff of the Committee on Open 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 November 1, which relates to the activities of a police commission created by the Board of Trustees of the Village of Montgomery.

According to your letter, following the creation of the commission and the designation of its members:

> "This commission was proclaimed as strictly advisory in nature, and were not authorized to participate in police business per se, but rather to function in an administrative role. They were to assist in the budget and other administrative matters such as interviewing candidates for part-time village police positions, investigate accidents in which patrol cars were involved, investigate complaints, handle department disciplinary actions and make recommendations to the Village Board regarding their decisions."

When you requested minutes of the commission's meetings, you were told that none had been prepared. Similarly, when you asked for a schedule of its meetings, the clerk explained that there were no announcements made regarding when and where the police commission meetings were held.

It is your view that those responses were "not in keeping with the intent of the Open Government Laws," and that, even if the public cannot attend its meetings, "some record should exist covering the process and activities of this commission."

You sought my comments on the matter. In this regard, I offer the folloiwng remarks.

First, 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."

Recent decisions 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, Inc. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642, 643 (1989); Poughkeepsie Newspaper 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). Further, in NYPIRG v. Governor's Advisory Commission, [507, NYS 2d 798; aff'd with no opinion, 135 AD 2d 1149; motion for leave to appeal denied, 71, NY 2d 964 (1988)], it was found that an advisory body created by means of an executive order was not a public body.

Based upon the decisions cited above, if the commission is solely advisory, it would not constitute a "public body" and its meetings would fall beyond the scope of the Open Meetings Law. However, if it has some authority or performs a function necessary in the completion of some procedure, I believe that the commission would be a public body required to comply with the Open Meetings Law.

Assuming that it is a public body, I point out that, 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 also noted that 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.

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 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 respect to minutes of meetings, 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. 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. Further, if those actions, such as motions or votes, occur during meetings, I believe that minutes must be prepared indicating those actions and made available to the public.

Second, irrespective of whether the commission is subject to the Open Meetings Law, I believe that any records that it prepares, such as minutes of meetings, are subject to the Freedom of Information Law. It is emphasized that the scope of that statute is expansive, for section 86(4) 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."

As such, documentation produced by the commission, and therefore for the Village, would constitute a "record" 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.

Since I am unfamiliar with the nature of records that might have been prepared by the commission, I cannot advise as to the extent to which they must be disclosed. Nevertheless, I believe that any such records would fall within the scope of the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1635G

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 7, 1990

Mr. Raymond A. & Mrs. Rose M. Malone
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. & Mrs. Malone:

I have received your letter of November 5 addressed to Ms. Mercer of this office.

You wrote that on August 1, you received a "notice of violation from the City of Olean." Following a discussion of the matter with the City's code enforcement officer, it was determined that a violation existed not with respect to your property, but rather that of an adjacent owner. At the end of the discussion, you requested the name of the person who made the complaint. That request was denied, and ensuing requests made under the Freedom of Information Law were also denied.

You requested an advisory opinion concerning the issue. 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, assuming that a written complaint was forwarded to the City or that a City employee prepared a record concerning a complaint, I believe that section 87(2)(b) of the Freedom of Information Law would be relevant. That provision 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.

I hope that 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: David John
John M. Hart, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1357

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 6, 1990

Mr. John Bal
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bal:

I have received your letter of November 5, as well as the correspondence attached to it.

The materials indicate that you directed a request on September 20 under the Freedom of Information Law to Ms. Helen Weinberg, Director of the Office of Adult and Continuing Education for the New York City Board of Education. The request involved the following records pertaining to a named employee of the Board:

> "1. The specific charges and findings regarding an Inspector General investigation pertaining to falsified time sheets and any other disciplinary action, including sanctions, known to your office.
>
> 2. All requests for reimbursement of travel or any other expense submitted from January 1, 1989 to August 31, 1990.
>
> 3. Any authorization for the conversion of Board of Education property for personal use.
>
> 4. Board of Education regulations and bylaws regarding (1) any standards of behavior for employees, and, (2) collection of money from pupils. Indicate if your office has waived these regulations or bylaws in any way."

Having received no response to the request, you appealed on October 15 on the ground that the request had been constructively denied. As of the date of your letter to this office, you had received no response to the request.

You have asked that I "inform [you] if the New York City Board of Education is in violation of the Freedom of Information Law and whether or not the information requested can be granted...".

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. Neither myself nor the Committee can render a determination concerning the degree to which an agency has complied with the Freedom of Information Law. However, in conjunction with the issues that you raised, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government pursuant to the Freedom of Information Law require that each agency designate one or more "records access officers" (21 NYCRR 1401.2). The records access officer has the duty of coordinating an agency's response to requests, and requests should, in my view, be made to the records access officer.

I do not believe that Ms. Weinberg has been designated as a records access officer. While I believe that she should have forwarded your request to the appropriate person, the fact that the request was not sent to the records access officer might constitute the basis for the delay or lack of a response.

If you have not yet received a response, it is suggested that you resubmit the request to Ms. Ruth Bernstein, Records Access Officer, New York City Board of Education, Room 920, 110 Livingston Street, Brooklyn, NY 11201.

Second, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests and appeals. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the

receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 to the records sought, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record might contain both accessible and deniable information. That phrase, in my view, imposes an obligation upon agency officials to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

With respect to records relating to disciplinary action, I believe that two of the grounds for denial are likely relevant.

Section 87(2)(b) 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); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Powhida v. City of Albany, 147 AD 2d 236 (1989); 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].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. 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)."

A recent decision involved a request for employees' names, job titles, the specific charges brought, the level at which the cases were adjudicated, and the penalty imposed. The court held that "Employee discipline is clearly relevant to the work of the agency and, thus, access to these records should be granted" [Buffalo News v. Buffalo Municipal Housing Authority, 558 NYS 2d 364, 366, ___ AD 2d ___ (1990)]. Similarly, in its discussion of the intent of the Freedom of Information Law, the Court of Appeals in the 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)."

From my perspective, if there has been a finding of misconduct or the imposition of disciplinary action regarding the employee in question, such determinations would be accessible under the Freedom of Information Law. 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 may, in my view, be withheld, for disclosure would 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 or allegations are found to be without merit, I believe that they may be withheld.

Also of significance is section 87(2)(g) which states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;

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 properly 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. Based upon decisions cited earlier, although a record reflective of disciplinary action imposed against a public employee would constitute "intra-agency material," it would be reflective of a final agency determination available under section 87(2)(g)(iii).

For reasons similar to those offered in the preceding analysis, although travel vouchers and similar or related records might identify specific employees, again, 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. 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. There may, however, be some aspects of those records that could be deleted as an unwarranted invasion of personal privacy, such as public employees' home addresses of social security numbers, for exampale, which may have be relevance to the performance of one's official duties.

An "authorization for the conversion of Board of Education property for personal use," if such record exists, would likely constitute a final agency determination. By-laws and regulations would be reflective of instructions to staff that affect the public available under section 87(2)(g)(ii) or final agency policies available under section 87(2)(g)(iii). Whether such records are arranged or indexed in a manner that enables Board officials to locate, identify and retrieve them is unknown to me.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ruth Bernstein
Helen Weinberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6358

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 7, 1990

Mr. Samuel Sheppard
78-A-4028
Box 51
Comstock, New York 12821

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Sheppard:

I have received your letter of November 5, as well as the correspondence attached to it.

You referred to a request for records directed to the New York City Police Department, including ballistics tests and related records. In response to the request, you were informed that the arrest report indicated that no weapon was found. Accordingly, it was determined that the records sought were never prepared. Nevertheless, you wrote that "a bullet...was recovered from a person who was shot," and you asked that I inform you of "the correct rule or regulation that the Police Department must follow when bullets are turned over to them...," or "where to look for" such a provision. You also requested the name of an attorney or firm that "specializes in the Freedom of Information 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. The Committee does not maintain records generally, and this office does not possess records that include the rules or regulations in which you are interested.

Second, if such rules or regulations exist, I believe that they would be maintained by the Department, and that a request should be made to its records access officer, Sgt. John G. Sultana.

Third, insofar as the records in question exist, 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.

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, instructions to staff that affect the public or an agency's policy. Therefore, I believe that those aspects of the records would be available, unless a different basis for denial could 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 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" and disclosure would enable people to evade law enforcement activities, they could in my view be withheld. If the harmful effects of disclosure described in section 87(2)(e) would not arise, it is likely that the records would be available.

Lastly, I do not believe that I am authorized or required to recommend a particular attorney or firm to you. However, it might be worthwhile to confer with a representative of Prisoners' Legal Services, for example.

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-6359

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 7, 1990

Ms. Patricia M. Kennedy
Assistant City Attorney
City of Ithaca
108 East Green Street
Ithaca, New York 14850

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kennedy:

I have received your letter of November 6 in which you requested an advisory opinion concerning a request for records.

Specifically, you wrote that the City of Ithaca received a request for "all offers to purchase or correspondence relating to the purchase or sale of City of Ithaca property situate on West State Street, commonly known as the Old Fire Station."

You added that:

> "The City has been attempting to sell Fire Station #6 and has received several offers from interested parties, including Bangs Ambulance, Inc. At this point, the Common Council has decided not to accept any of the currently pending offers to purchase and to announce and schedule a sealed bid auction for the property. We are continuing to negotiate with interested parties during the period prior to the sealed bid auction."

It is your view that section 87(2)(c) of the Freedom of Information Law would constitute an appropriate basis for 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, from my perspective, only one of the grounds for denial relates to the issue. Specifically, section 87(2)(c), the provision to which you alluded, 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.

On 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 of the bids 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, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

The other situation where section 87(2)(c) has successfully been asserted to withhold records pertained to real estate transactions where records in possession of an agency were requested prior to the consummation of a transaction. Again, where premature disclosure would have enabled the public to know the

prices the agency sought, thereby potentially precluding the agency from receiving an optimal price, denials of access have been upheld [see Murray v. Troy Urban Renewal Agency, Sup. Ct., Rensselaer County, April 24, 1980, rev'd 84 AD 2d 612, NY 2d 888 (1982)].

In the situation that you described in which the City is continuing to negotiate with interested parties, it appears that disclosure would, at this juncture, impair the City's ability to reach an optimal agreement. Disclosure of the records sought would indicate the range of offers received to date and might place a potential offeror at an advantage in relation to those who have previously submitted offers and impair the ongoing negotiations with those persons or firms.

Further, if an auction is conducted, disclosure now would likely provide recipients of the records with an indication of what the City expects or hopes to be paid, perhaps to the detriment of the City's taxpayers. Lastly, if the records are disclosed under the Freedom of Information Law, they would be equally available to any person. In some circumstances, disclosure of the kinds of records at issue might encourage collusion among potential bidders or offerors.

For the foregoing reasons, it appears that section 87(2)(c) would serve as an appropriate basis for a denial of 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:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1360

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 10, 1990

Mr. Walter Donnaruma
Attorney at Law
279 Washington Avenue
PO Box 6729
Albany, New York 12206

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Donnaruma:

I have received your letter of November 7 and the materials attached to it.

You referred to notice left at your residence by Finnegan Associates, Inc. ("Finnegan"), which is assisting to Town of Bethlehem in conducting a revaluation of real property. The notice suggests that an appointment be made in order that a representative of Finnegan could inspect the interior of your home. In a letter to Finnegan, you wrote that you consider the inspection of one's property to constitute an invasion of privacy, and that since Finnegan is acting for the Town, its records should be available throught the Freedom of Information Law. You apparently asked to inspect the data it has collected for the Town. The request was denied and you were told that the data will not become "public" until it is turned over to the Town in 1992.

You have requested assistance in the matter. 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 upon the foregoing, the Town of Bethlehem, for example, is clearly an agency; a private corporation, such as Finnegan, would not in my view constitute an agency required to comply with the Freedom of Information Law.

Second, the status of Finnegan is not, in my opinion, the determining factor with respect to rights of access to the records that you requested. As indicated previously, the statute pertains to agency records, and section 86(4) of the Freedom of Information Law defines "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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" subject to rights of access granted by the Law. 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 cross-over between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

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).

I am unaware of any judicial decisions that deal with facts analogous to those presented in this situation. However, the definition of "record" includes not only documents that are maintained by an agency; it refers to documents are that are "kept, held, filed, produced or reproduced by, with or for an agency." Under the circumstances, it appears that the records sought, although in the physical possession of Finnegan, are kept and produced for an agency, the Town of Bethlehem.

Third, of likely relevance under the circumstances is the judicial interpretation of the Freedom of Information Law concerning records prepared by outside consultants retained by agencies. When an agency lacks the resources, staff or expertise needed to develop opinions or obtain facts concerning a function to be carried out by government, it often retains consultants to provide expertise or information. Even though consultants or consulting firms may be private entities rather than governmental entities, it has been found that the records prepared by those entities or firms should be treated as if they were prepared by an agency. As stated by the Court of Appeals:

> "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)].

Based upon the foregoing, a record prepared by a consultant for an agency may be withheld or must be disclosed in the same manner as a record prepared by the staff of an agency. I would contend that a consultant's report, information "produced for" an agency, would fall within the scope of the Freedom of Information Law even if it is in the physical possession of a consultant rather than the agency. Any other conclusion would, in my opinion, serve to negate the effect of the decision rendered by the Court of Appeals.

Fourth, intra-agency materials represent one category of deniable records. 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.

Therefore, although intra-agency materials fall within the scope of one of the grounds for denial, the court in Xerox 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.

Fifth, 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)], including inventories and similar records used in conjunction with the assessment of real property. 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, supra, 758].

As recently as last month, it was held that property record cards are public records [see Property Valuation Analysis, Inc. v. Williams, ___ AD 2d ___, Third Department, Appellate Division, NYLJ, November 7, 1990].

Lastly, rather than requesting the records from Finnegan, it may be appropriate to seek them from the Town through its records access officer. Again, although the Town does not have physical custody of the records, it appears that it has legal custody, and that the records would be subject to rights conferred by the Freedom of Information Law. It is noted that I have no knowledge of the manner in which the records are kept or whether they exist at this juncture in a manner or format that would render them meaningful.

I hope that I ahve been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Robert Strong

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6361

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 11, 1990

Ms. Lisa Browka
[redacted]

Dear Ms. Browka:

I have received your letter of December 2. You wrote that you are preparing a report on the subject of surrogate motherhood and that you are required "to get information from the Freedom of Information Policy." As such, you requested material on the Freedom of Information Policy and how to use it.

In this regard, I offer the following comments.

First, the Freedom of Information Law is a statute, an act of the State Legislature, rather than a "policy."

Second, the Freedom of Information Law pertains 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."

Therefore, the Freedom of Information Law generally applies to records maintained by entities of state and local government in New York.

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 seek records under the Freedom of Information Law, a request should be directed to the records access officer at the agency or agencies that you believe would maintain records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests. Further, 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 and identify the records.

I am unaware of which agencies might maintain records on the subject of surrogate motherhood. However, it is possible that bills on the subject have been introduced by state legislators, or that reports have been prepared by or submitted to the State Legislature. I believe that such a report was prepared by the Senate Judiciary Committee within the past two or three years and that a copy of the report could be obtained from the State Library, which is located at the Empire State Plaza, Cultural Education Center, Albany, New York 12230.

Lastly, enclosed are copies of the Freedom of Information Law and "Your Right to Know," which describes the Freedom of Information Law in detail and contains a sample letter of request.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6362

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 11, 1990

Mr. Robert F. Reninger
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Reninger:

As you are aware, I have received your letter of November 12.

You wrote that the Town of Greenburgh "published its 1991 'Tentative Town Budget'" on October 30, a copy of which you attached, that a local newspaper reported on the tentative budget "in detail" on November 3, and that your request for the tentative budget on November 5 was denied "on the basis that the Town Board had not approved the Tentative 1991 Town Budget."

You have asked whether the foregoing is consistent with "Open Government Law." In this regard, I offer the following comments.

First, having reviewed the document that you characterized as the tentative budget, it is not clear that it is indeed the tentative budget. I direct your attention to section 106 of the Town Law, entitled "Preparation, filing and review of tentative and preliminary budgets." Subdivisions (1) and (2) of that statute state that:

> "1. The budget officer, upon receipt of the estimates of the various administrative units, shall review the estimates and may confer with the head of any such unit in regard to such estimates. He may require the head of any such unit to furnish information and to answer inquiries pertinent to such review.

> 2. Upon the completion of the review of the estimates, the budget officer shall prepare a tentative budget which shall include his recommendations and which shall be in the form prescribed in and in conformance with section one hundred seven of this chapter. He may also prepare a budget message explaining the main features of the tentative budget and containing such additional information as he may deem advisable. On or before the thirtieth day of September or in towns in Westchester county on or before the thirtieth day of October, he shall file in the office of the town clerk the tentative budget, the budget message, if any, and the estimates and schedules."

The attachment to your letter may be the "budget message" rather than the tentative budget itself, which may be a separate document.

Second, a denial based upon a contention that tentative budget had not been approved is, in my view, inconsistent with the Freedom of Information Law. Further, according to the Town Law, the tentative budget by its nature is not approved; when is it approved, it becomes the preliminary budget, which is available. Irrespective of its status as tentative, I point out that the Freedom of Information Law pertains to all agency records, and that 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."

Based upon the foregoing, all records, whether characterized as "approved" or "tentative," for example, are 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.

Lastly, I believe that one of the grounds for denial is relevant to the documentation in question. That provision, however, due to its structure, 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. In my view, the tentative budget or a budget message constitute "intra-agency" materials. Nevertheless, insofar as those records consist of "statistical or factual tabulations or data," such as "estimates and schedules," I believe that they must be made available, even if they have not been approved.

I hope that I have been of some assistance and 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

cc: Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1861
FOIL-AO-6363

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 11, 1990

Mr. Bernard Eisenberg
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Eisenberg:

I have received your letter of November 12. Please accept my apologies for the delay in response.

According to your letter, at many colleges and universities, there is a "Committee on Budget and Personnel which discusses budget and personnel matters". It is your view that it may be permissible for those committees to close their meetings due to the nature of their discussions. In conjunction with that assumption, you asked whether:

> "1. notice of these meetings must be given to the faculty at the college and to the public in general
>
> 2. minutes of these meetings are available under FOIL
>
> 3. the record of who voted for or against an action taken by this committee is available under FOIL."

In this regard, I offer the following comments.

First, responses to your questions are contingent upon whether the committees in question constitute public bodies subject to the Open Meetings Law. Section 102(2) of the Open Meetings 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."

Based upon the foregoing, it is clear that a governing body that has decision-making authority is a "public body" subject to the Open Meetings Law. Further, in view of the last clause of the definition, I believe that a committee or subcommittee consisting of members of a governing body would also constitute a public body required to comply with the Open Meetings Law. It is also noted, however, that the courts have found that advisory bodies which have no authority to act on behalf of a governmental entity, such as an entity consisting of staff or a citizens advisory body, for example, are not subject to the Open Meetings Law [see e.g., Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs, 145 AD 2d 65 (1989) and Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 151 AD 2d 642 (1989)]. In short, if a committee consists of members of a governing body, I believe that it is required to comply with the Open Meetings Law. If it is a different kind of entity, it is unlikely that the Open Meetings would apply.

Second, assuming that the committees in question are subject to the Open Meetings Law, I believe that they must provide notice in accordance with section 104 of that statutes. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time an place should be given to the news media (at least two) and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable," at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements imposed by the Open Meetings Law can generally be met by telephoning the local news media and by posting notice in one or more designated locations. While the Law requires that notice be given to the news media and by means of posting, there is no requirement in the Open Meetings Law concerning notice to faculty. It is possible, however, that an entity's rules and procedures may include such a requirement.

With respect to minutes of meetings, 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.

Separate from the requirements of the Open Meetings Law is a provision in the Freedom of Information Law, section 87(3)(a), which requires that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

As such, when a final vote is taken by a public body, a record must be prepared indicating the manner in which each member cast his or her vote.

Lastly, the Open Meetings Law is based upon a presumption of openness. Meetings of a public body must be conducted open to the public except to the extent that executive sessions may validly be conducted. Paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the topics that may appropriately be considered during executive sessions.

I believe that two of the grounds for entry into executive sessions may be relevant to the work of the kinds of committees to which you referred. Section 105(1)(e) permits a public body to enter into an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". As such, discussions involving collective bargaining negotiations between a public employer and a public employee union may be considered during executive sessions. With respect to minutes of executive sessions pertaining to collective bargaining, I point out that section 87(3)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure

would "impair present or imminent contract awards or collective bargaining negotiations". The other basis for entry into executive session of likely significance is section 105(1)(f), which permits a public body to conduct an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

If, for example, a discussion relative to budgetary matters involves personnel generally, tangentially or perhaps with respect to policy considerations pertaining to the expenditure of public monies, I do not believe that section 105(1)(f) would serve as a basis for conducting an executive session. However, if a discussion focuses upon a "particular person" in conjunction with one or more of the subjects described in section 105(1)(f), an executive session could in my view properly be held.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6364

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 11, 1990

Mr. Perry Tillman
#89-A-5230, D-6-4
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. Tillman:

I have received your letter of November 12, which pertians to your unsuccessful attempts to obtain records relating to your conviction from the City of Saratoga Springs Police Department and the Saratoga County District Attorney.

In this regard, I point out that those agencies are separate and distinct. A request for records maintained by the Police Department should be made to its records access officer; a separate request for records maintained by the Office of the District Attorney should be directed to its records access officer. An agency's designated records access officer has the duty of coordinating an agency's response to requests.

Further, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

It is also noted that in a case in which the records access officer for a district attorney denied access to records sought by an inmate but failed to inform the applicant of his right to an administrative appeal, the Court of Appeals found that the applicant could seek judicial review of the denial [see Barrett v. Morgenthau, 74 NY 2d 907 (1990)].

With respect to rights of access, I believe that I reviewed that issue extensively in my letter to you of September 4.

In an effort to enhance compliance with the Freedom of Information Law, copies of this letter will be sent to the Chief of Police and the District Attorney. It is suggested that you discuss the matter with your attorney.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Chief of Police
Saratoga County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1636S

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 11, 1990

Mr. David Safran
90-A-6710
Collins Correctional Facility
Helmuth, New York 14079-0200

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Safran:

I have received your letter of November 12, as well as the correspondence attached to it. The correspondence consists of a series of requests which, as of the date of your letter to this office, had not been answered.

You have asked for assistance in the matter. In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law is applicable to agency records 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."

Based upon the foregoing, the Freedom of Information Law does not apply to the courts or court records. This is not intended to suggest that court records are confidential, but rather that statutes other than the Freedom of Information Law pertain to court records. To seek court records, it is suggested that requests be made to the clerks of the appropriate courts.

Second, a request for agency records should be directed to the "records access officer" at the agency that maintains the records sought. The records access officer has the duty of coordinating an agency's response to requests.

Third, 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 and identify the records. I point out that the ability to locate records may be dependent in part upon the nature of an agency's filing or record-keeping system.

Lastly, the Freedom of Information Law provides guidance concerning the time and manner in which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6366

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 12, 1990

Mr. M.Y. Gray
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gray:

I have received your letter of November 14 in which you described a series of delays and difficulties in your attempts to review financial records of the Town of Oppenheim.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, from my perspective, books of account, bills, vouchers, checks, contracts, ledgers and similar documents involving Town finances are available, for none of the grounds for denial would apply.

Moreover, the Town Law imposes certain responsibilities upon a town supervisor concerning to maintenance and disclosure of financial records. Specifically, section 29(4) of the Town Law states that the supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control

> for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be the public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In addition, subdivision (1) of section 119 of the Town Law states in part that:

> "When a claim has been audited by the town board the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours." Similarly, as suggested earlier, vouchers, contracts, abstracts and similar documents, are, in my opinion, available to any person pursuant to the Freedom of Information Law.

Second, I believe that procedures concerning the implementation of the Freedom of Information Law should have been (or should be, if none exist) promulgated by the Town Board. By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires that Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 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."

In this instance, the governing body of a public corporation, the Town of Oppenheim, is the Town Board, and I believe that the Town Board is authorized to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

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 persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records 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.

While I am unaware of the identity of the Town's designated records access officer, usually the records access officer is the town clerk, for the clerk is the custodian of town records in accordance with section 30(1) of the Town Law.

Third, since you apparently did not receive timely responses to your requests, I point out that section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such records 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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."

Based upon the foregoing, the Town Board or a person or body designated by the Board may determine appeals following actual or constructive denials of access to records.

In sum, I believe that the records sought are accessible under the Freedom of Information Law and/or the Town Law. Further, the Town Board in my view has general responsibility for ensuring compliance with the Freedom of Information Law and promulgating procedures in accordance with the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0367

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 11, 1990

Mr. Jervis Cunningham
89-A-1322
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990-0900

Dear Mr. Cunningham:

I have received your letter of November 12.

You wrote that you submitted a request to a court clerk under the Freedom of Information Law for a copy of "plea minutes" relating to your indictment. In response, you were informed of the fee and you sent the appropriate facility disbursement form to the clerk on September 21. On October 4, you received a form stating that "someone at the address received [your] correspondence, a check. You asked whether "this is an acceptable time allowance in receiving transcripts".

In this regard, it is noted at the outset that the Committee on Open Government provides advice with respect to the Freedom of Information Law. That statute is applicable to agency records, and 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 does not appear to be applicable to the situation that you described. Further, I am unaware of any provision of Judiciary Law or other statute that deals specifically with the issue. Since you indicated that you need the records for use in a judicial proceeding, it is suggested that you contact the clerk to encourage a timely response or that you discuss the matter with your attorney.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6368

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 12, 1990

Mr. John 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 recieved your letter of November 16 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you requested from Fulton County "information about names of industries and/or businesses that furnish work to the Lexington Industries..." You wrote that you were informed by the County Budget Director that County allocated $110,000 to Lexington during 1990. Nevertheless, in response to your request, the clerk of the Board of Supervisors and records access officer wrote that: "I cannot give you information I do not have."

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 an agency need not create a record in response to a request. Therefore, if the County does not maintain the information sought in the form of a record or records, I do not believe that it would be obliged to prepare a record on your behalf in response to a request made under the Freedom of Information Law.

Second, although the County may furnish funding to Lexington Industries, I know of no requirement that it must maintain or acquire records identifying businesses that "furnish work" to Lexington.

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-6369

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 12, 1990

Mr. Jacques P. Wolfner
[redacted]

The staff of the Committee 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. Wolfner:

I have received your letter of November 13, as well as the correspondence attached to it. You asked that this office take action with respect to your request for records of the Plainview Water District.

As I understand the materials, you requested records pertaining to ledger accounts of the District, specifically "detailed reports" concerning particular accounts. The Records Access Officer apparently informed you that the District "will make available only written records which are physically available in file cabinets". You added, however, that the requested records are in "computerized files".

Another package of correspondence received by this office on November 23 includes a copy of your letter to the Chairman of the Board of Commissioners and his response to you, which included a computer printout of the ledger for the accounts in which you are interested. You were also advised that the District "does not have any other reports regarding the general ledger accounts".

In this regard, I offer the following comments.

First, it is noted at the outset that the Committee is authorized to advise with respect to the Freedom of Information Law. The Committee cannot take "action" by compelling 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 in part that an agency is not required to create or prepare a record in response to a request. Therefore, if no "detailed reports" exist or are maintained by the District, I do not believe that District officials would be obliged to prepare such reports on your behalf.

Third, insofar as records exist, it is emphasized that 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 upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held ten years ago that "Information is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983)' see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically in a computer, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, by the equivalent of creating a new record. As stated earlier, since section 89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available.

Fourth, as it pertains 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.

As indicated earlier, if data exists in printed form or can be retrieved from or printed out by a computer, it is in my view subject to rights conferred by the Freedom of Information Law. Relevant to your inquiry is section 87(2)(g). 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. Although the information sought may be characterized as "intra-agency material", it apparently consists of "statistical or factual tabulations or data" that must be disclosed under section 87(2)(g)(i) of the Law, and which in fact was made available by the Chairman.

In order to share the foregoing commentary with the District, copies of this opinion will be forwarded to the Chairman and the District's Records Access Officer.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bernard Chetkof, Chairman
Judy Cartier, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6370

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 12, 1990

Ms. Barbara S. Wall
[redacted]

The staff of the Committee 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. Wall:

I have received your letter of November 17, as well as the materials attached to it.

You have requested an advisory opinion concerning an issue arising under the Freedom of Information Law. According to your correspondence, you submitted a request to the Clerk of the Village of Ossining for records pertaining to Police Sergeant James G. Wall, specifically, "his 1987, 1988, 1989 W-2 Wage/Salary Totals and overtime totals for each of these years [and] his 1990 year-to-date salary and overtime...". Following receipt of your request, the Clerk informed you that she "sought the advice of Corporation Counsel Thomas G. Barnes, "who told her to just give [you] the base salary figures for years 1987-1990". You added that various officials were "aware that this information was sought for purposes of child support through Family Court".

As of the date of your letter to this office, you had not received the information sought. In this regard, I have discussed the matter with Mr. Gerry Faiella, Village Manager, and I believe that, based upon our conversation, he agreed that the records sought should be disclosed. Nevertheless, in the event that you have not received the records and for the purpose of clarifying the issues, I offer the following comments.

First, it has been held that records accessible under the Freedom of Information Law must 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, your intended use of the information sought is, in my view, irrelevant to your rights of access.

Second, the Freedom of Information Law generally pertains to existing records. Section 89(3) of the Law states in part that, unless specific direction is provided to the contrary, an agency need not create a record in response to a request. Consequently, if, for example, the Village does not maintain records indicating overtime payments for a particular period or periods, I do not believe that it would be obliged to prepare new records on your behalf.

Third, insofar as records exist and are maintained by an agency, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

Fourth, 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." 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 Capital Newspapers v. Burns, 109 AD 2d 292, 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 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; Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981].

I point out that one of the exceptions to the general rule that an agency need not create records under the Freedom of Information Law pertains to payroll information. Specifically, section 87(3)(b) of the Law states that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

Therefore, records indicating the base salary of public employees must be prepared and made available. It is noted, too, that one of the decisions cited above, Capital Newspapers v. Burns, supra, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer. The Appellate Division found that those records must be disclosed, and the Court of Appeals affirmed. The decision indicates that the public has both economic and safety reasons for knowing whether public employees perform their duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of payment of overtime must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties. Therefore, if the Village maintains the records concerning overtime in which you are interested, I believe that those records must be disclosed.

Lastly, with respect to W-2 forms, I believe that portions of those forms could justifiably be withheld as an unwarranted invasion of personal privacy, such as social security numbers, home addresses and the like, none of which relate to the performance of one's duties. However, those portions identifying a public employee and that person's gross wages, would, in my opinion, be accessible, for those items are clearly relevant to the performance of one's official duties. As such, in response to a request for those records, I believe that an agency would be obliged to make copies, from which various portions of the records could be deleted to protect against an unwarranted invasion of personal privacy.

As you requested, copies of this opinion will be forwarded to those designated 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: Hon. Joseph Caputo, Mayor
Gerry Faiella, Village Manager
Francis J. Pumillo, Chief Clerk
Penny Markowitz-Moses, Trustee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1862
FOIL-AO-6371

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 12, 1990

Mr. Walter Greening
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Greening:

I have received your letter of November 16, as well as the materials attached to it.

You have requested assistance concerning a request for records directed to the Valley Central School District Board of Education. Although some of the records sought were made available, you wrote that records falling within one category of the request were "partially received." In another category of the request, you sought "verification that the public was notified prior to the meeting of July 20, 1990." The official who responded indicated that he was unaware of a meeting held on the date in question. Further review of your correspondence indicates that you requested but did not receive minutes of meeetings held on certain dates, as well as those concerning "meetings with lawyers, public relations firms, counsellors, engineers, etc. during 1989-90," for example.

In this regard, I offer the following comments.

First, it is emphasized that 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," 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)]. The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. Based upon the decision, however, whether a meeting is characterized as "regular," "formal," or otherwise, I believe 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.

Second, with respect to minutes of meetings, 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 regard 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.

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. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes 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.

It is also noted 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, a record, presumably minutes, must be prepared that indicates the manner in which each member cast his or her vote.

Third, 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 likely easy to locate minutes of meetings held on particular dates or within certain time periods because minutes are generally kept chronologically. However, your request in part involved meetings during which certain persons or firms were present or certain kinds of discussions occurred. Unless minutes are indexed by subject matter, for example, it may be impossible to locate minutes involving certain matters unless each set of minutes is individually reviewed. Rather that requesting minutes by subject, it is suggested that you request them by time period. Further, while agencies may charge for photocopies of records, no fee may be assessed for the inspection of accessible records. By inspecting the minutes, you could determine which among them are of interest and thereafter request copies.

Lastly, section 104 of the Open Meetings Law requires that public bodies give notice prior to their meetings. That provision states in relevant part that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto."

There is nothing in the Open Meetings Law that requires that notice be "verified" or that a record indicating compliance with notice requirements be prepared. Further, in the case of a meeting that is not regularly scheduled, notice may be given by telephoning the news media and posting; it might not be mailed. As such, there may be no written instrument prepared that would verify that notice was indeed given.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6372

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 13, 1990

Mr. Peter C. Andreu
82-A-6090
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Andreu:

I have received your letter of November 19, as well as the correspondence attached to it.

According to your letter, you made requests under the Freedom of Information Law to the Nassau County Police Department and the Office of the District Attorney for "all records" concerning your arrest and conviction. You received a variety of documents in response to your request from the Police Department, but numerous deletions were made on the ground that disclosure would constitute an unwarranted invasion of personal privacy. The deletions pertain not only to witnesses who testified at your trial, but also to officers who prepared reports, commanding officers who signed the reports, the medical examiner and decedents. Upon questioning the deletions, you were advised to appeal the denial to the Police Commissioner. Although an appeal was made, you had received no response, even though a month had passed. You have asked what your next course of action might be.

In this regard, as you are aware, 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 the person designated to determine appeals fails to do so within the statutory time, it has been held that the applicant has exhausted his administrative remedies and may initiate a judicial proceeding challenging the denial pursuant to Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

With respect to your request to the District Attorney, you were informed that, since the request involved "all records" pertaining to your case, it was too general. As such, he asked that you be "more specific" in describing the records in which you are interested. You have questioned whether that response is consistent with the Freedom of Information Law.

The standard for requesting records is found in section 89(3), which states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate the records based upon the terms of a request, and that to deny a request on the ground that it is overbroad, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)]. I point out that, although it was found in the decision cited above, which involved a request by an inmate, 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 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. To the extent that the District Attorney's staff can locate records in conjunction with the terms of your request, I believe that the request was appropriate and that the agency is obliged to review the records to determine the extent, if any, to which the records may properly be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Samuel J. Rozzi, Nassau County Police Commissioner
Bruce E. Whitney, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6373

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 14, 1990

Mr. Ralph Schwartz
[redacted]

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Schwartz:

I have received your letter of November 21, as well as the correspondence attached to it.

The materials describe your attempts to obtain information concerning employees of the Division of Parole. Although you apparently received much of the information sought, you were informed that certain lists that you requsted do not exist "in a readily available format" and an answer to a question you raised was given "using language differnt from your request."

You have asked for assistance in the matter. In this regard, I offer the following comments.

First, I am unfamiliar with the manner in which the Division of Parole maintains the information sought or the means by which it may be retrieved.

Second, it is noted that the title of the Freedom of Information Law may be somewhat misleading, for that statute does not require the disclosure of information <u>per se</u>; rather it is a vehicle under which agencies may be required to disclose records. Stated differently, the Freedom of Information Law pertains to existing records and section 89(3) of the Law specifies that an agency need not create a record in response to a request. Therefore, if, for example, lists or other information that you requested do not exist in the form of a record or records, the

Division, in my opinion, would not be obliged to prepare new records on your behalf. Similarly, the Freedom of Information Law does not require agencies to answer questions or offer interpretations when an applicant seeks to elicit information. While an agency may answer questions, again, its obligation under the Freedom of Information Law involves the disclosure of existing records to the extent required by law.

In the future, rather than seeking lists or information, it is suggested that you request records containing the information sought.

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: William Altschuller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6374

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 14, 1990

Ms. Janet A. McCue
[redacted]

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Ms. McCue:

I have received your letters of November 16, as well as related correspondence.

The first letter refers to a request made on September 2 to the Village of Island Park for record indicating "the names of attorneys, with hourly fees and bills incurred to date, who were hired to represent the Village in all HUD-related lawsuits." Since you received no response, you raised the issue at a meeting of the Board of Trustees on September 20 and were advised that its attorneys "instructed the Mayor not to respond to any questions on HUD-related matters." On September 24, you received a letter from the Mayor indicating that the request was referred to the Village Attorney. Having received no further response, you appealed on the ground that the request had been denied.

You have requested my opinion on the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

Further, it is noted that a recent decision involved a situation somewhat similar to that presented. In that case, requests were made, but the agency engaged in continual delays and failed to grant or deny access to the records sought. When the applicant initiated a judicial proceeding, the agency contended that petitioner had failed to exhaust her administrative remedies. In a discussion of the matter, the decision states that:

> "The respondent contends that petitioner failed to appeal the denial of access to records with 30 days to the agency head as provided in Public Officers Law [section] 89(4)(a) and, therefore, may not bring this proceeding.

> "The petitioner alleges that Public Officers Law [section] 89(4)(a) is not applicable as petitioner's FOIL requests has never been decided by respondent as respondent's only correspondence in response to petitioner's application indicates only that the matter is under investigation.
>
> "While the papers, for both sides, in this proceeding fail to discuss the issue of constructive denial, it has been found that the failure of an agency to respond to a FOIL request, as provided for in Public Officers Law [section] 89(3), can be construed as a denial of said request. In the case of Mtr. Robertson v. Chairman, 122 Misc 2d 829, the court held the failure of the Division of Parole to respond within five days to a letter from petitioner requesting access to certain information contained in his parole records is properly construed as a denial of his request...
>
> "It, therefore, appears that respondent's failure in this particular proceeding to neither grant nor deny the petitioner's request may be construed as a denial of access that may be appealed to the agency head" (Bernstein v. City of New York, Supreme Court, New York County, NYLJ, November 7, 1990).

Based upon the Freedom of Information Law and its judicial interpretation, I believe that your appeal was proper and that the person or body designated to determine appeals was obliged to respond in accordance with section 89(4)(a) of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Bills, vouchers and similar records reflective of expenses incurred by an agency are in my opinion generally available, for none of the grounds for denial would be applicable.

With respect to payments to legal counsel, I point out that, while the Board may engage in an attorney-client relationship with its attorneys, 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 details or descriptions of services rendered found in the records might justifiably be withheld, numbers indicating the amounts expended are in my view accessible under the Freedom of Information Law.

It is also noted that decisions have been rendered under the Freedom of Information Law in which it was held that records indicating payment by municipalities to their attorneys 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]. Most recently, it was held that "billing statements for legal services" provided to an agency by a law firm are accessible [Knapp v. Board of Education, Canisteo Central School District, Supreme Court, Steuben County, November 23, 1990].

Third, the fact that the records pertain to "HUD-related" matters is, in my view, irrelevant. As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "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, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Your second letter involves your request for an opinion from the Attorney General, whose representative indicated that opinions are prepared only at the request of an agency's "official legal advisor." Consequently, you asked the Mayor to request the Village Attorney to seek an opinion from the Attorney General. You were told that the attorney would not be asked to do so. You wrote that you realize that you "are requesting the Village to get an 'Opinion'..., not an actual 'record,'" and you asked whether your request is "covered under the Freedom of Information Law." In short, the Freedom of Information Law pertains to existing records, and I do not believe that the Freedom of Information Law is applicable to the issue.

Lastly, you asked that copies of "Your Right to Know" be sent to the Village. In this regard, 100 copries were recently forwarded 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:saw

cc: Jacqueline Papatsos, Mayor
Board of Trustees
Jules St. Germain, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1375

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 14, 1990

Mr. Anthony Barnwell
86-C-1062
Auburn Correctional Facility
135 State Street
Box 618
Auburn, NY 13021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Barnwell:

I have received your letter of November 16 in which you sought assistance concerning the use of the Freedom of Information Law.

You wrote that you are attempting to obtain copies of the "bed report 'The Archives of the Beds report in reference to the yrs 1955-1965" from the Rochester City School School Board. It appears that you requested the documentation in question, but that you have not received it.

In this regard, I offer the following comments.

First, I am unaware of the nature of the records that you are seeking.

Second, it is emphasized 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 and identify the records.

Third, a request should generally be made to an agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests. Further, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

Lastly, agencies may, in accordance with directives issued by the State Education Department, dispose of records after certain periods of time. I am unaware of whether the records sought, in view of their age, continue to exist, and it is possible that they might have been destroyed.

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-6376

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 14, 1990

Honorable Robert H. Frankl
Mayor, Village of Wesley Hills
332 Route #306
Wesley Hills, New York 10952

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mayor Frankl:

I have received your letter of November 23, which pertains to the Freedom of Information Law.

In your capacity as Mayor and a member of the Board of Trustees of the Village of Wesley Hills, you wrote that you "are troubled at times with [y]our ability to obtain good financial reports from [y]our sister communities." As such, you asked whether you "are entitled to detailed actual financial records (not budgets) of the Township, Counties and Villages throughout New York State."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, from my perspective, books of account, bills, vouchers, checks, contracts, ledgers and similar documents involving municipal finances are available, for none of the grounds for denial would apply. In addition, section 87(2)(g)(iv) of the Freedom of Information Law specifies that external audits, such as those prepared by the State Comptroller, must be disclosed.

I point out, too, that other statutes may provide direction concerning access to particular records. For example, the Town Law imposes certain responsibilities upon a town supervisor concerning to maintenance and disclosure of financial records. Specifically, section 29(4) of the Town Law states that the supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be the public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In addition, subdivision (1) of section 119 of the Town Law states in part that:

> "When a claim has been audited by the town board the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours." Further, as suggested earlier, vouchers, contracts, abstracts and similar documents, are, in my opinion, available pursuant to the Freedom of Information Law.

Second, it has been held that records accessible under the Freedom of Information Law must 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, I believe that you could seek records under the Freedom of Information Law in your capacity as Mayor, for example, or as a citizen.

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

OML-AO-1863
FOIL-AO-0377

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 14, 1990

Mr. Bob Zaleski
President
Hicksville Congress of Teachers
79 W. Old Country Road
Hicksville, NY 11801

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zaleski:

I have received your letter of November 19 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, following a discussion of the matter in August, the Hicksville Board of Education adopted guidelines concerning the establishment of a Citizens Budget Advisory Committee. The guidelines concerning the establishment of the Committee indicate that, following the receipt of applications for membership, Board members would have the opportunity to read all applications "and each Board member will nominate five people for the committee". The guidelines also state that "Those whose names appear on the lists of two or more board members will be asked to serve on the committee". As such, it is your belief that various "rounds" of elections occurred that ultimately resulted in 21 people being "elected" to the Committee. However, you provided that the "members have never been publicly elected by the members of the Board of Education, nor has there been any charge to this committee, given by the Board, at least publicly".

In this regard, I offer the following comments.

As I understand the matter, the Board has essentially taken action by selecting members to serve on the Committee outside the confines of a meeting held in accordance with the Open Meetings Law.

While I believe that the Board could validly have discussed the respective merits of the applicants during executive sessions, I do not believe that it could likely have made its selections by mail or other communication outside the context of a meeting during which a majority of the Board was present and votes taken in public.

Relevant to the issue in my view are the provisions of the Open Meetings Law, as well as section 41 of the General Construction Law. 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 attended by at least a majority of its total membership.

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". 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" of a quorum requires the physical coming together of at least a majority of the total membership of a public body.

I believe that, during a meeting or meetings of the Board, a review of the applicants could have been conducted in private. Section 105(1)(f) permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Since the process involved a matter leading to the appointment of a particular person or persons, executive sessions could in my opinion validly have been held.

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 reiterated, however, that the Board in my opinion could only have voted or taken action in the context of a meeting during which a majority of its total membership was present.

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 final 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Gary Steffanetta

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6378

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 14, 1990

Ms. Pat Arthur
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Arthur:

I have received your letter of November 26 as well as the correspondence attached to it.

According to the materials, on October 12, you wrote to Mr. Thomas Bourne, Ontario County Recycling Manager, and asked "what the current total expense of the lastest county recycling program is and what are the respective municipal unit costs of this program." You also asked what the "timetable" is "for inclusion of all the county towns in this program." Having received no response to your letter, you submitted a "formal request" to the County's records access officer on October 30. On the next day, you received a letter form Mr. Bourne, who wrote that was engaged in an effort "to research this information, all of which is not readily available." He did provide a figure concerning the 1990 budget for the program and added that his office does not maintain figures pertaining to municipal unit costs and that a timetable was being discussed but had not yet been determined. Mr. Bourne suggested that cost figures concerning your town of residence could be obtained from the Town Supervisor.

You have sought my opinion "as to whether this matter has been handled by the County officials in a manner acceptable under the Freedom of Information Law." In this regard, I offer the following comments.

First, it is unclear whether Mr. Bourne considered your initial inquiry to constitute a request made under the Freedom of Information Law. It is noted that the title of the Freedom of Information Law may be somewhat misleading, for that statute does not require the disclosure of information per se; rather it is a vehicle under which agencies may be required to disclose records. Stated differently, the Freedom of Information Law pertains to existing records and section 89(3) of the Law specifies that an agency need not create a record in response to a request. Therefore, if, for example, the information that you requested does not exist in the form of a record or records, the County, in my opinion, would not be obliged to prepare new records on your behalf. Similarly, the Freedom of Information Law does not require agencies to answer questions or offer interpretations when an applicant seeks to elicit information. While agency officials may answer questions, again, their obligation under the Freedom of Information Law involves the disclosure of existing records to the extent required by law.

In the future, rather than seeking information or asking questions in an effort to obtain records, it is suggested that you request records containing the information sought.

Second, if your inquiry had been viewed as a request made under the Freedom of Information Law, and it apparently was not, I believe that Mr. Bourne should have responded in a manner consistent with the Law. In such a case, he should likely have conferred with the designated records access officer, who has the responsibility of coordinating an agency's response to requests [see 21 NYCRR 1401.2(b)], and in accordance with section 89(3) of the Freedom of Information Law, he should have granted access, denied access in writing, stating the reasons, or acknowleged the receipt of the request within five business days.

Lastly, under the circumstances, assuming that Mr. Bourne did not view your inquiry as a request made under the Freedom of Information Law, it appears that he acted appropriately; he provided the information that he maintains that fell within the scope of your request; he suggested a source of information that he does not possess; and he specified that no timetable had yet been established. In view of the terms of your inquiry, it appears that responded to the extent possible.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Thomas Bourne, Ontario County Recycling Manager
Lorraine Brooks, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6379

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 17, 1990

Ms. Mary Jane Poli
[redacted]

The staff of the Committee on 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. Poli:

I have received your letter of November 26, as well as the materials attached to it.

By way of background, you requested the bill for services rendered by the Village of Solvay's attorney for the month of September. Although the amounts billed by the attorney were disclosed, the remainder of the bill indicating services rendered was deleted on the ground that it is exempted from disclosure by statute.

You have requested an advisory opinion on the matter. 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. Bills, vouchers and similar records reflective of expenses incurred by an agency are in my opinion generally available, for none of the grounds for denial would be applicable.

With respect to payments to legal counsel, I point out that, while the Village Board may engage in an attorney-client relationship with its attorneys, 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 details or descriptions of services rendered found in the records might justifiably be withheld, numbers indicating the amounts expended are in my view accessible under the Freedom of Information Law.

Second, I believe that the scope of the attorney-client privilege in the context of your inquiry is limited. 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) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been waived, and that records consist of legal advice or information relating to it provided by counsel to the client, 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 com-

> munication 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; 39 AD 2d 806 (1988)].

In my view, a generic description of services rendered would not fall within the scope of the attorney-client privilege or any other basis for withholding appearing in the Freedom of Information Law, for those descriptions would indicate nothing specific or confidential about the services rendered. When a record identifies particular litigation or the parties to litigation, I do not believe that the privilege could be asserted, for that information is publicly available from a court or perhaps other sources. On the other hand, if, for example, a statement includes reference to an attorney's investigation or preparation of work product pertaining to a specific individual against whom charges have been initiated whose name has not been disclosed and where there is no final determination of the charge, the name of the individual could in my view be withheld. Similarly, to the extent that the record in question describes services rendered in conjunction with litigation that may be taken against a person or entity, but which has not yet been initiated, those portions identifying the person or entity or or an indication of the details of such litigation could likely be withheld.

As stated in the Knapp decision cited earlier, which was rendered less than a month ago:

> "The statements provided to Petitioner list only the time period covered and the total amount owed for services and disbursements. No other identifying information has been provided to Petitioner.
>
> "Respondents maintain that all other information on the billing statement is protected by the attorney client privilege and therefore exempt from disclosure under Public Officers Law Section 87(2). Petitioner recognizes that, under limited circumstances, identifying information may be confidential. However, Petitioner maintains that she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation.

"In adopting the Freedom of Information Law, the New York State Legislature established a general policy in favor of public disclosure of government records. (Matter of Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY2d 75.) When a public agency resists disclosure, it has the burden of justifying its refusal to disclose based upon the very limited exemptions created by Public Officers Law Section 87(2). (Matter of Farbman & Sons v. New York City Health and Hospitals Corp., supra; Matter of Fink v. Lefkowitz, 47 NY2d 567). The agency must articulate a particularized and specific justification for denying access. (Matter of Capital Newspapers v. Burns, 67 NY2d 562, 566.)

"Respondents maintain that releasing any additional information on the billing statement would jeopardize the client confidentiality protected by CPLR 4503(a) and would require the School District to effectively create a new document in order to shield confidential information...

"The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)

"There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that

> questions pertaining to the date and the general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.)...
>
> "Respondents are not required to create a new document to fill a request under the Freedom of Information Law. (Gannett Co. v. County of Monroe, 59 AD2d 309, 313, aff. 45 NY2d 954; Matter of Gannett v. James, 86 AD2d 744, lv denied 56 NY2d 502.) Nevertheless, Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, supra.) Therefore, Petitioner's request for disclosure of the fee, type of matter and names of parties to pending litigation on each billing statement must be granted."

Based upon the foregoing, it appears that the denial of all but the numbers appearing on the bill was overbroad. In an effort to enhance compliance, copies 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:jm

cc: Phyllis DiFlorio, Clerk
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1864
FOIL-AO-6380

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 17, 1990

Ms. Judith Habegger
[redacted]

The staff of the Committee on 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. Habegger:

I have received your letter of November 26, as well as the correspondence attached to it.

Your inquiry pertains to the "Containerboard Project" in Westfield, and you indicated that you have been successful in obtaining records concerning the project from some sources. However, you have encountered difficulty in obtaining records from the Town of Westfield. In an appeal following a denial of a request you focused on the provision in the Freedom of Information Law involving "inter-agency or intra-agency materials." In addition to your request for certain aspects of those materials, you also sought:

> "- any other correspondence, such as letters from concerned citizens, or correspondence with county legislators or the county executive's office (which are not agencies).
>
> - minutes or notes from any meetings at which the project was discussed, including regularly scheduled board meetings (please note the Law considers a "meeting" as any time a quorum of a public body gathers for the purpose of discussing public business).

> - statistical information on the project including anything relative to the environmental review (other than a copy of the EAF which I already have).
>
> and all other records which do not specifically qualify for the exception under the Authority of Public Officers Law, Section 87(2)(g)."

You have requested my assistance in 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, the Freedom of Information Law pertains 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 term "agency" generally includes entities of state and local government in New York. Further, while communications between Town officials and citizens or private corporations (i.e., Checkerboard) would not constitute inter-agency or intra-agency materials, for private citizens and corporations are not "agencies," communications between town officials and county legislators or a county executive would, in my opinion, be inter-agency materials, for they would be forwarded from officials of one agency to officials of another agency.

Third, as you suggested in your appeal to the Town Supervisor, the contents of inter-agency or intra-agency materials determine the extent to which they must be disclosed or may be withheld. The provision concerning those materials, 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, 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 section 87(2)(g), the Court of Appeals specified that the contents of those materials determine the extent to which they may be available or withheld, for it was found 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" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 133 (1985)].

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.

I am not sufficiently familiar with the nature of the records sought, other than inter-agency or intra-agency materials, to provide specific guidance. However, in the case of "letters from concerned citizens," it is possible that names or

other identifying details pertaining to those persons could be withheld pursuant to section 87(2)(b) of the Freedom of Information Law on the ground that disclosure would result in "an unwarranted invasion of personal privacy."

Lastly, since you referred to minutes of meetings, it is emphasized that 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," 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)]. The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. Based upon the decision, however, whether a meeting is characterized as "regular," "formal," or otherwise, I believe 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.

With respect to minutes of meetings, 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 regard 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.

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. David N. Ross, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1638

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 18, 1990

Mr. John H. Warner
Town Taxpayers Association
44 Susan Drive
Newburgh, New York 12550

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Warner:

I have received your letter of November 30 and the correspondence attached to it.

According to the materials, you "are preparing to work on a project for the Town of Newburgh offering several garbage district options," and you requested data maintained by the Orange County Real Property Tax Agency, which apparently exists in that agency's "parcel master file for the town." In addition, you offered to provide the Agency" with the necessary 5 1/4[inch] high density diskettes." Nevertheless, in response to the request, you were informed by the Director of the Agency "that he would not allow [you] to have a copy of this file without a written request from the town assessor's office."

You have sought an advisory opinion concerning the 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 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, re-

> ports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the language quoted above, it is clear that computer tapes and disks, and other information stored electronically constitute "records" as defined by the Freedom of Information Law. Further, when a record is "kept" or "held" by an agency, such as the Real Property Tax Service Agency, I believe that the agency must respond to a request and disclose records to the extent required by the Freedom of Information Law, even though the record might have originated or been kept elsewhere, perhaps by a different agency. While an official of one agency may confer or consult with an official of another agency, nothing in the Freedom of Information Law suggests that permission to disclose must be obtained from the original custodian of a record. Similarly, if a record is maintained by two agencies, for example, I believe that either agency would be obliged to respond to a request for the record sought under the Freedom of Information Law. Moreover, since the Freedom of Information Law applies equally to the County and the Town, presumably the data would be equally available from either entity in receipt of 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.

Third, in view of the duties of the agency from which the data has been requested, it appears to be related to the assessment of real property. As you are likely aware, assessment records and related information are generally available and were found to be accessible long before the enactment of the Freedom of Information Law. For instance, as early as 1951, it was held that the contents of a so-called "Kardex" system used by assessors were available. The records determined to be available were described as follows:

> "Each card, approximately nine by seven inches (comprising the Kardex System), contains many printed items for insertion of the name of the owner, selling price of the property, mortgage, if any, frontage, unit price, front foot value, details as to

> the main building, including type, construction, exterior, floors, heating, foundation, basement, roofing, interior finish, lighting, in all, some eighty subdivisions, date when built or when remodeled, as well as details as to any minor buildings" [Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756, 758; see also, Sanchez v. Papontas, 32 AD 2d 948 (1969)].

Moreover, in Szikszay v. Buelow [107 Misc. 2d 886, 436 NYS 2d 558 (1981)], the applicant sought assessment information as well as tax maps. The assessment information existed in computer tape format. The court referred to section 87(2)(b), as well as section 89(2)(b)(iii) (id. at 558) of the Freedom of Information Law, which states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes". Notwithstanding those provisions, the court granted access to the computer tapes and held that:

> "In view of the history of public access to assessment records and the continual availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.L.R.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted'" (id.).

The Court also found that:

> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner's purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy. It is therefore improper for respondent to deny petitioner's request for copies of the County assessment rolls in computer tape format" (id.).

I point out, too, that the same conclusion was reached by another court in an unreported decision (Real Estate Data v. Nassau County and Abe Seldin, Chairman, Board of Assessors, Sup. Ct., Nassau Cty., September 18, 1981).

In view of the foregoing, I believe that assessment information that is stored on a computer tape or in some other format is available to anyone, even if the data would be used for commercial 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:saw

cc: Gary Bennett
Doris Greene, Town Clerk, Town of Newburgh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6382

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 18, 1990

Mr. John B. Carroll
House Counsel
NYS Office of Mental Health
44 Holland Avenue
Albany, NY 12229

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Carroll:

I have received your letter of December 3 in which you requested an advisory opinion concerning the status of "health systems agencies" under the Freedom of Information Law. You wrote that although health systems agencies are organized pursuant to the Not-for-Profit Corporation Law, "the Public Health Law imposes a number of responsibilities upon these agencies which are seemingly governmental in nature".

In this regard, I offer the following comments.

First, the Freedom of Information Law applies to agency records, and 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."

Second, as you suggested, various provisions of the Public Health Law refer to health systems agencies. Specifically, section 2904 pertains to the State Hospital and Planning Council, which must "include at least one member nominated initially by each of the health systems agencies as hereinafter provided" [section 2904(a)]. Section 2904 contains other provisions dealing with the role of health systems agencies and states in relevant part that:

> "(c) The governor shall approve each health systems agency with a defined geographical boundary, which shall consist of areas entirely within New York state except in those areas where a bi-state planning agreement exists...
>
> (e) The council, in cooperation with the various health systems agencies shall consider and advise in accordance with the provisions of this chapter relative to applications for the incorporation or establishment of a new institution and the provisions of this chapter relative to applications for the construction of a hospital as defined in article twenty-eight of this chapter. The state council shall consult with or otherwise obtain the advice of the health systems agency of the area in which the institution is located or the health systems agency of areas that might be substantially affected by the application. At the time members of the council are notified that an application is scheduled for consideration, the applicant and the health systems agency shall be so notified in writing. Before taking any action contrary to the advice of the health systems agency involved, the state council shall afford them an opportunity to request a public hearing in which each such agency and the applicant shall have the right to participate...
>
> (g) The council and any health systems agency, with respect to any of the matters with which they may deal may hold such public hearings as they deem appropriate and may require the submission of such information and documents as they may deem appropriate...

> (i) No civil action shall be brought in any court against any member, officer or employee of the state council or of any health systems agency for any act done, failure to act, or statement or opinion made, which discharging his duties as a member, officer or employee of the state council or agency, without leave from a justice of the supreme court, first had and obtained. In any event such member, officer or employee shall not be liable for damages in any such action if he shall have acted in good faith, with reasonable care and upon probable cause."

Section 2904-a(1) states that:

> "The commissioner of health is authorized to contract with a health systems agency to the extent of any appropriation therefor for such health systems agency to provide assistance to the state in implementing state health planning and development functions and priorities."

In addition, section 2904-b of the Public Health Law, entitled "Health systems agencies", states in part that:

> "(a) For the purposes of this section, 'health systems agency' shall mean a corporation organized pursuant to the not-for-profit corporation law which is approved by the governor pursuant to subdivision (c) of section twenty-nine hundred four of this article.
>
> (b) The powers of health systems agency shall include those necessary to perform the duties and functions provided for in this section...
>
> (d) Each health system agency shall:
>
> (1) recommend to the appropriate authority approval or disapproval of applications for the establishment or construction of a hospital, the certification of home health agencies, and the authorization to provide a long term home health care program;

(2) assist appropriate state agencies in developing standards and guidelines to determine public need for hospital and other health services;

(3) develop areawide plans and carry out facility and services planning;

(4) recommend to the appropriate departments and to local providers priorities for improving the delivery of health services in the agency's local area;

(5) perform special studies and engage in other planning and implementation activities including the collection of relevant data and information regarding the health care system of each agency's area;

(6) serve as a community resource to actively promote increased public knowledge and responsibility regarding the availability and appropriate utilization of health care service;

(7) submit a semi-annual report to the senate and assembly health committees detailing the activities of each agency during that reporting period;

(8) annually submit a copy of its operating budget to the chairman of the senate finance committee and the chairman of the assembly ways and means committee and the director of the division of the budget. Such operating budget shall contain information detailing contributions received and the types and sources of contributions eligible for matching grants..."

Based upon the foregoing, and in view of their powers, duties, the statutory role they carry out in the process of health planning, their protection against civil suit and their statutory reporting requirements, I believe that health systems agencies are, with certain exceptions, "agencies", that are subject to the requirements of the Freedom of Information Law, for they appear to perform governmental functions.

Although I am unaware of any judicial determination that deals specifically with the status of a health systems agency 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 another decision involving volunteer fire companies, the court stressed the statutory relationship between those not-for-profit entities and government, stating 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).

More recently, it was held that a local development corporation, a not-for-profit corporation which, by statute, performs "an essential governmental function" (see Not-for-Profit Corporation Law, section 1411), is subject to the Freedom of Information Law, for it was found to be an "agent" of a municipality.

In sum, based upon the language of the provisions of the Public Health Law cited earlier and the expansive judicial interpretation of the Freedom of Information Law, it appears that health systems agencies are subject to the requirements of the Freedom of Information Law.

The exception to my opinion that health systems agencies are subject to the Freedom of Information Law involves those that operate in New York and a neighboring state. Since New York cannot impose its laws beyond its borders, a bi-state health systems agency would not, in my view, fall within the scope of the Freedom of Information Law [see Metro-ILA Pension Fund v. Waterfront Commission of New York Harbor, Supreme Court, New York County, NYLJ, December 16, 1986].

I hope that I have been of some assistance. If you would like to discuss the matter, 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-6383

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 18, 1990

Mr. Garland A. Wells
89-T-1741
Mt. McGregor Correctional Facility
Box 2071
Wilton, NY 12866

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Wells:

I have received your letter of December 14 in which you requested assistance concerning the use of the Freedom of Information Law.

According to your letter, you requested your "institutional records" from the appropriate person at your facility, but that the request, as of the date of your letter, had been "ignored". You requested "forms" that might be needed and that you would like to "clear any mistakes in [your] record."

In this regard, I offer the following comments.

First, there is no specific form that must be used to request records under the Freedom of Information Law, and it has been advised that any request made in writing that "reasonably describes" the records sought should suffice.

Second, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)]. As you may be aware, the person designated to determine appeals for the Department of Correctional Services is Counsel to the Department.

Lastly, I point out that the Freedom of Information Law deals with the disclosure of records; it does not confer a right to amend or correct records. However, the regulations promulgated by the Department of Correctional Services, sections 5.50 to 5.54, contain procedures under which an inmate may challenge the accuracy of information contained in the personal history or correctional supervision history portions of inmate records. It is suggested that you review those provisions at your facility library.

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-6384

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 18, 1990

Ms. Nicole Haynes
[redacted]

The staff of the Committee on 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. Haynes:

I have received your letter of December 3, which did not reach this office until yesterday.

You wrote that you would like to seek records under the Freedom of Information Law and asked whether it is "possible...to be provided with any information that will assist [you] in [your] litigation."

In this regard, I am unaware of the nature of the litigation in which you may be involved. It is noted, however, 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, I do not believe that your rights under the Freedom of Information Law as a member of the public are altered by your status as a litigant or potential litigant. As stated by the Court of Appeals, the state's highest court: "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, which is a disclosure device that may be used by litigants. Perhaps the most commonly used discovery mechanism is Article 31 of the Civil Practice Law and Rules (CPLR). 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 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public rights 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 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.'" [id. at 80].

Based upon the foregoing, the pendency of litigation would not affect your rights as a member of the public under the Freedom of Information Law, notwithstanding your status as a litigant.

Enclosed for your review 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.

I hope that I 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-6385

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 18, 1990

Raymond J. Quinn
Dean of Administrative Services
Hudson Valley Community College
Vandenburgh Avenue
Troy, NY 12180

Dear Dean Quinn:

I have received your letter of November 4 in which you requested an opinion concerning "the release of information to administrators by the staff of [y]our campus Director of Health Services".

According to your letter:

> "Two problems have arisen: The Director states that without the patient's approval, i.e. student or staff member, she cannot release to our Office of Public Safety either the name or the condition of the person being transported to the hospital. The second problem arose in the formation of a campus committee to comply with the latest statute on 'Sexual Assault Prevention'.....
> The committee has been advised by the Director of Health Services that no information will be released on any sexual assault through her office unless the individual wishes to press changes against the perpetrator."

In this regard, it is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which generally deals with public rights of access to records of government in New York. In my view, that statute has little relevance to the issues that you described, which involve the disclosure of records by officials of the College to other officials at the College. In terms of public access, it is likely that the information in question, if requested by the public, would, if disclosed, result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)] or would be exempted from disclosure by statute [section 87(2)(a)].

Of potential significance is the federal Family Educational Rights and Privacy Act (20 U.S.C. section 1232g), which pertains to education records identifiable to students. In brief, education records are confidential unless they are requested by parents of students under the age of eighteen or by "eligible students", students who have reached eighteen years of age and attend an institution of postsecondary education, such as a college or university, unless those persons consent to disclosure.

The regulations promulgated under the Act (34 C.F.R. section 99.3) define the phrase "education records" to mean those records that are:

> "[1] Directly related to a student; and
> [2] Maintained by an education agency or institution or by a party acting for the agency or institution."

The regulations also state, however, that the term "education records" 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;
>
> [2] Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are--
> [i] Maintained separately from

education records;
[ii] Maintained solely for law enforcement purposes; and
[iii] Disclosed only to law enforcement officials of the same jurisdiction;

[3][i] Records relating to an individual who is employed by an education agency or institution, that--
[A] Are made and maintained in the normal course of business;
[B] Relate exclusively to the individual's capacity as an employee; and
[C] Are not available for use for any other purpose.
[ii] Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph [b][3][i] of this definition.

[4] Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are--
[i] Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;
[ii] Made, maintained, or used only in connection with treatment of the student; and
[iii] Disclosed only to individuals providing the treatment. For the purpose of this definition 'treatment' does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution..."

Based upon the foregoing, it is likely that some of the records in question would constitute "education records" subject to the Act, while others would not.

Insofar as the Act is relevant to the issues, again, education records are generally confidential, unless an appropriate consent to disclose has been given. I point out, however, that

there are certain conditions under which prior consent is not required. One of those conditions arises when: "The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests" [34 C.F.R. section 99.31(a)(1)]. Based upon the foregoing, presumably the governing body or president of the College would have the authority to determine which officials within the College could obtain certain records without consent to disclose and under which circumstances those disclosure would appropriately be made.

In sum, the issues are largely unrelated to the Freedom of Information Law. Rather, it appears that their resolution is an internal matter to be determined by College officials.

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-0386

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 19, 1990

Mr. Ismael Del-Valle
88-B-1596
135 State Street
Auburn, New York 13021

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Del-Valle:

I have received your letter of December 3 in which you requested assistance.

According to your letter, you have attempted unsuccessfully to obtain information from a court clerk concerning a co-defendant who testified against you at your trial. You added that the co-defendent "testified before the grand jury at trial that his case was dismissed," and you are attempting to learn the date of the dismissal.

In this regard, I offer the following comments.

First, the Freedom of Information Law, the statute within the Committee's advisory jurisdiction, pertains to agency records, and 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 does not apply to the courts and court records.

Second, section 190.25(4)(a) of the Criminal Procedure Law states in part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 25.70 of the penal law, may. except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

Third, section 160.50 of the Criminal Procedure Law states generally that records pertaining to charges that have been dismissed in favor of an accused are sealed. Since the charges against your co-defendant were dismissed, it is likely that they are now confidential.

In short, the Freedom of Information Law appears to be inapplicable to the records in which you are interested. As a defendant, however, you may have other rights of access to records or means of obtaining records. Since I lack expertise concerning Criminal Procedure Law or the rights of defendants, it is suggested that you discuss the matter with your attorney.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6387

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 19, 1990

Mr. Mika'il A. 'Abdul-Malik
88-A-8521/A-4-5
Southport Correctional Facility
P.O. Box 2000
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. 'Abdul-Malik:

I have received your letter of December 4 in which you sought assistance.

According to your letter, you requested records under the Freedom of Information Law on October 1 from the Office of the Erie County District Attorney. Having received no response, you appealed on October 15. 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, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests and appeals. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

Further, it is noted that a recent decision involved a situation in which requests were made, but the agency engaged in continual delays and failed to grant or deny access to the records sought. When the applicant initiated a judicial proceeding, the agency contended that petitioner had failed to exhaust her administrative remedies. In a discussion of the matter, the decision states that:

> "The respondent contends that petitioner failed to appeal the denial of access to records with 30 days to the agency head as provided in Public Officers Law [section] 89(4)(a) and, therefore, may not bring this proceeding.
>
> "The petitioner alleges that Public Officers Law [section] 89(4)(a) is not applicable as petitioner's FOIL requests has never been decided by respondent as respondent's only correspondence in response to petitioner's application indicates only that the matter is under investigation.

> "While the papers, for both sides, in this proceeding fail to discuss the issue of constructive denial, it has been found that the failure of an agency to respond to a FOIL request, as provided for in Public Officers Law [section] 89(3), can be construed as a denial of said request. In the case of Mtr. Robertson v. Chairman, 122 Misc 2d 829, the court held the failure of the Division of Parole to respond within five days to a letter from petitioner requesting access to certain information contained in his parole records is properly construed as a denial of his request...
>
> "It, therefore, appears that respondent's failure in this particular proceeding to neither grant nor deny the petitioner's request may be construed as a denial of access that may be appealed to the agency head" (Bernstein v. City of New York, Supreme Court, New York County, NYLJ, November 7, 1990).

In an effort to enhance compliance, a copy of this opinion will be forwarded to the District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: District Attorney, Erie County

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6388

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 19, 1990

Mr. Fred Greenberg
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Greenberg:

I have received your letter of December 4 and the correspondence attached to it.

You referred to a request for records directed to Community School District Two in New York City. The District's records access officer responded by indicating that the records sought do not exist or are no longer maintained in District offices. It is your view that the response "implies records have been destroyed or transferred which is contrary to State Law." Further, you asked the records access officer for "certification when records don't exist," but that "[c]ertification has not been provided."

In this regard, I offer the following comments.

First, the Freedom of Information Law generally deals with rights of access to records; direction concerning the retention and disposal of records is found in other provisions of law.

Second, section 89(3) of the Freedom of Information law refers to certification and states in relevant part that:

> "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be,

> shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

In conjunction with an agency's procedure, its designated "records access officer" is responsible for preparing a certification. By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations that govern the procedural implementation of the Law. The Committee has done so by means of 21 NYCRR Part 1401. In turn, section 87(1) of the Law requires that governing body of an agency promulgate rules and regulations in a manner consistent with the Freedom of Information Law and the Committee's regulations. Further, the Committee's regulations require that the governing body "shall designate one or more persons as records access officer..." [section 1401.2(a)].

Section 1401.2(b)(6) of the regulations indicates that the records access officer is responsible for assuring that the following duties with respect to certification are carried out:

> "Upon failure to locate records, certify that:
>
> (i) The agency is not the custodian for such records; or
>
> (ii) The records of which the agency is a custodian cannot be found after diligent search."

As such, I believe that a certification made in accordance with section 89(3) of the Freedom of Information Law should be prepared by the records access officer.

In an effort to enhance compliance, a copy of this opinion will be forwarded to the District's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Andrew Lachman, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1868
FOIL-AO-6389

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 19, 1990

Ms. Karen Vardi
[redacted]

The staff of the Committee on 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. Vardi:

I have received your letter of December 4 in which you requested an advisory opinion.

According to your letter, at a recent meeting of the Board of Trustees of the Village of Lake Success, the Board "voted to disallow unapproved minutes of all meetings to be given out until such time the Board met again to approve these minutes." You added that the Board "generally mets once a month" and that, therefore, "the public could not receive approved minutes for at least one month after they have been taken." Further, the Village Attorney apparently has cited and relied upon section 87(2)(g) of the Freedom of Information Law as the basis for the Board's action.

In this regard, I offer the following comments.

First, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, section 106 of that statute provides 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."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Minutes of executive sessions reflective of action taken, the date and the vote must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. I point out that if a public body conducts an executive session and merely engages in a discussion but takes no action, there is no requirement that minutes of the executive session be prepared.

Second, 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. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes 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.

Third, with respect to the Freedom of Information Law, I point out that the Law makes no distinction between drafts as opposed to "final" documents. The Law pertains to all agency records, and section 86(4) defines that 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."

Due to the breadth of the language quoted above, once a document exists, it constitutes a "record" subject to rights of access, even if the record is characterized as "draft" or is unapproved.

The provision to which the Village Attorney referred, section 87(2)(g) of the Freedom of Information Law, is one of the grounds for denial of access to records. That provision, however, due to its structure, 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.

In the context of the issue, minutes generally consist of a factual rendition of what transpired at an open meeting. On that basis, I believe that they are available under section 87(2)(g)(i), for they would consist of factual information [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. Minutes likely also consist in part in some instances of instructions to staff that affect the public or final agency determinations that would be available pursuant to section 87(2)(g)(ii) or (iii) respectively. Additionally, in the case of an open meeting during which the public may be present and, in fact, may tape record the meting [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], there would appear to be no valid basis for withholding minutes, irrespective of whether they have been approved.

Lastly, the Freedom of Information Law deals with access to records generally. The Open Meetings Law, however, contains specific reference to minutes and the time within which they must be prepared and made available. In my view, that specific direction supersedes any general statute that may be contrary. I do not believe that the Freedom of Information Law provides contrary direction. Further, the "two week" provision in section 106 of the Open Meetings Law would be meaningless if the Village's policy were valid.

In sum, for the reasons expressed in the preceding commentary, I believe that the Board must prepare and disclose minutes within two weeks of their meetings, even if the minutes have not been approved.

In an effort to enhance compliance with and their understanding of the Open Meetings Law and the Freedom of Information Law, copies 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

Robert J. Freeman
Executive Director

RJF:saw

cc: Board of Trustees
Peter Mineo, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6390

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 20, 1990

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 December 8 as well as the materials attached to it.

You referred to a telephone conversation last year concerning a refusal by the Hauppauge Board of Education to disclose its "budget book". The budget book is distributed to administrators and the Board prior to the Board's deliberations concerning an upcoming budget, and you enclosed excerpts of an old budget book. In a letter addressed to you recently concerning a request for the budget book, the President of the Board wrote that it is a "working copy of planned expenditures" and is "not an approved or final draft of the District's budget". He added that "[c]opies of the Budget Book are therefore not intended for general publication or distribution", and that requests for copies "will as in the past, be denied".

You have requested an opinion concerning the matter. In this regard, I offer the following comments.

First, I point out that 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, 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 "working copies", 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 upon a presumption of access. Stated differently, all records 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 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 budget book 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 what may have been similar records, so-called "budget worksheets" maintained by the State Division of the Budget, it was held that numerical figures, including estimates and projections or 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, one of which related to certain areas 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 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 42 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 that 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 no statutory requirements that such data be limited to 'objective' information and there is no apparently 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, unless section 87(2)(c) is applicable.

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 Appellative 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 enter 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 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 and 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 ED 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.

Based upon the excerpts of a previous budget book that you disclosed, I believe that the excerpts consist of statistical or factual data that would be available. If analogous records are prepared with respect to the upcoming budget, it appears that the contents would be available, subject to the qualifications described in the preceding commentary.

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: Don Leslie, President, Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1870
FOIL-AO-6391

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 20, 1990

Mr. Kevin P. Gorman
[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. Gorman:

I have received your letter of December in which you raised questions concerning the Freedom of Information Law and the Open Meetings Law.

You wrote that the Yonkers City Board of Ethics was created by the City Charter and that its members are appointed by the Mayor, and your questions are as follows:

> "1. Should the Yonkers City Ethics Board conduct its meetings within the provisions of the Open Meetings Law?
>
> 2. Should the Board make available information provided within the Freedom of Information Law excluding only that information exempted."

In this regard, I offer the following comments.

First, in my opinion, a board of ethics is a public body required to comply with the Open Meetings Law. The scope of the Open Meetings Law is determined in part by section 102(2), which defines "public body" to mean:

> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency

> or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

The Board of Ethics in my view is subject to the Open Meetings Law, for it was created by the City Charter, it consists of at least two members, it may conduct its business only by means of a quorum (see General Construction Law, section 41), and it conducts public business and performs a governmental function for a public corporation, a city. Further, the definition makes specific reference to committees, subcommittees and "similar" bodies.

Second, although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally be conducted open to the public, section 105(1) of the Law lists eight grounds for entry for entry into executive session.

Of likely relevance to the duties of a board of ethics is section 105(1)(f) of the Law, which permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

If the issue before a board of ethics involves a particular person in conjunction with one or more of the subjects listed in section 105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, section 105(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

Further, the Law prescribes a procedure that must be accomplished by a public body during an open meeting before conducting an executive session. Section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

While a motion for entry into an executive session must describe the subject to be discussed, I do not believe that there is a requirement that the motion specify the issues with particularity or identify an individual who is the subject of a discussion before the Board.

Third, the Board of Ethics is in my view subject to the Freedom of Information Law. That statute pertains to agency records, and 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."

Based on the foregoing, I believe that a city board of ethics is clearly an "agency" for the purposes of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Of likely significance to the records of a board of ethics are two 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". Section 87(2)(g) enables 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 [i.e., section 87(2)(b)] would apply. 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 cannot advise as to the extent that the provisions described above could be asserted, for I am unfamiliar with the specific nature or contents of records maintained by 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1871
FOIL-AO-0392

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 20, 1990

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 9 addressed to the Committee and its Chairperson. Please be advised that Barbara Shack no longer serves on the Committee.

Your letter focuses upon requests made in August for records directed to the records access officers at the Westchester County Department of Real Estate and the Village of Croton-on-Hudson. In neither case did you receive a response to the requests within five business days of their receipt. You are seeking responses to your allegations that "there is dereliction of public service if not conspiracy in the established pattern of denial", and that the "US Federal Racketeering Act, known as RICO, should be invoked in this matter."

In this regard, insofar as your allegations involve conspiracy or the application of RICO, I believe that it would be beyond the authority of this office to comment. However, having reviewed your letter and the correspondence attached to it, I offer the following remarks, some of which have been made in previous correspondence.

First, if records are or have been made accessible under the Freedom of Information Law, I believe that they should be made equally available to any person, without regard to status or interest [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Therefore, if an agency has disclosed records under the Freedom of Information Law to a reporter, for example, I believe that those records should be disclosed to you.

Second, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests and appeals. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

Further, it is noted that a recent decision involved a situation in which requests were made, but the agency engaged in continual delays and failed to grant or deny access to the records sought. When the applicant initiated a judicial proceeding, the agency contended that petitioner had failed to exhaust her administrative remedies. In a discussion of the matter, the decision states that:

> "The respondent contends that petitioner failed to appeal the denial of access to records with 30 days to the agency head as provided in Public Officers Law [section] 89(4)(a) and, therefore, may not bring this proceeding.
>
> "The petitioner alleges that Public Officers Law [section] 89(4)(a) is not applicable as petitioner's FOIL requests has never been decided by respondent as respondent's only correspondence in response to petitioner's application indicates only that the matter is under investigation.
>
> "While the papers, for both sides, in this proceeding fail to discuss the issue of constructive denial, it has been found that the failure of an agency to respond to a FOIL request, as provided for in Public Officers Law [section] 89(3), can be construed as a denial of said request. In the case of Mtr. Robertson v. Chairman, 122 Misc 2d 829, the court held the failure of the Division of Parole to respond within five days to a letter from petitioner requesting access to certain information contained in his parole records is properly construed as a denial of his request...
>
> "It, therefore, appears that respondent's failure in this particular proceeding to neither grant nor deny the petitioner's request may be construed as a denial of access that may be appealed to the agency head" (Bernstein v. City of New York, Supreme Court, New York County, NYLJ, November 7, 1990).

Third, in your request to the County, you sought several lists. I am unaware of whether any such lists have been prepared. Here I point out that the Freedom of Information Law pertains to existing records, and that section 89(3) of the Law specifies that an agency need not create new records in response to a request.

Fourth, portions of your request to the Village likely relate to the Open Meetings Law. For instance, you requested records of the "municipal debate" concerning a position and the person selected to hold that position. It is noted in this regard that the Open Meetings Law contains 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 on the foregoing, it is clear that minutes need not consist of a verbatim transcript or account of the entire "debate" 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, to the extent that a discussion focused upon a particular candidate or candidates for a position, I believe that a closed or executive session could have been conducted pursuant to section 105(1)(f) of the Open Meetings Law. That provision permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Lastly, having received your letter of December 17, I have learned that the records access officer for the Department of Transportation at its Poughkeepsie regional office is Mr. Art Pasco, whose address is the same as that appearing in your letter.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: J. Yoegel
Richard Herbek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6393

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 21, 1990

Lieutenant Colonel John G. Henighan (Ret.)
Waterbury Road
Nassau, New York 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 Lieutenant Colonel Henighan:

I have received your letter of December 11 and the materials attached to it. You have requested assistance in obtaining information from the Division of Military and Naval Affairs.

The correspondence indicates that you requested:

> "copies of all rules, regulations, policies and procedures published or followed by the State of New York Division of Military and Naval Affairs and/or Headquarters New York Army National Guard regarding the consideration, selection and promotion of officers to the grades of O-5(LTC) and O-6(COL) in the New York Army National Guard."

In addition, you sought "data (numbers) describing the characteristics of incumbents in the grades O-4(MAJ), O-5(LTC) and O-6(COL) in Basic Branches only," and suggested "[t]hat information may be provided by either inserting the appropriate number in column 2 of the attached forms or in any other format readily available." In response to the request, you were informed by Colonel William E. Brass, the Division's records access officer, that the request "has been transferred to the National Guard Bureau" in Washington, D.C.

You have asked whether the information sought should be disclosed "[i]f it is available at the Division of Military and Naval Affairs".

In this regard, I offer the following comments.

First, section 31 of the Executive Law states in relevant part that: "There shall be in the executive department the following divisions...The division of military and naval affairs...". As such, I believe that the Division of Military and Naval Affairs is an "agency" required to comply with the Freedom of Information Law [see section 86(3)].

Second, 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."

It is emphasized that the state's highest court has construed the provision quoted above as broadly as its language suggests, and that information "in any physical form whatsoever" constitutes a "record", irrespective of its origin, use or function [see Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980); Capital Newspapers v. Whalen, 69 NY 2d 246 (1987)].

Third, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law specifies that an agency need not create a record in response to a request. Therefore, if the Division does not maintain the records sought, such as those containing the data described in the second aspect of your request, I do not believe that it would be obliged to create or prepare new records on your behalf. However, insofar as the data or the rules, regulations, policies and procedures that you requested exist and are maintained by the Division, I believe that they would fall within the scope of the Freedom of Information Law and the that Division would be obliged to disclose the records to the extent required by the Law.

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.

In my view, the records sought fall within one of the grounds for denial, section 87(2)(g). However, due to the structure of that provision, it often requires significant disclosure. Specifically, section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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 could properly 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.

Rules, regulations, policies and procedures, as well as the remaining data requested, to the extent that it exists, would constitute "intra-agency materials". Nevertheless, any such data would consist of statistical or factual information available under section 87(2)(g)(i). The other documentation would, in my view, consist either of instructions to staff that affect the public available under section 87(2)(g)(ii) or final agency policies available under section 87)(2)(g)(iii).

I point out that the New York Freedom of Information Law contains no exception analogous to the exemption in the federal Freedom of Information Act (5 U.S.C. 552) concerning the ability to withhold records in the interest of national defense or foreign policy. The only exception in the Freedom of Information Law that might be cited to protect against disclosure of those kinds of records would be section 87(2)(f), which enables an

agency to withhold records when disclosure "would endanger the life or safety of any person". While I am not familiar with the records sought, it does not appear that section 87(2)(f) would be relevant to a determination of rights of access.

In sum, assuming that the records sought are maintained by the Division of Military and Naval Affairs, I believe that it is obliged to respond to the request by disclosing the records to the extent required by the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Colonel Brass

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6394

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 21, 1990

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 December 11 and the materials attached to it.

As I understand your letter, you have attempted without success to obtain records relating to your arrest from the New York City Police Department, from the office of a district attorney and from the court in which proceedings were conducted. Records were also requested from and denied by the Human Resources Administration. Although the nature of the records sought is unclear, you referred to section 1038 of the Family Court Act, and one of the items of correspondence cites section 422 of the Social Services Law as the basis for a denial. Further, the correspondence also refers to section 89(4)(a) of the Freedom of Information Law.

You have requested assistance in the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records and 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, while a police department or an office of a district attorney, for example, are agencies, the courts and court records are not subject to the Freedom of Information Law.

Second, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests and appeals, and the time within which an applicant may appeal a denial of access to records. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

If an applicant's request is denied, but the time to appeal has expired, I believe that a new request may be made. If that request is denied, an appeal could be made within the period specified in section 89(4)(a) 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. Without knowledge of the nature of the records sought, I cannot provide specific guidance. However, several of the grounds for denial may be relevant.

As indicated to you in a letter prepared on September 8, 1989, section 87(2)(a) of the Law provides that an agency may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute...". Section 422 of the Social Services Law is a statute which pertains specifically to the statewide central register of child abuse and maltreatment and all reports and records included the register. Subdivision (4)(A) of section 422 states that reports of child abuse as well as information concerning those reports are confidential, and may be disclosed only under specified circumstances listed in that statute. Two of those circumstances involve disclosures to "any person who is the subject of the report or other persons named in the report" [section 422(A)(d) and to "a court, upon a finding that the information in the re- cord is necessary for the determination of an issue before the court" [section 422(A)(e)]. In addition, subdivision (7) of section 422 states:

> "At any time, a subject of a report and other persons named in the report may receive, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized to prohibit the release of date that would identify the person who made the report or who cooperated in a subsequent investigation, which he reasonably finds will be detrimental to the safety or interests of such person."

I am unaware of whether any of the provisions cited above would be applicable to your situation. However, any rights of access that you might have would arise under section 422 of the Social Services Law rather than the Freedom of Information Law.

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 in a variety of situations, i.e., where a record identifies persons other than yourself, such as witnesses, for example.

Perhaps the most relevant provision concerning access to 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 and 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). Under the circumstances, it does not appear that section 87(2)(e) would serve as a basis for denial.

The remaining 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.

Records prepared by agency employees or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

In sum, the nature and content of the records in question and the effects of their disclosure would, in my view, determine the extent to which they must be disclosed or may be withheld.

Since you referred to a "Vaughn" index, it is noted 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. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring 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, one 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 Offices 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 and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 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)].

Lastly, you referred to section 1038 of the Family Court Act, which provides that:

> "Each hospital and any other public or private agency having custody of any records, photographs or other evidence relating to abuse or neglect, upon the subpoena of the court, the corporation counsel, county attorney, district attorney, counsel for the child, or one of the parties to the proceeding, shall be required to send such records, photographs or evidence to the court for use in any proceeding relating to abuse or neglect under this article. The court shall establish procedures for the receipt and safeguarding of such records."

Again, records of the Family Court are not subject to the Freedom of Information Law. Further, the records described in section 1038 are disclosed "upon subpoena of the court".

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-1395

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 24, 1990

Ms. Mary Speedy Hajdu
Burgett & Robbins
15 East Fifth Street
P.O. Box 1135
Jamestown, NY 14702-1135

The staff of the Committee on 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. Hajdu:

I have received your letter of December 11 and the materials attached to it.

You wrote that you represent Joseph D. Fluent and the Salamanca Coalition of United Taxpayers, Inc. concerning their attempts to obtain records under the Freedom of Information Law from the Salamanca Indian Lease Authority and the City of Salamanca. You added that the materials have been enclosed "to demonstrate that [you] are exhausting all administrative remedies prior to seeking court intervention in this matter."

Specifically, on November 15, Mr. Fluent requested:

> "1.) Any and all minutes of formal and informal meetings, negotiating sessions and discussions held by and between the Salamanca Indian Lease Authority and the Seneca Nation of Indians wherein the topic of negotiation of a lease or renewal of a lease for citizens in the City of Salamanca were discussed, and specifically including entire transcripts, recordings, written minutes and technical documents relied upon therein.

> 2.) Any and all minutes, transcripts, tapes and recordings of formal or informal meetings, discussions or negotiating sessions conducted by the Salamanca Indian Lease Authority regardless of whether the Seneca Nation of Indians participated therein, and specifically including all such meetings which were in executive session, together with the substance and complete summary of all action taken during executive sessions."

In response to the request, David M. Franz, attorney for the Authority, wrote that:

> "Negotiation sessions and discussions were conducted by an Indian lease negotiating committee, on behalf of consenting lessees, with the Seneca Nation of Indians. Such negotiations were conducted over a period of approximately thirty months commencing in or about the month of February, 1988. All negotiations were conducted on the Allegany Indians Reservation and the Cattaraugus Indian Reservation. There are no minutes of such negotiations, but all negotiations were taped and a portion of such tapes have been transcribed. Such tapes and the transcriptions of such tapes are maintained within the the Salamanca Municipal Building, 225 Wildwood Avenue, Salamanca, New York."

Further, he denied the request for the following reasons:

> "1. The negotiations on behalf of the consenting lessees were not conducted under the authority of the Salamanca Indian Lease authority Act (Chap. 791 of the Laws of 1969). The Salamanca Indian Lease Authority Act provides that the power of the authority is that of entering into a master lease for any or all of the reservations lands underlying the City. The negotiations were conducted not for a master lease of the reservation lands within the City, but, rather, for individual leases for each lessee consenting to have the members of the SILA conduct negotiations on their behalf. The negotiations were therefore conducted not by the SILA for a master lease in the name

> of SILA as lessee. The negotiations were conducted by the lessees through their authorized representatives -- those persons identified in your informal Freedom of Information request. The negotiations, therefore, do not constitute an 'agency' subject to the Freedom of Information Law.
>
> 2. The negotiated lease is in the process of being accepted by the lessees and until such process is completed a disclosure would impair the negotiations and process of acceptance.
>
> 3. The negotiations were conducted under federal statutes with a federally protected Indian Nation who itself claims exemption from a disclosure of the information sought (see 25 USC section 177 and 18 Stat. 330, the federal Act of 1875.
>
> 4. The summary and substance of meetings requested is not available under the applicable law."

Mr. Franz added that an appeal could be made to Patrick Callaghan, representing the Authority, and to Mayor Antonio Carbone and the City Council.

Mr. Fluent appealed the denial on November 30 and offered a variety of contentions in support of his request. As of the date of your letter to this office, it does not appear that the appeal had been determined. Further, you referred to an opinion rendered by this office on June 21 in which the same or related issues were considered.

In this regard, in an effort to enhance compliance with law and avoid the necessity of litigation, I offer the following comments, some of which may be repetitive of remarks offered in the June opinion.

First, as indicated in the earlier opinion, section 1793 of the Public Authorities Law states that the Authority is a "public-benefit corporation". As such, I believe that is is an "agency" as defined by section 86(3) of the Freedom of Information Law. The City of Salamanca is also clearly an "agency".

Second, the reasons for the denial by Mr. Franz are unclear. On one hand, he wrote that the "negotiations on behalf of consenting lessees were not conducted under the authority of the Salamanca Indian Lease Authority Act", sections 1790 to 1799 of the Public Authorities Law. On the other hand, he wrote that

the negotiations were conducted "for individual leases for each lessee consenting to have the SILA conduct negotiations on their behalf". He wrote further that the negotiations "do not constitute an 'agency' subject to the Freedom of Information Law".

While negotiations "do not constitute an 'agency'", I do not believe that is an issue. The issue rather is whether the materials sought constitute "agency records". It is emphasized in this regard that section 86(4) of the Freedom of Information 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."

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" subject to rights of access granted by the Law. 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.).

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 short, assuming that the materials requested constitute information in some physical form that is "kept, held, produced or reproduced by with or for" either the Authority or the City of Salamanca, I believe that they constitute "records" subject to rights conferred by the Freedom of Information Law. In view of Mr. Franz' position as City Attorney and attorney for the Authority, as well as the terms of the denial, it appears that the materials sought are in the physical if not the legal custody of the City and/or the Authority. If my assumptions are accurate, the materials consist of "records" that fall within the scope 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.

One of the contentions concerning the denial by Mr. Franz is that negoations were conducted under federal statutes "with a federally protected Indian Nation who itself claims exemptions from a dislcosure of the information". While the meaning of that statement is not clear, the records have not been requested from an Indian nation, but rather from agencies required to comply with the Freedom of Information Law. Further, although I was unable to locate one of the federal statutes to which Mr. Franz referred (18 Stat. 320, enacted in 1875), the other statute, 25 USC 177, makes no reference to the disclosure of records. Therefore, unless 18 Stat. 330 exempts the records from disclosure, I do not believe that the federal statutes cited by Mr. Franz would be relevant to a determination of rights of access. Rather, as suggested earlier, rights of access to agency records would be governed by the New York State Freedom of Information Law.

Another basis for denial offered by Mr. Franz is that the "negotiated lease is in the process of being accepted by the lessees and until such process is completed a disclosure would impair the negotiations and the process of acceptance". Nevertheless, Mr. Fluent wrote that "[i]t is ironic that this reason for denial is set forth since negotiations have already been concluded, and no leap of logic can justify the maintenance of secrecy when such a long term commitment is at stake".

Without knowledge of the facts, I cannot offer specific guidance. However, relevant to the issue is section 87(2)(c) of the Freedom of Information Law, which permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards...". 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 of the bids 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, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

The other kind of 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.

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.

The application of section 87(2)(c) and the decisions cited in the discussion of that provision are based upon the effects of disclosure and specific facts. In my view, insofar as disclosure would impair the parties' capacity to engage in agreements, section 87(2)(c) would likely be applicable. If, however, disclosure would not impair the negotiating process or the position of the parties to the negotiations, I do not believe that section 87(2)(c) could justifiably be asserted as a basis for denial.

Lastly, Mr. Franz indicated that there "are not minutes" of negotiations, but that "all negotiations were taped, that some of the tapes were transcribed, and that the tapes and any transcriptions of the tapes are maintained in the Salamanca Municipal Building. The location of the materials sought in my opinion confirms the contention that they constitute "agency records", for their placement in the Municipal Building in my opinion indicates that they are "kept" or "held" by an agency. With respect to minutes of meetings and related issues involving the Open Meetings Law, several points were made in the advisory opinion on

June 21, and I do not believe that it is necessary to reiterate them here. However, whether minutes have or should have been prepared, the tapes or transcripts of negotiations are in my opinion agency records that must be disclosed to the extent required by the Freedom of Information Law for reasons expressed herein and in the earlier opinion.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: David M. Franz
Hon. Antonio Carbone
Patrick Callaghan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6396

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 26, 1990

Mr. Donald Nash
83-A-4150
Clinton Correctional Facility
P.O. 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. Nash:

I have received your letter of December 12 in which you requested assistance in obtaining records from the New York City Police Department.

According to your letter, the Department conducted an investigation and "turned its findings over to the District Attorney," which did not make the information available at the time of your trial. You added that the name of an individual identified in your letter was given to you by the FBI pursuant to a request made under the federal Freedom of Information Act, and you contend that "the action of the District Attorney is a clear violation of the law."

Attached to your letter is a copy of a portion of a memorandum purportedly obtained fron the FBI. I point out that the memorandum makes no reference to the person that you identified. Also attached is a document that lists the information you need from the Police Department. While it is unclear whether that list represents your request, it seeks to elicit information by raising a series of questions, i.e., "Did [the named individual] have a police record"; "Did the police interview the FBI informant," etc.

In this regard, I offer the following comments.

First, assuming that the list of questions represents a request, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Freedom of Information Law specifies that an agency need not create records in response to a request. Similarly, although agency officials may answer questions in response to a request for information, the Freedom of Information Law does not oblige them to do so. Rather, the Freedom of Information Law requires that agencies respond to requests for existing records and to disclose records to the extent required by the Law. As such, instead of asking questions, it is suggested that in any ensuing requests you seek records containing the information 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. Since I am unfamiliar with the contents of the records in which you may be interested, or the effects of their dislcosure, I cnanot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the records in question.

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 in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example, even when you are aware of the identity of such a person or persons [see Hawkins v. Kurlander, 98 AD 2d 14 (1983)].

Perhaps the most relevant provision concerning access to 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 invsetigative 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 sub-paragraphs (i) thorught (iv) of section 87(2)(e). Particularly significant under the circumstances is section 87(2)(e)(iii), for it relates to confidential information relating to a criminal invstigation [see Moore v. Santucci, 543 NYS 2d 103 (1989)]. Moore also indicates that records which might otherwise be withheld that have been introduced in a public proceeding, such as a trial, must be disclosed.

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.

Records prepared by employees of a law enforcement agency, such as a police department, or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Those records might include opinions or recomendations, for example, that could be withheld.

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-6397

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 26, 1990

Mr. Richard Walker
85-A-8322
Great Meadow Correctional Facility
P.O. Box 51
Comstock, New York 12821

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Walker:

I have received your letter of December 14, as well as the correspondence attached to it.

The first attachment is a letter of December 5 addressed to the Chief Clerk of a court in which you requested various materials under the Freedom of Information Law. The second is a letter addressed to you by the Confidential Law Secretary to the District Administrative Judge, who wrote that "the courts do not have any material which you are seeking." He added that:

> "Your letter seeks trial exhibits and papers related to your 'Persistent Violent Conviction.' Trial exhibits are returned to the party who offered them, and the other material, if it exists, would be on file with the County Clerk."

You have asked that I inform you "as to where [you] may be able to obtain" the documentation that you requested.

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law is applicable to agency records and that 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, the Freedom of Information Law does not apply to the courts or court records. This is not to suggest that court records fall beyond the scope of rights of access, for often statutes other than the Freedom of Information Law grant rights of access to court records (see e.g., Judiciary Law, section 255). As such, to the extent that the records in which you are interested are maintained by a court clerk, it is suggested that a request be made to that office.

Second, since the response to request indicates that certain materials were returned "to the party who offered them," it is assumed that they are in possession of the District Attorney or perhaps a law enforcement agency, such as a police department. Those entities are, in my view, agencies subject to the Freedom of Information Law.

A request for agency records 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 for records. Further, 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.

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. Without knowledge of the nature of the records or the effects of their disclosure, I cannot offer specific guidance concerning the extent to which the Freedom of Information Law would require disclosure.

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-1639B

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 27, 1990

Mr. Fioravante G. Perrotta
Rogers and Wells
Two Hundred Park Avenue
New York, New York 10166

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Perrotta:

I have received your letter of December 13, as well as the materials attached to it.

According to your letter, you represent Connecticut Mutual Life Insurance Company in connection with a request made under the Freedom of Information Law for records of the New York State Insurance Department originally made on December 21, 1989. That request was amended and narrowed on January 8, 1990, and further amended on November 28 during the pendency of an appeal "in an effort to expedite the production of documents, and in response to a suggestion from the Department that additional documents might be produced."

The request as initially amended involved records relating to Connecticut Mutual's proposed "Persistency Compensation Plan" of agent compensation and its "Update Program" proposal to "compensate its agents participating in its Variable Loan Rate Update Program" pursuant to section 4228(h)(2) of the Insurance Law. The request, as indicated in items 1 through 4, includes "each and every document concerning any communications" with named individuals "concerning Connecticut Mutual's (a) Update Program or (b) Persistency Compensation Plan." In the remainder of the request, you sought:

> "5. Each and every document in the possession, custody, or control of the Superintendent concerning Connecticut Mutual's: (a) Update Program or (b) Persistency Compensation Plan.
>
> 6. Each and every document which contains any fact relied upon the Superintendent in evaluating Connecticut Mutual's: (a) Update Program or (b) Persistency Compensation Plan.
>
> 7. Each and every document concerning an interpretation or position of the Superintendent with respect to Section 4228(h)(2) of the Insurance Law, or its predecessor, Section 213.
>
> 8. Each and every document concerning the Superintendent's approval or disapproval of any plan for agency compensation under Section 4228(h)(2) of the Insurance Law or its predecessor, Section 213, from January 1, 1980 to the present.
>
> 9. Each and every document concerning guidelines and procedures for evaluating plans for agent compensation under Section 4228()h)(2) of the Insurance Law, and its predecessor, Section 213."

In a response to the request dated October 10, Mr. John E. Oxley, Supervising Actuary in the Department's Life Insurance and Companies Bureau, wrote that:

> "With respect to items '1' through '6', which call for various documents relating to the two proposed compensation plans, the documents consist of either:
>
> (a) materials provided to the Department by the company itself, or
>
> (b) internal, non-final Department materials which are not disclosable under FOIL [Public Officerrs Law 87(2)(g)]

The request is granted as to (a) and denied as to (b)....

> "With regard to item '7,' which concerns Department interpretations of Section 4228(h)(2) or its predecessor section, the request is granted...
>
> "As to item '8,' which requests 'each and every document concerning the Superintent's approval or disapproval of any plan for agent compensation under Section 4228(h)(2) of the Insurance Law or its predecessor, Section 213, from January 1, 1980 to the present,' the request is denied. You are advised that the persistency bonus plans of other companies are considered to be and materials which if disclosed would cause substantial injury to the competitive position of such companies.
>
> "Item '9,' which calls for Department guidelines and procedures for evaluating plans under section 4228(h)(2), is granted."

You appealed those aspects of the request that were denied on November 6 and offered a variety of contentions concerning the propriety and breadth of the denial, including a claim that some of the records withheld under section 87(2)(d) of the Freedom of Information Law are publicly disseminated by the various insurance companies the Department now claims to protect."

On November 28, following a series of conversations with the Superintendent, the scope of the request, as it pertained to items 7 and 8, was narrowed to pertain to particular companies identified in a letter of that date.

Finally, in a letter of November 30 addressed to you by Richard G. Liskov, Deputy Superintendent and General Counsel, the denial was reversed in part. Specifically, Mr. Liskov wrote that:

> "As to the documents it initially claimed to be entirely exempt under section 87(2)(g), the Bureau should review and release those documents or provide specific justification for withholding all or portions thereof, by December 10, 1990."

However, he added that:

> "As to documents claimed to be exempt under section 87(2)(d), I understand that the Bureau has already contacted entities who may be entitled to protection thereunder and has required such entities to provide detailed justification therefor by December 10, 1990. Thereafter the Bureau shall review the requested documents submitted by the companies specified in your firm's last amended F.O.I.L. request and the justifications received and determine, with the requisite explanation, which specific documents or portions thereof, if any, may validly be exempted under that provision. This review will be completed in stages, with documents from at least one-third of such entities determiend by December 21, 1990, and the remaining documents determined by January 25, 1991."

Further, in a letter sent to "All Domestic and Foreign Insurers Authorized to Write Life Insurance in New York" dated November 26, the request made on behalf of Connecticut Mutual was described, and for those companies that might have submitted records falling within the scope of the request, it was advised that:

> "...if you believe any of the information submitted in connection with your filing(s) should be <u>excepted</u> from public disclosure under Public Officers Law section 87(2)(d) because such information constitutes trade secrets or if disclosed would cause substantial injury to the competitive position of your company, you are directed to contact us, in writing, within ten (10) business days of the date of your receipt of this letter, and <u>specifically identify</u> the document or documents in your company's file which you believe should be excepted from public disclosure, and provide detailed support for such exceptions.
>
> "If you do not submit such a letter within ten business days, the entire contents of your company's Section 4228(h)(2) filing(s) may be made available for public inspection" (emphasis supplied by the author of the document).

In view of the terms of the Freedom of Information Law and the Department's regulations concerning the protection of trade secrets (11 NYCRR section 241.6), it is your view that its solitication to insurance companies on November 26 is "intended to thwart public access" and is "entirely improper."

Based upon the foregoing, you requested an advisory opinion concerning the following issues:

> "(1) Is it permissible for an agency to solicit requests for 'trade secrets' treatment or documents submitted, as long as ten years ago, with no prior indication that information was confidential or required confidential treatment?
>
> (2) Can a blanket claim of 'trade secret' exempt an entire document or class of documents from disclosure without a particularized showing as to the specific confidential and competitively sensitive information sought to be protected?
>
> (3) Is it ever permissible to exempt from disclosure as a supposed 'trade secret,' information that has been widely disseminated without a 'confidential' designation or specific restriction on disclosures, is otherwise publicly available?"

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. Further, it is emphasized that the introductory language of section 87(2) of the Law 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 or report might contain both accessible and deniable information, and that an agency is obliged to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

The basis for denial at issue, section 87(2)(d), as recently amended by Chapter 289 of the Laws of 1990, permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which is disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In conjunction with your first question, as you are aware, related provisions of the Freedom of Information Law pertain to the protection of records that might be withheld under section 87(2)(d). Those provisions, which appear in section 89(5), prescribe a procedure that may be utilized by a commercial enterprise in certain circumstances and that must be carried out by an agency in those circumstances. Specifically, the cited provision states in part that:

> "(1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.
>
> (2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.
>
> (3) Information submitted as provided in subparagraph one of this paragraph shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction."

The language quoted above includes a series of conditions that must exist before section 89(5) can be found to apply.

Information submitted to a state agency must be accomplished by a person "acting pursuant to law or regulation." It would appear that records transmitted to the Insurance Department by insurance companies regarding their "persistency compensation plans" or "update programs" are submitted pursuant to law, for section 4228(b)(2) of the Insurance Law states in part that "...no such schedule or plan of compensation shall be made effective until it has been submitted to and approved by the superintendent."

Another condition that must be met when an exception from disclosure is sought is that the exception must be requested "at the time of submission" to an agency.

A third condition is that a request for an exception "shall be in writing," including "the reasons why the information should be excepted from disclosure."

In my opinion, unless each of the conditions described in section 89(5)(a) can be met, the procedural protection accorded by that provision and the remainder of section 89(5) would be inapplicable. Further, assuming that those conditions are not present, I believe that the Department's effort, as you suggested, "to solicit requests for exemption, long after materials have been submitted," would be inconsistent with the Freedom of Information Law.

The materials that you enclosed contain no indication that requests for exceptions were made either at the time any such records were submitted to the Department, or that any written rationale concerning a claim of an exception was made at any time by the entities that the submitted the records in question.

If the procedure described in section 89(5) is inapplicable, the statements made and the process described in the letter of November 26 to insurance companies would in my view conflict with the requirements of section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "Except as provided in subdivision five of this section, 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."

If section 89(5) does not apply, an appeal following a denial of a request must be determined within ten business days of the receipt of the appeal. Unless you waived the requirements of section 89(4)(a) pursuant to your discussions or negotiations with Department officials, I believe that a determination should have been made within ten business days of the receipt of your appeal.

With respect to the Department's solicitation of requests for an exemption, even if section 89(5) does not apply to your request, I know of no provision that would preclude agency officials from consulting with or seeking the views of persons or entities that submitted records to an agency in an effort to determine the extent to which records might properly be withheld under section 87(2)(d). It is noted that seeking the procedural protection accorded by section 89(5) is optional; a person or entity that submits records to certain agencies may, at the time of submission of those records, seek to except the records or portions thereof from disclosure. There is no requirement, however, that a person or entity must do so. Moreover, even if no such claim is made when records are submitted, an agency in receipt of the records could, in my opinion, withhold records when appropriate pursuant to section 87(2)(d). I point out, too, that the procedure described in section 89(5) applies only when records are submitted to a "state agency;" the procedure does not apply when records are submitted to entities of local government, for example. I believe that those entities, however, may in appropriate cases, withhold records pursuant to section 87(2)(d), despite the absence of a claim of trade secret protection. Often the staff of an agency may have insufficient technical expertise concerning an industry or process, for example, to determine the effects of disclosing records, and consultation with the submitters of records may be proper to attempt to determine the effect of disclosure. Nevertheless, in the instant situation, assuming that section 89(5) does not apply, I believe that it would be inappropriate to solicit the views of the firms submitted the records in a manner that extends the time for rendering a determining following an appeal so as to conflict with section 89(4)(a) of the Freedom of Information Law. When section 89(5) is applicable and the submitter of records believes that records should be withheld, the agency is prohibited from disclosing the records until fifteen days after its final determination, or perhaps not at all, if a proceeding to preclude disclosure is initiated by the submitter of the records [see section 89(5)(d)]. However, if section 89(5) does not apply, I do not believe that an agency can be compelled to withhold records, notwithstanding the claims that may be made by the submitters of the records.

It is also noted 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, unless section 89(5) is applicable. 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 [see Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985)].

Based upon the foregoing and an assumption that section 89(5) is inapplicable, I do not believe that tacit consent to disclose by the entities that submitted the records or perhaps their eventual claims that the records should be withheld would necessarily be 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 submitted the records.

With respect to your second question, a "blanket claim" that an entire document or class of documents on the grounds that those records consist of trade secrets is likely inappropriate. In good faith, it is admitted that I have no familiarity with the records that have been withheld. Nevertheless, as indicated at the outset, in view of the language of section 87(2) of the Freedom of Information Law, I believe that an agency must review requested records in an effort to determine which aspects of the records can properly be withheld, make the necessary redactions or deletions, and disclose the remainder. While some aspects of the records sought might constitute trade secrets, other aspects of the records, such as the names of companies, effective dates of implementation, and other aspects of the documentation, likely would result in no competitive disadvantage to those firms. Therefore, except in rare circumstances, a blanket denial of a record or class of records would in my opinion be inconsistent with the requirements of the Freedom of Information Law.

If a suit is initiated following the exhaustion of one's administrative remedies, section 89(4)(b) of the Freedom of Information Law indicates that the agency has the burden of proof. Further, based upon judicial interpretation of the Freedom of Information Law, an agency cannot merely assert grounds for denial and prevail should a judicial proceeding be commenced to review a denial. As stated by the Court of Appeals:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for in camera inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In another decision, one that you cited in your letter, the Court of Appeals found 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 and 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" [Capital Newspapers v. Burns, 67 NY 2d 562, 565-566 (1986)].

The Court also reiterated that:

> "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" (id. at 566).

As such, in meeting the burden of proof imposed by section 89(4)(b) of the Freedom of Information Law, an agency must demonstrate that the harmful effects described in the grounds for denial would arise by means of disclosure.

Your remaining question deals with the propriety of exempting from disclosure "information that has been widely disseminated without a 'confidential' designation or specific restriction on disclosures."

In this regard, there are relatively few decisions that have been rendered under the New York Freedom of Information Law concerning the scope of section 87(2)(d). However, 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.).

In my view, the nature of records and the area of commerce in which a firm is involved would determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a firm. Therefore, the proper assertion of section 87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of a firm.

If indeed records have been "widely disseminated" and have become publicly known or known within an industry or area of commerce, I do not believe that it could effectively be contended that disclosure would "cause substantial injury to the competitive position of the subject enterprise." Further, in terms of the effects of disclosure, the age of records may be a relevant consideration. For example, current financial information concerning a firm might, if disclosed, be damaging to its competitive position in an industry. Disclosure of the same records years after their creation might have no harmful effects, because the records might have become irrelevant to a firm's competitive position due to the passage of time and the occurrence of events.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the Insurance Department.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Hon. Salvatore R. Curiale, Superintendent
Richard A. Liskov, Deputy Superintendent and General Counsel
David Schulz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6399

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 27, 1990

Mr. Louis Rose, 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. Rose:

I have received your letter of December 13 and the correspondence attached to it.

Your inquiry concerns a request made under the Freedom of Information Law on October 18, "by filling out [its] written form", to the Code Division of the Department of Community Development of the City of Syracuse. The request involved "all complaints, citations for violations and inspections" pertaining to certain properties during an eighteen month period. You received no response to the request, but you were telephoned on November 27 and were informed that the records would not be disclosed. You added that the denial was made verbally and that City officials have "refused to put in writing a denial, thereby denying [you] a right to appeal.

You have sought assistance in the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests and appeals. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknow-

> ledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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)].

Further, it is noted that a recent decision involved a situation in which requests were made, but the agency engaged in continual delays and failed to grant or deny access to the records sought. When the applicant initiated a judicial proceeding, the agency contended that petitioner had failed to exhaust her administrative remedies. In a discussion of the matter, the decision states that:

> "The respondent contends that petitioner failed to appeal the denial of access to records with 30 days to the agency head as provided in Public Officers Law [section] 89(4)(a) and, therefore, may not bring this proceeding.
>
> "The petitioner alleges that Public Officers Law [section] 89(4)(a) is not applicable as petitioner's FOIL requests has never been decided by

> respondent as respondent's only correspondence in response to petitioner's application indicates only that the matter is under investigation.
>
> "While the papers, for both sides, in this proceeding fail to discuss the issue of constructive denial, it has been found that the failure of an agency to respond to a FOIL request, as provided for in Public Officers Law [section] 89(3), can be construed as a denial of said request. In the case of Mtr. Robertson v. Chairman, 122 Misc 2d 829, the court held the failure of the Division of Parole to respond within five days to a letter from petitioner requesting access to certain information contained in his parole records is properly construed as a denial of his request...
>
> "It, therefore, appears that respondent's failure in this particular proceeding to neither grant nor deny the petitioner's request may be construed as a denial of access that may be appealed to the agency head" (Bernstein v. City of New York, Supreme Court, New York County, NYLJ, November 7, 1990).

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.

Records reflective of code violations must, in my opinion, be disclosed, for none of the grounds for denial would be applicable.

With regard 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.

An inspection report would in my view 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.

Lastly, to the extent that the records in question pertain to multiple dwellings, another provision of law might be relevant. Specifically, section 307 of the Multiple Residence Law, which refers to records of municipal building departments, states that:

> "All records of the department shall be public. Upon request the department shall be required to make a search and issue a certificate of any of its records, including violations, and shall have the power to charge and collect reasonable fees for searches and certificates."

In sum, it appears that the records sought are accessible under the Freedom of Information Law and perhaps pursuant to other statutes as well, at least in part if not in their entirety.

In an effort to enhance compliance, copies of this opinion will be forwarded to officials of the City of Syracuse.

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: Director, Code Division
Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 0460

152 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 27, 1990

Mr. Maurice Lockwood
[redacted]

Dear Mr. Lockwood:

I have received your letter of December 16,

You wrote that you are "trying to get an original copy of [your] indictment 89/83 in which to determine if the New York County District Attorney, I.E. Robert Morgenthau has drafted an authentic true bill of an indictment against [you] for a capitol case". It is your belief that you were convicted on the basis of an "invalid indictment", and you want "someone in authority to grant a fact finding hearing to ascertain the authentication of a true bill as being endorsed by a full grand jury for a capitol crime".

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice with respect to the Freedom of Information Law. The Committee is not empowered nor does it possess the expertise to advise concerning the Criminal Procedure Law or the grant of the kind of hearing to which you referred.

Since you wrote that the fee for a copy of your indictment that would be charged by the court is "astronomical", it is suggested that you seek a copy from the Office of the District Attorney. A request made under the Freedom of Information Law should be addressed to the agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests. I point out that section 89(3) of 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 and identify the record.

Lastly, although an agency subject to the Freedom of Information Law may assess fees for photocopying, section 87(1)(b)(iii) limits the fee to twenty-five cents per photocopy for records up to nine by fourteen inches, unless a statute other than the Freedom of Information Law authorizes a different fee.

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-6401

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 27, 1990

Mr. Matthew Reiss
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Reiss:

I have received your letter of December 14, which reached this office on December 24.

You have questioned your right to obtain certain records maintained by the New York City Police Department. Specifically, you requested "a description of NYPD rules, practices and [f]unding methods for hiring, recruiting, maintaining and training of civilian and non-civilian informants", as well as "those legal guidelines which authorize the NYPD detective division and other divisions to utilize such civilian and non-civilian informants as they see fit". You added that you are a reporter for the Village Voice, and your intent is "to provide a substantial understanding of the operations of the NYPD to the general public".

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is emphasized that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In my view, the phrase quoted in the preceding sentence indicates that a single record, for example, might contain accessible and deniable information. I believe that phrase also imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any,

may justifiably be withheld. Following such a review, the Law requires that the agency disclose those portions that are accessible under the Law after having made appropriate redactions or deletions.

Second, from my perspective, three of the grounds for denial may be relevant to your inquiry.

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, instructions to staff that affect the public or an agency's policy. Therefore, I believe that those aspects of the records would be available, unless a different basis for denial could be asserted.

Another 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 section 87(2)(e)(iv) is most relevant. 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 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)].

A third ground for denial of potential relevance is section 87(2)(f), which permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person".

Based upon the foregoing, 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, for example, or endanger a person's life or safety, they could in my view be withheld. Other aspects of the records, however, would likely be available.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Rosenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1402

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 28, 1990

Mr. Russell Hawkins
[redacted]

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Councilman Hawkins:

I have received your letter of December 21 in which you requested a written advisory opinion concerning access to records.

Your question is as follows:

> "Can any Town of South Bristol resident ask to examine the daily time sheets and accrual leave records of any employee or official of the Town?"

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 nar-

> rowly 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.

Lastly, I point out that the courts have consistently held that records accessible under the Freedom of Information Law should be made equally available to any person, without regard to status or interest [see Farbman, supra; Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Therefore, I believe that the records in question would generally be available not only to residents of the Town, but to any member of the public, irrespective of residence.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1403

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 28, 1990

Mr. Philip Gerace
88-A-5369
354 Hunter Street
Ossining, NY 10562

Dear Mr. Gerace:

I have received your letter of December 17, in which you referred to my correspondence of December 5. You wrote that you are "drawnback" by my response that an advisory opinion would not, as a matter of policy, be provided following the commencement of litigation.

You referred to requests for records of the Office of the Kings County District Attorney and the New York City Police Department. In brief, you apparently requested a copy of the "reverse side" of a record made available to you by the District Attorney in September. In response to that request, you were informed that the reverse side was blank. The request to the Police Department involves reports concerning your case that have not been disclosed to you. Although you wrote in your recent letter that the initiation of an Article 78 proceeding against the Department would be "pre-mature at this time", you indicated in your letter of October 28 to this office that you "have started an Article 78 proceeding in the Supreme Court of New York County to compel production of the documents [you have] requested...". As such, the statements made on October 28 and December 17 are conflicting. Nevertheless, you have sought advice concerning the "steps [you] should take pertaining to the production of the requested materials from the NYCPD...".

In this regard, the ensuing comments are offered in good faith based upon your recent statement that no proceeding has yet been initiated against the Police Department.

First, the Freedom of Information Law provides direction concerning the time within which an agency must respond to a request. Specifically, request, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record 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 neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial 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, 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, 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 believe that the person designated to determine appeals at the Police Department is Susan R. Rosenberg, Assistant Commissioner for Civil Matters.

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-1404

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 28, 1990

[redacted]
84-C-0998
Collins Correctional Facility
Helmuth, NY 14079-0200

Dear [redacted]

I have received your letter of December 21, as well as the correspondence related to it.

As I understand the facts, you requested copies of psychological reports from the hospital administrator at the Collins Correctional Facility under section 18 of the Public Health Law. However, the administrator informed you that the records in question were kept at the Wende Correctional Facility and suggested that your request be made to Dr. Robbie Bush, who serves as the Office of Mental Health Unit Chief at Wende. You directed the request to Dr. Bush, who informed you that it was forwarded to his supervisors in Albany in accordance with "current operating procedure with regards to release of OMH records".

You have requested assistance in ensuring compliance by the Office of Mental Health. In this regard, I offer the following comments.

First, although the Freedom of Information Law provides broad rights of access, the first ground for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is section 33.13 of the Mental Hygiene Law, which generally requires 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 should be directed to Mr. Charles Giglio, Director of Sentenced Services, Bureau of Forensic Services at the Office of Mental Health. As such, it appears that Dr. Bush forwarded your request to the appropriate office.

Third, I have contacted the Office of Mental Health on your behalf in an attempt to ascertain the status of the request. In brief, I was informed that the records in question will be made available to you on or about January 3, 1991.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm