STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6405

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

January 2, 1991

Mr. Eddie Barrett
87-A-8102
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Barrett:

Your letter of December 18 addressed to the Inspector General 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.

According to your letter and the materials attached to it, you sent a request under the Freedom of Information Law on November 27 to John J. Durante, Clerk at the Queens County Courthouse, for "records of court orders pertaining to the assignment of Professional Investigator" to you as a defendant. As of the date of your letter to the Inspector General, you had received no response to the request. Therefore, you have suggested that the Clerk has failed to comply with the Freedom of Information Law, which requires that agencies respond to requests within five business days of their receipt.

In this regard, I offer the following comments.

First, the Official Directory of the City of New York indicates that Mr. Durante serves as County Clerk and Clerk of the Supreme Court in Queens County.

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, since your request involves court records, I do not believe that the Clerk would be bound by the Freedom of Information Law or required to respond within five business days as required by that statute.

The foregoing is not intended to suggest that court records need not be disclosed, for statutes other than the Freedom of Information Law (see e.g., Judiciary Law, section 255) may require the disclosure of court records. Rather, I am suggesting that, under the circumstances, the Freedom of Information Law in my opinion is not applicable.

If you do not receive a response soon, it is suggested that you resubmit the request.

I hope that the foregoing serves to clarify 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-6406

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

January 3, 1991

Ms. Elizabeth Lesly
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 Ms. Lesly:

I have received your letter of December 11, which, for reasons unknown, did not reach this office until December 27.

The correspondence attached to your letter indicates that you submitted a request under the Freedom of Information Law to the Division of State Police for records concerning "the 'moonlighting' or off-duty employment practices" of three named employees. You also requested a "formal written explanation of the department's penalties for troopers using their status as law-enforcement officers to support claims of honesty and integrity in outside business endeavors."

In response to the request, the records concerning the named employees were denied by Lieutenant Colonel Gary C. Dunne, who wrote that:

> "The records you request are an integral part of the personnel files of the employees concerned and, as such, are exempt from disclosure. Additionally, the disclosure of such records would constitute an unwarranted invasion of personal privacy of those concerned."

He added that section 479 of the New York Code of Rules and Regulations "provides for the disciplinary process used by the New York State Police."

It is your view that since troopers must "formally request permission to perform off-duty work," and that since those requests "undergo a hearing process," the information "is part of the public records." You also expressed the belief that "the troopers should provide a more detailed explanation of the punitive measures it takes when a trooper violates the procedure."

You have requested my "evaluation" of the issues. In this regard, I offer the following comments.

Insofar as your request involves records pertaining to specific individuals, a blanket denial of access may have been inappropriate. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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, for example, might contain both accessible and deniable information. That phrase also imposes an obligation upon agency officials 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 deletions or redactions.

Although I am unfamiliar with the records that might relate to the employees that you named, it appears that three of the grounds for denial may be relevant to a determination of rights of access. The nature and content of the records would be the factors used to ascertain the extent to which the records may be accessible or exempted from disclosure.

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." One such statute is section 50-a of the Civil Rights Law. Specifically, 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 be mandated by lawful court order."

Notwithstanding the foregoing, the Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has 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 by 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-a of the Civil Rights Law.

Those circumstances, however, are not present, in my opinion, in this instance. Your request involves requests for permission to engage in off-duty employment, and you informed me by phone that the request does not include records concerning disciplinary action, for example. In short, it does not appear that the records in question would be used to "evaluate performance toward continued employment or promotion," or that section 50-a of the Civil Rights Law would serve as a basis for withholding, even though they could be characterized as personnel records.

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." While that standard is flexible and issues involving privacy may involve subjective judgements, there are numerous decisions that pertain to the privacy of public employees. In brief, the courts have held that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of State Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980].

Another ground for denial of likely significance is section 87(2)(g), which states that an agency may withhold records that:

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

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

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

Based upon the provisions described above and the judicial interpretation of the Freedom of Information Law, I believe that the records concerning the three named employees could be characterized as intra-agency materials. Further, a request to engage in off-duty employment could, in my view, be withheld, for it would not likely contain the kinds of information that must be disclosed under subparagraphs (i) through (iv) of section 87(2)(g). However, at the end of the process, if permission is granted to engage off-duty employment or activity, I believe that records reflective of those decisions must be disclosed, for they would constitute final agency determinations that are available under section 87(2)(g)(iii). Further, the existence of an approval procedure that must be followed before permission is granted indicates that a determination is relevant to the performance of the duties of the employees as well as the agency. Consequently, a disclosure of an approval of off-duty employment would not in my opinion constitute an unwarranted invasion of personal privacy.

I point out that, in a decision cited earlier dealing with a request for records indicating the dates of sick leave claimed by a particular police officer 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 obli-

> gation 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)].

Moreover, 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... 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 a determination specifies the location where an employee will engage in off-duty employment or includes the name of an employer, those details could in my opinion be withheld. A disclosure, for example, that an employee works part-time at a department store, would likely constitute an unwarranted invasion of personal privacy. Nevertheless, as suggested earlier, a determination to grant off-duty employment, is, in my opinion, relevant to the duties of both the agency and its employees and must be disclosed.

With respect to your request for a "formal written explanation" of penalties that may be imposed against troopers in certain circumstances, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, if, for example, no "formal written explanation" exists, the Division would not be obliged to prepare such a record on your behalf. However, rather than citing a section of its regulations, I believe that a copy of that provision should have been made available to you, and I have enclosed a copy for you. Similarly, if there are records other than the regulations that represent rules or procedures that fall within the scope of your request, I believe that they would be available under section 87(2)(g)(iii), for they would consist of agency policies.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Gary C. Dunne, Assistant Deputy Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6407

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

January 3, 1991

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 December 21 in which you raised questions pertaining "to responses to an advertisement by a college or university seeking candidates to fill a position."

Specifically, you have my opinion concerning "which of the following items of information" should be disclosed under the Freedom of Information Law:

> "1. The number of responses to the advertisement and breakdown by sex.
>
> 2. The names of the individuals who applied for the position.
>
> 3. If the names are not available, are the submitted resumes available when identifying information is removed?
>
> 4. Are each candidate's educational background and experience available with identifying data removed or deleted?
>
> 5. The names of members of the search committee who recommended the individual to be selected.
>
> 6. The criteria by which each candidate was evaluated.

> 7. The number of candidates who were interviewed, the dates of the interviews, the names of the interviewers present at each interview, records or minutes of each interview, and the educational background and experience of those interviewed."

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, I believe that the Freedom of Information Law applies to public institutions of higher education, such as the State University of New York and its components, the City University of New York, and community colleges. The Freedom of Information Law would not in my view apply to records or private colleges or universities. For purposes of this opinion, the ensuing remarks will be based on the assumption that your inquiry deals with an agency that is subject to the Freedom of Information Law.

Second, the Freedom of Information Law generally pertains to existing records. Section 89(3) of the Law states that an agency need not create a record in response to a request for information. Therefore, if, for example, there is no "breakdown by sex" of those who responded to an advertisement, I do not believe that an agency would be obliged to review its responses and prepare such a breakdown on your behalf.

Third, insofar as agency 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. 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 available 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. Following such a review, I believe that the agency would be required to disclose records, after having made deletions or redactions to the extent permitted by the Law.

Two of the grounds for denial, as well as another provision, are in my view relevant to your questions.

Section 89(7) states in part that nothing in the Freedom of Information Law shall require the disclosure "of the name or home address...of an applicant for appointment to public employment." Therefore, I do not believe that the names of those who applied for the position must be disclosed.

Also 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 under the provisions of subdivision two of section eighty-nine of this article." Section 89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, the first of which refers to "disclosure of employment...histories or personal references of applicants for employment. However, section 89(2)(a) provides in part that "an agency may delete identifying details when it makes records available" in order to prevent against unwarranted invasions of personal privacy. Further, section 89(2)(c) states in part that, unless another ground for denial applies, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy "when identifying details are deleted." Therefore, with respect to items 3 and 4 of your inquiry, I believe that the records would be available after identifying details concerning the applicants are deleted. I point out that in a somewhat similar situation, a request was made for the curricula vitae of certain faculty members at a branch of the City University of New York. In that case, the court held that the agency could delete identifying details, thereby enabling the applicant to compare his credentials to those of other professionals, while concurrently protecting the privacy of faculty members [see Harris v. City University of New York, Baruch College, 114 AD 2d 805 (1985)].

With respect to your remaining questions, I direct your attention to section 87(2)(g) of the Freedom of Information Law. Although that provision represents one of the grounds for denial, due to its structure, it often requires disclosure. 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.

If records exist indicating the number of responses to the advertisement and a breakdown by sex, those figures would constitute statistical or factual information and would be available in my opinion under section 87(2)(g)(i). Similarly, the names of persons who served on a search committee would represent factual information. It is possible, however, that the specific information described in question 5, the "names of the members of a search committee who recommended the individual to be selected," might if disclosed result in an unwarranted invasion of personal privacy. Further, a recommendation could likely be withheld under section 87(2)(g) [see McAulay v. Board of Education, City of New York, 61 AD 2d 1048 (1978); aff'd with no opinion 48 NY 2d 659]. Criteria used to evaluate candidates would likely consist of either instructions to staff that affect the public available under section 87(2)(g)(ii) or an agency's policy, which would be available under section 87(2)(g)(iii). Records indicating the number of candidates interviewed, the dates of interviews and the names of interviewers would constitute factual information that would, in my view, be available under section 87(2)(g)(i).

Rights of access to records of interviews and the educational background and experience of those who were interviewed would be determined on the basis of the analysis offered earlier. Some aspects of such records might consist of opinions or impressions expressed with respect to particular candidates, and those aspects of the records could be withheld under section 87(2)(g). Further, as suggested earlier, insofar as those records identify the candidates, I believe that identifying details could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6408

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

January 4, 1991

Mr. Charles F. Fadden
[redacted]

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

Dear Mr. Fadden:

I have received your letter of December 29 in which you requested an advisory opinion concerning the propriety of denials of certain requests made under the Freedom of Information Law.

According to your letter two requests were directed to Oswego County, one of which involved records indicating the qualifications of candidates for a position; the second involved the status of the position, i.e., whether it is "covered by the union bargaining agreement or not." You added that the requests were made in an effort "to determine if [you] have been unfairly denied this position." Both requests were denied in the first instance and following your appeals.

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. In my opinion, the phrase quoted in the preceding sentence indicates that a single record might contain both available 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. Following such a review, I believe that the agency would be required to disclose records, after having made deletions or redactions to the extent permitted by the Law.

As your inquiry pertains to the qualifications of candidates for the position who were not hired, I believe that two provisions in the Freedom of Information Law are relevant.

Section 89(7) states in part that nothing in the Freedom of Information Law shall require the disclosure "of the name or home address...of an applicant for appointment to public employment." Therefore, I do not believe that the names of those who applied for the position, other than the person appointed, must be disclosed.

Also 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 under the provisions of subdivision two of section eighty-nine of this article." Section 89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, the first of which refers to "disclosure of employment...histories or personal references of applicants for employment. However, section 89(2)(a) provides in part that "an agency may delete identifying details when it makes records available" in order to prevent against unwarranted invasions of personal privacy. Further, section 89(2)(c) states in part that, unless another ground for denial applies, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy "when identifying details are deleted." Therefore, I believe that records indicating the qualifications of candidates would be available, after identifying details concerning the candidates are deleted. I point out that in a somewhat similar situation, a request was made for the curricula vitae of certain faculty members at a branch of the City University of New York. In that case, the court held that the agency could delete identifying details, thereby enabling the applicant to compare his credentials to those of other professionals, while concurrently protecting the privacy of faculty members [see Harris v. City University of New York, Baruch College, 114 AD 2d 805 (1985)].

In the case of the person who has been hired, it is likely that portions of a resume or application would be available. 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. In general, 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].

As indicated earlier, section 89(2)(b)(i) pertains to the authority to withhold employment histories. While that provision and section 87(2)(b) 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 a resume, for example, concerning the person appointed 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.

The second request involves the status of a position as being subject to a collective bargaining agreement or otherwise. In my opinion, there would be no privacy issue concerning the request, for the classification or status of a title relates to the position rather than the person who might hold the position. Moreover, I believe that a record indicating the status of a position would be available, 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: County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6409

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

January 4, 1991

Mr. Rory Lancman
[redacted]

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

Dear Mr. Lancman:

I have received your letter of December 24 in which you sought assistance concerning a request made under the Freedom of Information Law.

Attached to your letter is a request made on November 15 to Joanne Imohiosen, Assistant Commissioner for Revenue of New York City Department of Parks and Recreation, in which you sought "copies of all documents relating to the city's relationship to the United States Tennis Association's National Tennis Center in Flushing Meadows-Corona Park." Specifically, you sought:

> "1. the document which spells out the License agreement which indicates how much the USTA pays for the land.
>
> 2. the revenue estimate from which the city claims to make '$100 million' on the U.S. Open.
>
> 3. the Parks Department Charter or Mandate which outlines its license granting authority and guidelines for exercising such authority.
>
> 4. the exact procedure for turning parkland over to private use, i.e., from proposal to environmental review through ULURP, etc...
>
> 5. the exact status of the proceedings."

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, a request made under the Freedom of Information Law should generally 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. According to the Official Directory of the City of New York, the Department's records access officer is Mary F. Pazan, Deputy General Counsel. If you have not yet received a response, it is suggested that you contact Ms. Pazan at 360-1319 to attempt to determine the status of your request.

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to requests. Similarly, although agency officials may furnish information by responding to questions, there is no obligation to do so under the Freedom of Information Law. Therefore, if, for example, there is no record indicating the status of a proceeding, agency officials would not, in my opinion, be required to prepare a record containing the information sought.

Third, section 89(3) also 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. I am unfamiliar with the scope of records that fall within your request or the nature of the agency's record-keeping systems. It is possible, however, that a request for "all documents" concerning the City's relationship with the National Tennis Center may be so broad and open-ended, particularly in terms of time, that your request might not have reasonably described the records in which you are interested.

Fourth, insofar as your request involves existing records that can be located, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

In my view, a license agreement, a contract or similar record should be disclosed, for none of the grounds for denial would be applicable. With respect to the other records sought, section 87(2)(g) may be particularly relevant. That provision, although one of the grounds for denial, often requires disclosure due to its structure. 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.

Revenue estimates, for example, would likely consist of "intra-agency" materials. However, those documents may contain "statistical or factual tabulations or data" that would be available under section 87(2)(g)(i). A written procedure followed by an agency would be reflective of its policy and would be available under section 87(2)(g)(iii).

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. 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, copies of this opinion will be forwarded to Department 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: Joanne Imohiosen, Assistant Commissioner
Mary F. Pazan, Deputy General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0410

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

January 7, 1991

Mr. Jonathan Gill
The Village Voice
842 Broadway
New York, New York 10003

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

Dear Mr. Gill:

I have received your letters of December 24 and December 28. You have requested assistance in obtaining records under the Freedom of Information Law from the Division of State Police.

The materials attached to your letter indicate that on December 18, you requested records concerning Joseph Anastasi, who retired from the Division in 1987, as follows:

> "*the dates and circumstances of his individual promotions, i.e., were they by appointment or exam?
>
> *the dates of his individual assignments, particularly his term around 1979-1980 with the Lt. Governor's security detail, and his dates with the Governor's security detail. I am also interested in his dates on assignment witht he state Urban Development Corporation.
>
> *state police rules on leaves of absence, and whether Anastasi took any leaves from duty, and what the circumstances were, i.e., were rules waived in his case, and the basis on which the leave was granted, and what the dates were.

> *Whether any disciplinary action was ever taken or initiated against Anastasi, and what it concerned."

As I understand the situation, you were orally given the dates of Mr. Anastasi's employment. However, when you asked for a record containing that information, the request was denied on the basis that it is "an interagency document." Further, through a number of telephone conversations with officials of the Division, particularly Deputy Superintendent Lecakes, it appears that there was an initial willingness to disclose certain information, but that those representations have been reversed. You were also told that inquiries involving "general police pension matters" are not handled by the Division, and "that Lecakes won't even tell [you] the general guidelines."

In this regard, I offer the following comments.

First, while agency officials may respond to oral requests for information made by phone, for example, the Freedom of Information Law does deal with those kinds of inquiries. However, section 89(3) of the Freedom of Information Law requires that an agency respond to a request made in writing that reasonably describes the records sought. Similarly, the Freedom of Information Law pertains to existing records, and section 89(3) also states that an agency need not create a record in response to a request, unless specific direction to the contrary is provided. Therefore, if, for example, there is no record explaining the circumstances under which a leave of absence was granted, the Division would not be obliged to prepare such a record on your behalf.

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, three of the grounds for denial are potentially relevant to the issue of rights of access to the records in which you are interested.

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," and 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 be 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 by 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-a 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. Your request appears to have no relationship to litigation. Further, the records sought, with the possible exception of those involving discipline, would not likely have been "used to evaluate performance toward continued employment or promotion." Consequently, I do not believe that section 50-a is applicable as a basis for withholding.

Also 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." While that standard is flexible and often may result in subjective interpretations, there are numerous decisions that pertain to the privacy of public employees. In brief, the courts have held that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372, NYS 2d 905 (1975); Capital Newspapers v. Burns, 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 the oral denial, 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..."

The language quoted above contains what in effect is a double negative. While inter-agency 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 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. For instance, although records indicating dates of promotions or assignments may be characterized as intra-agency materials, those items would consist of factual information that would be available under section 87(2)(g)(i). Further, I do not believe that those items could be withheld as an unwarranted invasion of personal privacy, for they are relevant to the duties of both the employee and the agency. It is also noted that when persons are hired or promoted after taking a civil service exam, those who passed the exam are identified in an "eligible list," which is public (see Rules and Regulations of the Department of Civil Service, section 71.3). As such, the means by which a public employee is hired or promoted (i.e., by apopintment or exam) is, in my view, generally public. Similarly, although rules regarding leaves of absence may be intra-agency materials, I believe that they would constitute an agency's policy and, therefore, would be available under section 87(2)(g)(iii).

I point out, too, that in a decision cited earlier dealing with a request for records indicating the dates of sick leave claimed by a particular police officer 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)].

Moreover, 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... 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)."

From my perspective, if sick leave and similar records are public, records indicating dates and locations of assignments or leaves of absence would also be public, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. However, if a portion of a record indicates the rationale for seeking a leave of absence, i.e., a personal or medical problem, that aspect of the record could in my view be withheld as an unwarranted invasion of personal privacy.

With respect to matters involving the discipline of public employees, 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, 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 de-

termined 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 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, 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, to obtain general information concerning police pension matters, it is suggested that you contact the Police and Fire Retirement System, which operates in the Department of Audit and Control. That office may be reached at (518) 474-7736.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to officials at 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: Socrates G. Lecakes, Deputy Superintendent
Gary L. Dunne, Assistant Deputy Superintendent, Committee on Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6411

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

January 7, 1990

Mr. James Butler
90-A-2895
Drawer B
Stormville, New York 12582

Dear Mr. Butler:

I have received your letter of January 3 in which you appealed to the Committee on Open Government following a denial of a request for records by the New York City Police Department.

In this regard, the Committee is authorized to provide advice concerning the Freedom of Information Law. This office is not empowered to render a determination in response to an appeal, nor can it compel an agency to grant or deny access to records.

The provisions in the Freedom of Information Law concerning the right to appeal are found in 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. 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 the ensuing determinations must be sent to the Committee on Open Government, the determinations are made by a person or body at the agency that maintains the records sought.

For your information, the person designated to determine appeals at the New York City Police Department is Susan R. Rosenberg, Assistant Commissioner, Civil Matters.

I hope that the foregoing serves to clarify the Freedom of Information Law and the role of the Committee on Open Government.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6412

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

January 8, 1991

Ms. Jody Adams
[redacted]

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

Dear Ms. Adams:

I have received your letter of December 31, which pertains to requests directed to the Office of Court Administration (OCA).

You referred to comments by John Eiseman, Deputy Counsel at OCA, who indicated, in your words, that "he is unable generally to respond to requests in under thirty days despite the fact that that is a violation of the law". You also alluded to a request for "a report being developed by an OCA employee" which was denied because it consisted of "inter-office" material. Further, attached to your letter is a response to you by Mr. Eiseman in which he wrote that the Freedom of Information Law "requires the production of existing records and does not require the compilation of records or responses to questions". According to Mr. Eiseman, your letter consisted "solely of responses to questions", and your request was denied on that basis.

You have requested my "intervention" 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 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..."

Therefore, although an agency must respond to a request within five business days of the receipt of the request, one manner of initial response may be a written acknowledgement of the receipt of the request, which includes an approximate date when the request will be granted or denied. If, for example, it is estimated that an agency will be unable to grant or deny access to a request for thirty days, an acknowledgement with an estimate to that effect would in my view be appropriate, so long as that period is reasonable under the circumstances.

Second, I am unaware of the content of the report to which you referred. However, section 87(2)(g) pertains to "inter-office" records and states that an agency may withhold records that:

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

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

Lastly, as Mr. Eiseman suggested, the Freedom of Information Law is applicable 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 information sought does not exist in the form of a record or records, I do not believe that an agency would be obliged to prepare a new record on behalf of an applicant in order to satisfy a request for information. Similarly, while agency officials may answer questions as a means of providing information, the Freedom of Information Law does not require that they do so. Again, the Freedom of Information Law is a vehicle under which any person may seek existing records, and which requires agencies to disclose records to the extent required by law.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: John Eiseman, Deputy Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1876
FOIL-AO-6413

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

January 8, 1991

Mr. Keith A. Wiggand
Citizens Against Rising Expenditures
P.O. Box 302
Glenmont, New York 12077

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

Dear Mr. Wiggand:

I have received your letter of January 4 prepared on behalf of a taxpayers' organization, Citizens Against Rising Expenditures.

According to your letter, representatives of your group sought to attend the organizational meeting of the Selkirk Fire District Board of Fire Commissioners. The meeting was held by quorum of the Board, and you believe that the public had the right to attend. Nevertheless, you were informed by a commissioner that the meeting was not open to the public. As a consequence, you submitted a request for minutes of the meeting under the Freedom of Information Law, "which would have otherwise been unnecessary" if the public had been permitted to attend.

You have requested an advisory opinion concerning the status of the Board under the Open Meetings Law, as well as the Freedom of Information Law. In this regard, I offer the following comments.

First, it is noted that the Open Meetings Law pertains 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."

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, section 66(1)], a board of commissioners of a fire district in my view is clearly a public body subject to the Open Meetings Law.

Similarly, the Freedom of Information Law is applicable to agency records, and section 86(3) of that statute 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."

Once again, since a fire district is a public corporation, a governmental entity performing a governmental function, it is an agency required to comply with the Freedom of Information Law.

Second, it is emphasized that the courts have interpreted the term "meeting" expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Court affirmed a decision rendered by the Appellate which dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also stated that:

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'" (id. at 416).

In addition, in its consideration of the characterization of meetings as "informal", the court found that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id. at 415).

In view of the judicial interpretation of the Open Meetings Law, if indeed a majority of the Board met for the purpose of discussing public business, the gathering would in my view have constituted a "meeting" subject to the Open Meetings Law that should have been preceded by notice given in accordance with section 104 of the Law and conducted open to the public to the extent required by the Law.

Lastly, with respect to minutes, section 106 of the Open Meetings Law prescribes what may be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 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, 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.

As you requested, 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: Charles Fritts, Chairman, Bd. of Fire Commissioners
Glenn Lasher, Commissioner, Bd. of Fire Commissioners
Robert Wedell, Commissioner, Bd. of Fire Commissioners
Don Gager, Commissioner, Bd. of Fire Commissioners
Joseph Keller, Commissioner, Bd. of Fire Commissioners
Thomas Jeram, Attorney to the Board
Ken Ringler, Supervisor, Town of Bethlehem

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-117
FOIL-AO-6414

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

January 9, 1991

Mr. Leonard Fischer
#84-B-1060
Shawangunk Correctional Facility
Box 700
Wallkill, New York 12589

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

Dear Mr. Fischer:

I have received your letter of January 1 in which you requested a clarification of the Freedom of Information Law and the Personal Privacy Protection Law.

Specifically, you asked whether a clerk of a court is considered a court within the meaning of the term "judiciary" as it is used in those statutes. The question has arisen because you are seeking to obtain "the rules that govern the procedures that the clerk of the court must follow in disclosing information from their files, and any and all accounting, or log sheets of disclosure made of [your] file."

In this regard, I offer the following comments.

First, as you may be aware, 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, it is my view that the courts and court records are not subject to the Freedom of Information Law.

Similarly, for purposes of the Personal Privacy Protection Law, "agency" is defined in section 92(1) 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."

As such, the Personal Privacy Protection Law does not extend to the courts or court records.

Although a clerk is neither a court nor an agency, in that person's role as custodian of court records, I believe that, as a general matter, a clerk performs his functions as a part of the judiciary.

Second, it has been held that the Office of Court Administration is not a court, but rather that it is an agency subject to the requirements of the Freedom of Information Law. If the rules and procedures in question were developed or are maintained by the Office of Court Administration, it is suggested that a request for the records in question be directed to its public information officer at 270 Broadway, New York, New York 10007. Alternatively, although you did not identify the particular court in which you are interested or its location, a request might be made to the administrative judge of the judicial district in which the court is located.

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-6415

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

January 9, 1991

Mr. Lenny Durio
#86-A-9029
Great Meadow Correctional Facility
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. Durio:

I have received your letter of January 2, as well as the materials attached to it. You have requested assistance concerning your efforts in obtaining records from the Office of the District Attorney of Kings County.

According to the materials, you requested transcripts of polygraph tests given to a named individual in relation to a criminal complaint made against you. The receipt of your request was acknowledged, and you were later informed that the request "must be denied as these materials are not in the possession of the Kings County District Attorney's Office."

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) states in part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity...."

Therefore, if the Office of the District Attorney does not possess the records in which you are interested, that agency is incapable of making them available under the Freedom of Information Law.

Second, in a situation in which an agency indicates that it does not maintain the records sought, an applicant may seek a certification in writing to that effect. Section 89(3) also provides that, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Third, in your requests, you identified the persons who administered the polygraph tests, and they appear to be employees of the New York City Police Department. Therefore, the records may be maintained by the Police Department, and it may be appropriate to request the records from that agency. For your information, such a request may be made to Sgt. Joseph G. Sultana, Records Access Officer, New York City Police Department, 1 Police Plaza, New York, New York 10038.

Lastly, I am unfamiliar with the circumstances under which the polygraph tests were administered or your knowledge of the results of those tests. However, I point out that section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, section 87(2)(e) states in relevant part that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would...
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

Again, while I am unware of the facts regarding the use of the polygraph, the provisions cited above may be relevant to a determination of rights of access to the records in question.

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-6416

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

January 9, 1991

Mr. Jon A. Kelley
[redacted]

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

Dear Mr. Kelley:

I have received your letter of December 31 in which you raised questions concerning the Freedom of Information Law.

By way of background, you wrote that you are "surveying towns in Saratoga and Fulton Counties to obtain statistical information about log home construction in the Southern Adirondacks", and that the most accurate data appears in building permit applications submitted within the past three years.

You have questioned whether building permit applications and related materials are available for inspection and what procedures should be followed to request those records. You also asked "what can be done to get access to the records" following the exhaustion of "administrative procedures of FOI" and "who pays".

In this regard, I offer the following comments.

First, to seek records under the Freedom of Information Law, a request should be directed to an agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests for records. The records access officer for a municipality most often is its clerk.

Second, section 89(3) of the Law provides that a written request must "reasonably describe" the records sought. Therefore, a request should include sufficient information to enable agency officials to locate and identify the records. I

would surmise that it would be appropriate to request building permits by year, for example. However, if a request is made for applications concerning log homes, it is questionable, in my view, whether such a request would reasonably describe the records, for an agency's record-keeping or filing system may not be structured in a manner that permits the retrieval of that class of records, i.e., applications concerning log homes.

Third, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests, as well as appeals when records are initially denied. 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)].

Should a proceeding be initiated under Article 78 after an applicant has exhausted his administrative remedies, section 89(4)(c) of the Freedom of Information Law 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."

As such, an award of attorney's fees is not automatic; rather, certain conditions must be met in order to be awarded attorney's fees. Further, the grant of any such award is in the court's discretion.

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.

In my view, building permit applications and related documents are generally available, for none of the grounds for denial would be applicable. Further, it has consistently been advised that licenses, permits and similar, related kinds of records are available to the public, even though they might identify particular individuals. From my perspective, various activities are licensed or require permits due to some public interest in ensuring that individuals or entities are qualified to engage in certain activities. I believe that licenses, permits and similar records should be available, for they are intended to enable the public to know that an individual has met the appropriate requirements to be engaged in an activity that is regulated by government or in which government has a significant interest.

I point out, however, that one of the grounds for denial may be potentially relevant. Section 87(2)(b) of the Freedom of Information Law provides that an agency may withhold records to the extent that disclosure 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.

As a general matter, I believe that the purpose for which a request is made is generally irrelevant and ordinarily has no bearing upon rights of access. It has been held that accessible records should be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; also M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. The only instance in the Freedom of Information Law in which the reason for a request may be determinative with respect to disclosure pertains to section 89(2)(b)(iii). The cited provision is one of the examples of unwarranted invasions of personal privacy appearing in section 89(2)(b) of the Law. Section 89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes:

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

The language quoted above represents what might be characterized as an internal conflict in the Freedom of Information Law, for it specifically refers to the purpose for which a request is made for a list of names and addresses. In one judicial determination involving such a list, it was found that an agency could inquire as to the purpose for a request. In that case, it was stated that:

> "Under the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents' denials of petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgment for that of the respondents" [Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty. (September 5, 1980)].

Therefore, 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 noted, too, that section 89(2)(b)(iii), as well as other examples of unwarranted invasions of personal privacy, has been cited by the Court of Appeals as a basis for the deletion of names and addresses from records that are individually available, but which were requested for the purpose of engaging in direct mail solicitation [see Scott, Sardano and Pomeranz v. Records Access Officer, 65 NY 2d 294(1985)].

In Scott, a law firm sought motor vehicle accident reports in order to engage in "direct mail solicitation of accident victims" (id. at 299). Although it was held that an accident report is available, notwithstanding the purpose for which the request is made, it was apparently found that the accident reports sought by the law firm were intended to be used to develop the equivalent of a mailing list of names and addresses that would be used for a commercial purpose. As such, the court determined that names and addresses of accident victims could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

In view of Golbert and Scott, supra, it appears that an agency may inquire as to the intended use of the records for the purpose of determining whether they would be used for a "commercial or fund-raising purpose" and, therefore, whether disclosure would result in an unwarranted invasion of personal privacy. If it is found that the records sought would be used for a commercial or fund-raising purpose, based upon section 89(2)(b)(iii) of the Freedom of Information Law and the decision rendered in Scott, it appears that personally identifiable details contained in the records might justifiably be withheld; if, on the other hand, the records are not intended to be used for commercial or fund-raising purposes, I believe that they would be accessible.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6417

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

January 9, 1991

Dr. Stephen Dobrow
Committee for Better Transit, Inc.
P.O. Box 3106
Long Island City, NY 11103

The staff of the Committee on 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. Dobrow:

I have received your letter of December 29, as well as the materials attached to it.

According to the correspondence, you made a request for records of the New York City Transit Authority pursuant to the Freedom of Information Law on July 16. Although receipt of the request was acknowledged on July 25, you have received no further response. The subject of your inquiry involved a "doomsday" plan to reduce subway service due to possible budgetary problems, and you requested "reports or other documents containing such a 'doomsday' plan or any proposals for cuts beyond what the MTA Board acted upon last month."

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).

Based upon the foregoing, I believe that you may appeal a constructive denial of your request pursuant to section 89(4)(a) of the Freedom of Information Law.

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

While I am unaware of the existence or content of records that you requested, it would appear that one of the grounds for denial would be particularly relevant in relation to the kinds of records sought. 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 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 likely, therefore, that a proposal, for example, that is not final and which may be accepted, rejected or perhaps modified could be withheld. On the other hand, if a plan represents a final agency determination or its policy, I believe that such a record would likely be available.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to Transit Authority officials.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Alan F. Kiepper, President
Corrine McCormick, Freedom of Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6418

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

January 9, 1991

Mr. John Anthony
[redacted]

Dear Mr. Anthony:

I have received your letter of January 1 addressed to William Bookman, Chairman of the Committee on Open Government. As I have indicated in the past, the staff of the Committee on Open Government is authorized to respond on behalf of the Committee.

One of the issues raised deals with constructive denials of access to records by Westchester County and the Village of Croton-on-Hudson. That topic has been the subject of extensive correspondence. In short, if you believe that records have been improperly withheld, you may seek judicial review.

The other issue, as I understand it, involves records concerning the designation of the Village records access officer and appeals officer or body. 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 corporations and the head of an executive agency or governing body of other agencies shall be responsible for insuring complaince 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."

With respect to the designation of a person or body to determine appeals, section 89(4)(a) of the Freedom of Information Law states in part that:

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

Similarly, section 1401.7(a) of the 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."

Based upon the foregoing, I believe that the Village Board of Trustees must have adopted rules and regulations under the Freedom of Information Law that include the designation of one or more records access officers and an appeals person or body.

Since the Freedom of Information Law became initially effective on September 1, 1974, and was repealed and replaced with the current version of the Law on January 1, 1978, it is likely that any rules and regulations adopted by the Village would have been approved at a time or times near the dates specified above. Further, such approvals would likely appear in minutes of meetings prepared during those periods.

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-6419

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

January 10, 1991

Mr. & Mrs. J. Uciechowski
[redacted]

The staff of the Committee on Open 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. Uciechowski:

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

The correspondence consists of a request directed to the Supervisor of the Town of Fallsburg made on December 17 in which you sought "a detailed listing of all new employees, their names, positions and salaries, who were hired during the year 1990." As of the date of your letter to this office, you had received no response to the request.

You have asked that the Committee conduct an "investigation...as to why the Town of Fallsburg is failing to respond." In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office is not empowered to compel an agency to grant or deny access to records.

Second, with certain exceptions, the Freedom of Information Law is does not require an agency, such as a town, 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..."

Therefore, if, for example, there is no list of employees hired in 1990, I do not believe that the Town would be required to prepare such a list on your behalf. However, the information sought would be included in one of the records required to be kept pursuant to "subdivision three of sectin 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, a payroll record that identifies all town employees by name, public office address, title and salary must be prepared by an agency to comply with the Freedom of Information Law. Further, if no list of new employees exists, but other records containing the information sought are maintained by the Town, I believe that the information should be disclosed from those records for the following reasons.

In general, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. One of the grounds for denial, secction 87(2)(b), permits an agency to withhold record 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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, if the Town maintains records containing the information sought, I believe that those aspects of the records must be disclosed.

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. 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 opinion will be sent 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:saw

cc: Darryl J. Kaplan, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6920

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

January 10, 1991

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 letter of January 1, as well as the materials attached to it.

You have asked for assistance concerning a problem involving the Mayor and Police Department of the Village of Johnson City, as well as the Broome County Office of the District Attorney. By way of background, you wrote that the issue relates to the investigation of forgery of your checks in 1977, which was never solved. [redacted] and, even though the statute of limitations has passed, the Police Department apparently maintains that the matter remains under investigation. You did receive some records from the District Attorney after the statute of limitations had expired, and you have been advised that no other records relating to the investigation are maintained by the Office of the District Attorney. [redacted] You added that the Chief of Police told you "that his reason not to release files is to prevent lawsuits."

Earlier this year, following a request for rules and regulations that would "prohibit" the Police Department from disclosing records to you, the Mayor informed you that the case is "still pending," that "Pending cases are not opened to the public unless released by the District Attorney," and that "No specific rules or regulations exist preventing you from re-opening a past,

unsolved case, and to exonerate any innocent suspects." He also advised that requests be directed to the District Attorney "who could advise the Village of Johnson City as to what information was releasable, and what was not." In September, you submitted a request under the Freedom of Information Law to the Police Department for [redacted] as a result of reopening this case" and "any other reason, rule, regulation procedure of information needed to reopen this case." The request was denied by the new Mayor for reasons previously offered.

In this regard, I offer the following comments.

First, it is emphasized 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."

Based upon the foregoing, the Village of Johnson City and the Office of the Broome County District Attorney, for example, are agencies responsible for complying with the Freedom of Information Law. While Village officials may consult with or seek the expertise of representatives of another agency, such as the Office of the District Attorney, I do not believe that the District Attorney maintains custody or control of Village records, or that the Village needs permission from the District Atorney to disclose records. While the correspondence does not indicate that the District Attorney seeks to exercise such control, it appears that the Mayor believes that some action to must be taken by the District Attorney to permit the Village to disclose its records. If that is the Mayor's view, it is, in my opinion, inaccurate. As a public corporation separate and distinct from the Office of the District Attorney, I believe that the Village must review records falling within the scope of your request to determine the extent to which the Freedom of Information Law requires disclosure.

Second, 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 no rules or regulations that you reques-

ted exist, the Village would not be required to create such records on your behalf. Similarly, if no record indicating that you have been exonerated exists, the Freedom of Information Law would not require the Village to prepare a record to that effect in order to comply with 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. Since I am unfamiliar with the contents of the records in which you may be interested, or the effects of their disclosure, 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), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself.

Perhaps the most relevant provision concerning access to 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)(c). For instance, although records might properly be withheld when disclosure would interfere with an investigation under section 87(2)(c)(i), when the investigation has ended, that provision could not likely

serve as an appropriate basis for a denial. Further, although I am not an expert with respect to the Penal Law or the Criminal Procedure Law, if the statute of limitations concerning a criminal act has expired, the capacity to withhold records under section 87(2)(e) would, in my opinion, diminish.

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.

Lastly, the possibility that litigation might follow the disclosure of records is in my view irrelevant to a determination of rights of access to records under the Freedom of Information Law. As indicated earlier, the Freedom of Information Law permits agencies to withhold records only to the extent authorized in section 87(2). If none of the grounds for denial can appropriately be asserted to withhold records, I believe that the records must be disclosed, notwithstanding the possibility that litigation may ensue.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Donald Dutter, Mayor
R. Jewett, Chief of Police
Gerald F. Mollen, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6421

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

January 14, 1991

Mr. Duncan Osborne
OutWeek Magazine
159 W. 25thh Street
7th Floor
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, unless otherwise indicated.

Dear Mr. Osborne:

As you are aware, I have received your letter of December 31 and the correspondence attached to it.

According to the materials, in your capacity as a reporter for OutWeek Magazine, you submitted a request to the New York City Police Department for records concerning the AIDS Coalition to Unleash Power (ACTUP). The receipt of the request was acknowledged, and it was indicated that the request would be reviewed and you would be notified of the Department's response. No approximate date of such a response was included in the acknowledgement. Another request for the same records was directed to the "Handschu Authority," which also operates within the Department. Due to the failure of the Department to grant or deny access to the records sought, you apparently appealed on the ground that the request had been constructively denied. In view of the duplication of your requests (i.e., one made under the Freedom of Information Law and the other to the Handschu Authority), you were informed that the Authority "directed the Intelligence Division of the Police Department to conduct a search of its records in order to comply with your request." It was also stated that since your request is being processed in accordance with the Handschu Stipulation, a request made under the Freedom of Information Law "is unnecessary."

Your letter constitutes a complaint concerning the Department's handling of your request made under the Freedom of Information Law, for you contend that the dismissal of your request made under the Freedom of Information Law "because it was also made under Handschu is a sleight of hand."

In this regard, I offer the following comments.

First, I am unfamiliar with the specific terms of the stipulation reached in Handschu. It is my understanding, however, that the Handschu litigation was precipitated by claims that the New York City Police Department carried out surveillance and intelligence gathering concerning groups or persons engaged in various activities, such a marches, protests and the like. It is also my understanding that the stipulation reached in Handschu precludes the Department from gathering such information about non-criminal activities and that records prepared or obtained would be subject to disclosure, in some instances, perhaps only to persons identified in the records. Further, I was informed that the Handschu Authority is a board that reviews complaints of violations of the Handschu stipulation. I am unaware of whether the stipulation makes reference to the Freedom of Information Law. Assuming that it does not, it would appear that the records sought would be subject to rights conferred by the Freedom of Information Law, whether a request is made to the Department citing that statute or to the Handschu Authority in conjunction with the stipulation.

Second, the Freedom of Information Law pertains to agency records and section 86(4) of the Law defines that 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 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, 67 NY 2d 557 (1984); and Capital Newspapers Division of the Hearst Corporation v. Whalen, 69 NY 2d 246

(1987)]. If indeed the records sought in the two requests are identical, a single determination of rights of access would in my view be proper. Moreover, in view of the definition of "record" and the scope of the Freedom of Information Law, unless the stipulation provides to the contrary, I believe that a determination must be made in accordance with that statute.

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 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

Lastly, while I am unfamiliar with the nature or content of the records falling within the scope of your request, 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 an effort to enhance compliance, a copy of this opinion will be forwarded to the Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Susan R. Rosenberg, Assistant Commissioner, Civil Matters

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6422

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

January 16, 1991

Mr. Steven M. Schapiro
Schapiro and Reich
325 East Sunrise Highway
Lindenhurst, NY 11757

<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. Schapiro:

I have received your letter of January 3 in which you seek an advisory opinion concerning the propriety of a denial of access to records by the Town of Babylon.

By way of background, you represent a senior citizens' complex in Deer Park, which is located in the Town of Babylon. Recent newspaper articles indicate that a "tire recycling operation would soon open" on property adjacent to the complex. Your client requested information concerning the matter at a Town Board meeting "and was able to ascertain that there were certain letters on file to various agencies in town government". At the direction of the Town Supervisor, a request for those records was made under the Freedom of Information Law. In the request, a copy of which you enclosed, your client sought:

> "Any and all correspondence between Donald Middleton New York Tire Recycling Company, Ernest Force, and/or any other officer or employee of the above mentioned company with any employee or officer of the Town of Babylon, specifically but not limited to Supervisor Pitts, Deputy Supervisor Melitto, and Town Attorney Stephen Braslow. This correspondence to cover the entire calendar year 1990."

The request was denied on the Town's form on the ground that the "Record [is] exempt by Law".

In this regard, I offer the following comments.

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

Second, the reason for denial marked on the form by the Town is inconsistent with the Freedom of Information Law. The phrase "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)]. In view of the nature of the records sought, I do not believe that there is any statute upon which the Town may rely in characterizing the records as exempted from disclosure.

Further, having reviewed the remaining grounds for denial appearing in section 87(2) of the Freedom of Information Law, none of the grounds for denial could in my opinion be asserted to withhold the records sought. For example, there are no considerations of personal privacy, for the communications were made between a private entity and an agency; the records could not be characterized as "inter-agency materials", because the private entity is not an agency as defined by section 86(3) of the Freedom of Information Law; there are no present or imminent contract awards involved; records exchanged between the Town and the company could not under the circumstances be considered as having been compiled for law enforcement purposes.

In short, I believe that the denial was inappropriate, because none of the exceptions to rights of access would apparently serve to justify a denial.

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: Raye D'Abramo, Town Clerk
Stephen Braslow, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6423

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
518) 474-2518, 279

January 16, 1991

Ira J. Cohen, Esq.
Town Attorney
Town of Mamakating
P.O. Box 345
Wurtsboro, New York 12790

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

Dear Mr. Cohen:

As you are aware, your letter of December 17 addressed to the Office of the State Comptroller was recently 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.

In your capacity as Town Attorney for the Town of Mamakating, you wrote that the Town Assessor "is constantly bombarded, via telephone and by people requesting information from the Assessor's records." As such, you raised the following questions:

> "Can the Town Assessor's Office charge for services rendered such as: photocopying expenses in supplying information to persons requesting it? Can the Assessor's Office refuse to give out information over the telephone and demand that the information be obtained personally or through the mail and charge a fee for supplying same?"

In this regard, I offer the following comments.

First, the title of the Freedom of Information Law may be somewhat misleading, for it pertains to agency records rather than "information" per se. Stated differently, that statute is not a vehicle that enables the citizens to cross-examine public officials or that requires those officials to provide information by answering questions. While agency officials may respond to questions by phone, the Freedom of Information Law, in my opinion, does not require them to do so. Similarly, while an agency may accept oral requests for records, section 89(3) of the Freedom of Information Law provides that an agency may require that requests be made in writing.

Second, although an applicant may inspect accessible records at no charge, section 87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost cost of reproducing other records (i.e., those that cannot be photocopied, such as tape recordings, computer disks, etc.), unless a different fee is prescribed by statute.

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 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-6424

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

January 17, 1991

Mr. Jerry Brixner
[redacted]

The staff of the Committee 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. Brixner:

I have received your letter of January 6 in which you requested an explanation of the application of the Freedom of Information Law.

According to your letter, you submitted a request to the Town of Chili for a "study" prepared for the Town by the Center for Government Research. The request was denied, and you referred to local newspaper article indicating that I had advised that the report need not be disclosed. You have asked why the Freedom of Information Law does not require disclosure.

In this regard, I offer the following comments.

If my recollection is accurate, the reporter who contacted me said that the study in question was prepared by a consultant retained by the Town. Further, the Town Clerk confirmed by phone that the document is a consultant's report. My oral, informal opinion was based upon that description of the record, and the rationale for that advice is as follows.

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

Second, based upon the 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. If, for example, such a report consists wholly of opinions or recommendations, it could, in my view, be withheld under section 87(2)(g).

I hope that the foregoing serves to enhance 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:saw

cc: Carol O'Connor, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6425

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

January 17, 1991

Mr. Howard Fox
Ms. Kirsten Engel
Sierra Club Legal Defense Fund
1531 P Street, N.W. Suite 200
Washington, D.C. 20005

Mr. Michael Elder
Elder & Long
45 North Front Street
Kingston, New York 12401

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

Dear Messrs. Fox and Elder and Ms. Engel:

I have received your letter of January 8 in which you seek an advisory opinion concerning rights of access to records requested from the Department of Transportation.

According to your letter:

> "The five documents requested from the New York State Department of Transportation (NYSDOT) consist of data inventories and other working papers prepared in the course of assessing the environmental impacts of the proposed improvement of the Stewart Airport Properties in Orange County, New York."

The Department denied the request on the ground that the records constitute "inter-agency or intra-agency materials." You have contended that denial is inappropriate, particularly in view of the fact that certain of the documents "have the phrase 'Data Inventory' in the title."

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.

Although records may consist of inter-agency or intra-agency materials, which appears to be so in this instance, that alone is not determinative of whether those materials may be withheld. Rather, the contents of inter-agency or 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 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 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 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)].

Based upon the foregoing, even though statistical or factual information contained within a record may be "intertwined" with opinions, the statistical or factual portions 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)].

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)].

In sum, while I am unfamiliar with the records that have been withheld, it appears that portions of the records, or perhaps the entirety of certain records, consist of statistical or factual information that must be disclosed under section 87(2)(g)(i) of the Freedom of Information Law.

In an effort to enhance compliance, copies of this opinion will be forwarded to the Department of Transportation.

I hope that 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: Franklin E. White, Commissioner
Timothy J. Gilchrist

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-6426

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

January 17, 1991

Mr. Edward Littlejohn
88-A-5383/A-4-20
Southport Correctional Facility
P.O. Box 2000
Pine City, New York 14871

Dear Mr. Littlejohn:

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

You have asked that I "investigate" why your appeals made under the Freedom of Information Law to Westchester County and the City of Peekskill have not been answered.

In this regard, I have contacted Frank Marocco, Senior Assistant County Attorney on your behalf. He informed me that the appeal involved a number of records, which are currently being reviewed, and that you will receive a response to your appeal shortly.

I also contacted Ms. Pamela Beach, Clerk of the City of Peekskill. Ms. Beach informed me that she was aware of your initial request, but that no appeal had been received.

It is noted that section 89(4)(a) of the Freedom of Information Law, which pertains to the right to appeal a denial, indicates that an applicant may appeal within thirty days of a denial. Since more than thirty days have transpired since the initial denial by the City Clerk, it is suggested that you resubmit your request. If it is again denied, I was informed that you may appeal to William M. Florence, Corporation Counsel. That procedure would in my view be necessary, for an appeal at this juncture would be untimely.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Frank Marocco, Senior Assistant County Attorney
Pamela Beach, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6427

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

January 18, 1991

Mr. Gerald S. DePasquale, CMC
City Clerk
Office of the City Clerk
City Hall, Room 215
Lackawanna, New York 14218

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

Dear Mr. DePasquale:

I have received your letter of January 11.

In your position as the "Freedom of Information Officer" for the City of Lackawanna, you wrote that "on occasion, [your] authority in determining access to records is questioned." You also pointed out that there is nothing in the Freedom of Information Law that outlines a procedure or penalty that might be imposed if agency employees fail to comply with your directive as the freedom of information officer or for "ignoring the Appeals Board directive to release records."

You have requested advice on the matter. In this regard, I offer the following comments.

By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate 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."

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 freedom of information officer, a position characterized in the regulations as the "records access officer," and the 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 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.

Similarly, with respect to the duties relating to response to an 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."

Based upon the foregoing, it is clear that the governing body of a municipality, such as a city council, through the designation of a records access officer or appeals board, confers authority upon the persons serving in those positions. In short, as records access officer, you have been given the authority to make initial determinations to grant or deny access to records and, again, to coordinate the City's response to requests. The City Council was not required to designate you as records access officer; it could have designated one or more persons to carry out that function. Nevertheless, by selecting you to do so, it conferred the authority described in the preceding commentary. I point out that municipalities' records access officers are invariably their clerks, for the clerks are the custodians of the records, and because of their legal relationships with persons or entities within the municipalities.

Lastly, the Freedom of Information Law does not include provisions concerning the failure of agency personnel to adhere to a determination made by the records access officer or an appeals board. That is so, in my view, because of the clear delegation of authority conferred upon those persons by the head or

governing body of an agency. I believe that such a failure is essentially an internal matter that could be corrected by the implementation of disciplinary procedures used in other situations in which employees fail or refuse to carry out their duties or otherwise comply with 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-6428

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

January 18, 1991

Mr. Milton Jones
88-B-2329
Attica Correctional Facility
Attica, New York 14011

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

Dear Mr. Jones:

I have received your letter of January 9 in which you raised questions concerning rights of access to records.

You wrote that you are interesed in obtaining "the rap sheet of a particular witness who testified at [your] trial." In addition, you asked how you may obtain records "in regard to the evidence used in your trial against [you]."

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."

Based upon the foregoing, the Freedom of Information Law pertains to records maintained by entities of state and local government, such as police departments and offices of district attorneys. However, it excludes court records from its coverage. This is not to suggest that court records necessarily are confidential, for other provisions of law may grant rights of access to those records. Insofar as the records in which you are interested are maintained by a court, it is suggested that you request them from the clerk of the court in which your proceeding was conducted.

Second, the agency that generally maintains "rap sheets," criminal history records, is the Division of Criminal Justice Services, and it has been held that criminal history records maintained by that agency are exempted from disclosure by statute and, therefore, are not subject to the Freedom of Information Law [see Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. However, in a case in which a witness's criminal record was requested from the office of a district attorney, it was held that "the criminal convictions and any pending criminal action against the witness" are available under the Freedom of Information Law [Thompson v. Weinstein, 150 AD 2d 782, 783 (1989)].

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 agency records in which you are interested, I cannot offer specific guidance concerning the extent to which they may be available under the Freedom of Information Law. However, a request for those records should be made to the "records access officer" at the agency or agencies that you believe would maintain the records sought. The records access officer has the duty of coordinating an agency's response to requests. 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 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
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 6429

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

January 18, 1991

Mr. Wallace S. Nolen
West Main Street
[redacted]

The staff of the Committee on Open 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 January 7, as well as the correspondence attached to it.

According to the materials, having submitted a request for records under the Freedom of Information Law to the Town of Union Vale, you were advised that you would be required to complete the Town's form. You have requested an advisory opinion concerning the propriety of requiring the completion of a form in order to seek records.

In this regard, I offer the following comments.

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, the Law and the regulations are silent concerning the use of forms prescribed by agencies. 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 or, as in this instance, verified for accuracy. 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.

In an effort to enhance compliance with the Freedom of Information Law, copies of the 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:saw

cc: Mary Lou DeForest, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1643O

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

January 18, 1991

Mr. Wallace S. Nolen
West Main Street
[redacted]

The staff of the Committee 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 January 7, as well as the correspondence attached to it.

According to the materials, in a letter dated January 2 addressed to the clerk of the Pawling Central School District, you requested:

> "1) A complete, accurate and up-to-date list of the full names, titles and salary of each and every employee.
>
> 2) For each person that is authorized by your school district to drive any vehicle, including but not limited to school bus drivers, messengers, etc. any document currently in your agency's possession that shows that a check of the appropriate state's agency that licenses such person to drive was made and the results (such as a copy of a driving abstract) that was obtained from such state/federal agency."

The receipt of your request was acknowledged on January 4 by John E. Wood, the District's Acting Superintendent, who wrote that he forwarded your letter to school attorneys for their review. On January 9, you appealed what you characterized as "...an automa-

tic denial of the records requested..." You added that, "unless the request for records IN TOTAL [emphasis yours] is granted within the statutory period, [you] will have no other choice but to commence a proceeding as provided by law."

You have requested an advisory opinion concerning the matter, for "it appears based upon conversations and written communications that they are not sure that the requested information is accessible under the Freedom of Information Law."

In this regard, I offer the following comments.

First, I do not view Mr. Wood's response as "an automatic denial." While I do not believe that his acknowledgement of the receipt of your request represents full compliance with the Freedom of Information Law, that response could not, in my opinion, be viewed at that time as a denial. The Freedom of Information Law provides direction concerning the time and manner in 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)].

Mr. Wood acknowledged the receipt of your request within the statutory period of five business days. Although I believe that the acknowledgement should have included "a statement of the approximate date when such request [would] be granted or denied," his quick response was not, in my view, a denial.

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

Third, with certain exceptions, the Freedom of Information Law is does not require an agency 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, one category of the information sought is included among the records required to be kept pursuant to "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, a payroll record that identifies all school district employees by name, public office address, title and salary must be prepared by an agency to comply with the Freedom of Information Law. Further, I believe that the payroll record must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

Fourth, with respect to the second category of your request, I direct your attention to provisions of the Vehicle and Traffic Law, Article 19-A, entitled "Special Requirements for Bus Drivers." Subdivisions (2) and (3) of section 509-a provide that:

> "(2) driver or bus driver shall mean every person: (i) who is self-employed and drives a bus for hire or profit; or (ii) who is employed by a motor carrier and operates a bus owned, leased or rented by such employer; or (iii) who as a volunteer drives a bus which is

> owned, leased or rented by a motor carrier. Provided, however, bus driver shall not include those persons who are engaged in the maintenance, repair or garaging of such buses and in the course of their duties must incidentally drive a bus without passengers, or who, as a volunteer, drive a bus with passengers for less then thirty days each year.
>
> (3) motor carrier shall mean any person, corporation, municipality, or entity, public or private, who directs one or more bus drivers and who operates a bus wholly within or partly within and partly without this state in connection with the business or transporting passengers for hire or in the operation or administration of any business, or place of vocational, academic or religious instruction or religious service for persons under the agency of twenty-one or persons of any age who are mentally disabled including nursery schools, day care centers and camps, or public agency, except such out-of-state public or governmental operators who may be exempted from the provisions of this article by the commissioner through regulation promulgated by the commissioner."

In addition, section 509-d(3)(i) requires that a motor carrier retain driver abstracts obtained from the Department of Motor Vehicles for three years. Further, section 509-d(1)(ii) requires that each motor carrier, such a school district, shall:

> "make an inquiry to the appropriate agency in every state which the person resided or worked and/or held a driver's license or learner's permit during the preceding three years, for such person's motor vehicle driving record..."

In my view, a driver's record obtained by a school district would be public, for it would be relevant to the performance of that person's official duties, and because I believe that the same record could be obtained by any person under the

provisions of the Vehicle and Traffic Law (see e.g., section 202). Further, a similar rationale would apply with respect to employees other than bus drivers with respect to whom "a check" on their licenses has been made.

Lastly, based upon various contacts with this office, it appears that you have made a number of requests for equivalent records maintained by numerous agencies. In this regard, the preceding commentary should be considered as applicable to records maintained by school districts. Different considerations may be present with respect to other agencies and their employees, such as police officers.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: John E. Wood, Acting Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6431

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

January 22, 1991

Mr. Frank J. Ginther
[redacted]

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

Dear Mr. Ginther:

I have received your letter of January 10 and appreciate your kind words.

You have asked that I review a proposed ordinance attached to your letter concerning the Freedom of Information Law that is apparently being considered by the Rensselaer Common Council. Your concern is "whether any aspect of the proposed ordinance would unreasonably restrict the public's access".

In this regard, I offer the following comments.

First, as a general matter, insofar as an ordinance or local law, for example, is more restrictive than the Freedom of Information Law, an enactment of the State Legislature, it would in my opinion be void.

Second, I point out that each agency is required to adopt regulations to implement the Freedom of Information Law. 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 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 rules and regulations should be consistent with those promulgated by the Committee.

Third, having reviewed the proposed ordinance, I believe that it contains certain provisions inconsistent with the Freedom of Information Law and the regulations promulgate by the Committee.

For example, section 51-3B.(1) pertains to an application form to be used to request records. It is noted that the Freedom of Information Law, section 89(3), and the regulations promulgated by the Committee (21 NYCRR 1401.5) require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [21 NYCRR 1401.5(a)]. As such, the Law and the regulations are silent concerning the use of forms prescribed by agencies. 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 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.

You made reference to a portion of the proposed ordinance, section 51-4B concerning a voting record. Here I direct your attention to section 87(3) of the Freedom of Information Law, which states in relevant part that "Each agency shall maintain: (a) a record of the file vote of each member in every agency proceeding in which the member votes". That provision would, in my view, be applicable to any City entity consisting of members who vote, including the Common Council.

Section 51-8 of the proposal is unclear and may be inconsistent with the basis for that provision, which is section 89(4)(a) of the Freedom of Information Law. Section 89(4)(a) states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Sections 51-6 and 51-7A of the proposal involve attempts to restate provisions in the Freedom of Information Law that enable agencies to withhold records. Insofar as they deal with rights of access, I believe that those provisions are unnecessary. As stated at the outset, an agency's rules and regulations are intended to deal with the procedural aspects of the Law, rather than rights of access. Further, in attempting to restate portions of the Freedom of Information Law, certain provisions of the proposal are out of date. For example, section 51-7A(4) pertains to trade secrets; the language of the equivalent provision in the Freedom of Information Law, section

87(2)(d), was recently amended and now contains language different from that in the proposal. Similarly, section 51-7A(7) is intended to be the equivalent of section 87(2)(g) of the Freedom of Information Law, which was amended some time ago. Consequently, the equivalent provision in the proposal is inconsistent with the Freedom of Information Law.

Lastly, section 51-7B indicates that the records access officer must grant access to records "not exempt from disclosure under Subdivision A hereof...unless he determines that to do so would adversely affect the public interest". I emphasize that the courts have held that the ability to withhold records is governed by the provisions of section 87(2) of the Freedom of Information Law; unless one or more of the grounds for denial appearing in section 87(2) may properly be asserted, records must be disclosed, notwithstanding a claim that disclosure would be adverse to the public interest [see Doolan v. BOCES, 48 NY 2d 341 (1979)].

Enclosed for your review are copies of the Freedom of Information Law, the Committee's regulations and model regulations designed to enhance agencies' ability to adopt appropriate procedures. Copies of those materials and this opinion will be forwarded to the Common Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6432

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

January 22, 1991

Mr. William Knobler
[redacted]

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

Dear Mr. Knobler:

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

According to the materials, you submitted two requests to the records access officer of the Great Neck Park District on December 14, and you indicated that your purpose "was to investigate allegations (of impropriety)" and to ascertain "whether they could be true." On December 17, the Clerk of the Board of Commissioners, Ms. Gloria Brady, apparently informed you "that she had been instructed to determine the sources of the underlying allegations before proceeding." She later informed you that the Board's bookkeeper "had started work to meet [your] requests." However, on January 4, Ms. Brady told you that the work on your requests had been stopped and that she was instructed to place your requests on the Board's agenda for the Board's meeting of January 7.

The documentation attached to your letter indicates that you applied to inspect:

> "Itemized listing of payments to vendors, 1/1/90 to date, for printing, typography & related services as posted to budget lines 445 & 401. Please identify vendor name & address for and AND identify rejected competitive bids, if any;"

and

> "Inventory of equipment used for receipt of payments and/or dispensing of receipts at all GNPD parking fields. For each item, indicate date of acquisition, manufacturer, vendor, current book value & sevice/maintenance contracts and their cost."

You have asked for assistance in encouraging the District "to accede" to your requests. In this regard, I offer the following comments.

First, although you specified your intent for seeking reocrds, in general, the purpose for which a request is made is irrelevant to rights of access. It has been held judicially 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)].

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)].

Third, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law also states in part that an agency need not create a record in response to a request. Therefore, if, for example, the District maintains no "itemized listing" of certain payments or an "inventory" of certain equipment used, I do not believe that it would be obliged to prepare new records on your behalf in order to comply with the Freedom of Information Law.

Fourth, as stated previously, section 89(3) of the 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 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 re-

> quested 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. It is noted that 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. Whether the District maintains the records or files them in a manner that permits their retrieval is unknown to me.

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. Insofar as the records sought exist and can be located, I believe, in view of their nature, that they would be available under the Law, for none of the grounds for denial would apparently apply.

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

Copies of this opinion will be forwarded to the District Officials.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Board of Commissioners
Gloria Brady, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6433

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

January 22, 1991

Mr. James Ray Harrison
#67768 2-A-106
West Tennessee High Security Facility
RT 2 Greens Chapel Road
Henning, Tennessee 38041

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

Dear Mr. Harrison:

I have received your letter of October 11 in which you requested materials concerning the Freedom of Information Law. In addition, you inquired as to the information to which the Freedom of Information Law applies and asked whether you could gain access to "a state employee's personnel file, work record, disciplinary file, past employment records".

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."

As such, the Freedom of Information Law generally is applicable to entities of state and local government. Further, section 86(4) of the Law defines "record" to mean:

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

Therefore, all agency records are 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.

Third, 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.

A provision in the Freedom of Information Law of significance concerning personnel records is 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); 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 have been findings of misconduct or the imposition of disciplinary action regarding public employees, 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.

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 employment record, I do not believe that they could be cited to withhold an records indicating a public employee's public employment.

Many personnel records 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.

Lastly, enclosed for your review are copies of the Freedom of Information Law and an explanatory brochure on the subject.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1877
FOIL-AO-6439

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

January 22, 1991

Mr. Bernard J. Blum
President
Rockaway Bay Sierra Club Task Force
[redacted]

The staff of the Committee 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. Blum:

As you are aware, I have received your letter of January 9.

You have asked that I "evaluate" the "style of voting for the new chair" of Community Board #14 in Queens. According to your letter, at a recent meeting "during time allotted for public speaking", you were discussing the issue of candidates in general terms when "the retiring chair directed that the microphone plug be pulled out to interrupt the expression of opinion". You have questioned whether that action represented a violation of "constitutional rights". Further, when the vote for chair began, a member of the Board suggested that a "ruling" by the New York City Corporation Counsel "permitted a secret form of balloting". You have asked whether there should have been a "record kept of how each Board member voted."

In this regard, I offer the following comments.

First, with respect to the issue of speaking at a meeting, I do not believe that there is any constitutional right to do so. Moreover, while 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), that statute is silent with respect to the issue of public participation. Consequently, unless a statute or rule provides direction to the contrary, 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)]. For example, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for five, or not at all, such a rule, in my view, would be unreasonable.

It is noted that section 2800(h) of the New York City Charter, which pertains to community boards, states in part that: "At each public meeting, the board shall set aside time to hear form the public...". While the Charter does not specify the manner or the amount of time that should be set aside for public comment, again, I believe that a community board may establish reasonable procedures or rules to implement section 2800(h).

I am unfamiliar with any rules that might have been adopted by the Community Board. Nevertheless, if the meeting to which you referred was open for discussion by members of the public, and if any person in attendance was allowed to speak, I do not believe that your commentary should have been prohibited.

Second, with regard to the preparation of a voting record, 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.

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.

Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of section 87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listing to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

I point out, too, that 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)].

Lastly, in a memorandum dated August 31, 1990, Michael Kharfen, Director of the Community Assistance Unit of the Office of the Mayor, direction was given concerning voting at community board meetings. In his memorandum, Mr. Kharfen wrote that the New York City Law Department "has recently re-examined the issue and has "determined that the use of secret ballots is inconsistent with [the Freedom of Information Law and the Open Meetings Law], and may not be continued". Consequently, it was stated that "Each Community Board must therefore record the vote of each member in the elections of officers, and list it in the minutes of that meeting". As such, I believe that the guidance given by New York City officials is consistent with this opinion.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Vincent Castellano, Chair
John Baxter, Rockaway Press

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6435

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

January 23, 1991

Mr. Edgard Andre
89-A-0054
[redacted]

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

Dear Mr. Andre:

I have received your letter of January 8 concerning a request for records of the New York City Police Department.

According to the correspondence attached to your letter, you sent a request to the Department's records access officer on August 1. The receipt of the request was acknowledged on August 20, and you were informed that you would be notified when a determination was reached. Having received no further response, you appealed on November 2. No additional response has been given.

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 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

Second, while I am unfamiliar with the nature or content of the records falling within the scope of your request, 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.

For your information, the person designated by the Department to determine appeals 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
cc: Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6436

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

January 23, 1991

Mr. Kyle Davis
85-A-3056
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. Davis:

I have received your letter of January 9, as well as the correspondence attached to it.

You have complained that reports sent to you by the New York City Police Department were "useless", that it "took about a month" for the Department to respond to your initial request, at which time "they requested more information in order to locate the records". The attachment is or pertains to an appeal addressed to Susan R. Rosenberg, who is designated by the Department to determine appeals under the Freedom of Information Law. In that letter, you requested the Department's subject matter list, and a "case index and/or cross index". Further, it appears that you requested a police memo book, for you cited a portion of the Department's Patrol Guide, which, according to your letter, states in part that officers are required to "store active and complete Activity Logs in locker, available for inspection at all times".

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 is not obliged to create a record in response to a request. Therefore, if, for example, the reports made available to you were those that you requested, the Department in my opinion would have complied with the Freedom of Information Law, despite the utility of the reports to you. Further, it would not be obliged to prepare new records in response to a request.

A second issue involves the specificity of your request. As you inferred, the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought [section 89(3)]. 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 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. 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. I am unfamiliar with your request. Similarly, I have no specific knowledge of the means by which the Department maintains its records or the manner in which the records may be retrieved.

Third, in your letter to Ms. Rosenberg, you requested a copy of the Department's subject matter list. I believe that she may respond to your request. However, it appears that you had not sought the subject matter list in any previous correspondence and that your request should have been directed to the Department's records access officer. Under the circumstances, I believe that she could have chosen not to respond directly to

your request for the subject matter list but that she should have forwarded it to the records access officer. The provision dealing with the subject matter list, section 87(3)(c) of the Freedom of Information Law, states that an agency shall maintain:

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

Based upon the foregoing, the record described above need not include reference to each and every record of an agency; rather, I believe that a subject matter list should consist of a categorization, in reasonable detail, of the kinds of records maintained by an agency. I point out too that the requirements of the Freedom of Information Law concerning the subject matter list, based upon case law, do not require that such a list be further indexed into topics or components. As such, while a reference in a subject matter list might pertain to a class of "cases", the Freedom of Information Law does not require that those cases by further indexed [see D'Alessandro v. Unemployment Insurance Appeal Board, 56 AD 2d 962 (1977)].

Lastly, the Freedom of Information Law pertains to all 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."

If a "police memo book" or activity log consists of information prepared by, with, or for an agency, such as the Department, I believe that such materials would constitute "records" subject to rights conferred by the Freedom of Information Law. The statement in your letter derived from the Patrol Guide indicates that activity logs must be stored on Department premises. If that is so, they are, in my opinion, "records" subject to the Freedom of Information Law. However, the statement that they must be "available for inspection at all times" likely does not mean that they are available for public inspection, but rather for inspection by officers or other Department personnel.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan R. Rosenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6437

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

January 24, 1991

Mr. Frederick A. Jones, C-34-18
#88-A-00439
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. Jones:

I have received your letter of January 5, which reached this office on January 14.

You wrote that you requested various records from the New York City Police Department pertaining to your arrest. As yet, you have not received the records, and you asked that "action" be taken by this office to ensure disclosure.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office has no power to compel an agency to grant or deny access to records.

Second, since you cited provisions of the Criminal Procedure Law in your letter, I point out that rights conferred under those provisions are separate and distinct from the Freedom of Information Law. Rights under the Criminal Procedure Law are based upon one's status as a defendant; rights under the Freedom of Information Law are conferred upon the public generally.

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 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), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself.

Perhaps the most relevant provision concerning access to 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. 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
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6438

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

January 24, 1991

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.

Dear Ms. _____:

I have received your letter of January 6 in which you asked that I "order" the Office of Mental Health to provide copies of certain documents to you.

By way of background, you have alleged that New York Hospital has engaged in a variety of unlawful practices. As such, you have attempted to obtain records concerning the Hospital, as well as others, from the Office of Mental Health. You indicated, however, that the requests have been "ignored".

In this regard, I have contacted the Office of Mental Health on your behalf to learn more of the matter. I was informed by phone that the agency does not maintain records involving the kinds of allegations described in your request. I was also told, however, that the annual reports that you requested would be forwarded to you.

With respect to the issues raised in your enclosure entitled "Requested Documents II", I believe that they were considered expansively in an opinion sent to you on October 16 via Ms. Johnson of the Commission on Quality of Care for the Mentally Disabled, and I see no need to reiterate those points here.

Since you contended that the Office of Mental Health ignored your requests, for future reference, I point out that 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)].

Lastly, the Committee on Open Government is authorized to advise with respect to rights of access to records. This office is not empowered to "order" an agency to grant or deny access to 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia W. Johnson
Robert M. Spoor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6439

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

January 24, 1991

Mr. Daniel J. Haggerty
[redacted]

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

Dear Mr. Haggerty:

I have received your letter of January 13 in which you raised a series of issues relating to the Freedom of Information Law.

By way of background, you wrote that you have attempted to obtain records from the New York City Office of the Sheriff and the Parking Violations Bureau (PVB) to resolve an error resulting in your having been mistakenly identified "as the registrant/ owner of a license plate that was the subject of about five parking tickets." Due to the error, an order to garnish your wages has been served upon your employer. You wrote that: "Essential to correcting this error is the identification of the party responsible." As of the date of your letter to this office, the PVB had not responded to your request, and the Sheriff's office forwarded your letter to the PVB, "instead of complying with [your] request for those records that are specific and unique to the Sheriff's office."

You have requested advice on the matter and asked whether you may "initiate an investigation into an agency's failure to comply with the Freedom of Information Law," whether there are penalties for violations, and which state agency investigates such matters.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office has neither the authority nor resources to conduct what may be characterized as an investigation. Further, no state agency is charged with such a responsibility or duty concerning the Freedom of Information Law.

Second, the Freedom of Information Law pertains to agency records, and section 86(4) of the 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, if the Sheriff's office maintains records falling within the scope of your request, I believe that it should have responded in accordance with the requirements of the Freedom of Information Law.

Third, 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)].

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 complaints or allegations made to an agency by a member of the public, it has generally been advised that the substance of such a record is available, but that those portions of the record 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 a complaint or allegation is often irrelevant to the work of an agency. If the deletion of identifying details would not serve to protect the privacy of the complainant, I believe that the entire record could likely be withheld. Further, it is unclear why the "identification of the party responsible" is "essential to correcting the error." Based upon the facts that you provided, the most important proof that you could provide would appear to be your license and registration.

Lastly, in terms of a penalty for non-compliance with the Freedom of Information Law, I direct your attention to section 89(4)(c) of the Law. That provision states that when a judicial proceeding is brought against an agency:

> "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:saw

cc: Records Access Officer, Parking Violations Bureau
Jeannette C. McNulty, Records Access Officer, Office of the City Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6440

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

January 25, 1991

Mr. David Brooks
89-A-4087
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. Brooks:

I have received your letter of January 15 in which you raised questions concerning your attempts to obtain minutes of a judicial proceeding from the Supreme Court, New York County.

You wrote that you recognize that there are "two Freedom of Information Acts, Federal and State", and you asked whether the records sought fall within the federal or the state statutes.

In this regard, I offer the following comments.

First, the federal Freedom of Information Act (5 U.S.C. section 552) pertains to records maintained by federal agencies. Therefore, it would not apply to records maintained by a state court.

Second, the New York 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."

In turn, section 86(1) defines "judiciary" to mean:

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

Therefore, the New York Freedom of Information Law excludes the courts and court records from its coverage. As such, neither of the statutes to which you referred would serve as a basis for obtaining court records.

This is not to suggest that court records are not in many instances available to the public, for other statutes (see e.g., Judiciary Law, section 255) often provide substantial rights of access to court records. It is suggested that you seek the records from the clerk of the appropriate court.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-644

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

January 25, 1991

Ms. Linda L. Hamby
President
First National Data Management, Inc.
2300 Henderson Mill Road N.E.
Suite 417
Atlanta, Georgia 30345

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

Dear Ms. Hamby:

Your letter of January 11 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 Law.

According to your letter, your firm "compiles insurance licensing information from various states through the country", and you are expanding the information offered by your company "to include the names and addresses of 'newborn' children and 'newly issued marriage certificates'". You added that you have received information from 43 states, that you hope "to add New York to [your] list of 'business friends'", and that you intend to request "Names, addresses, and date-of-marriage of persons married in New York within a specified time period", as well as "Names, addresses, and date-of-birth of 'newborn' children and their parents within a specified time period."

You have requested assistance in obtaining the information described above.

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". One such statute is section 4173 of the Public Health Law, which states in part that:

> "A certified copy or certified transcript of a birth record shall be issued only upon order of a court of competent jurisdiction or upon a specific request before 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."

Based upon the foregoing, birth records may be disclosed only by means of a court order, unless requested by the subjects of the records or their representatives.

Third, even if section 4173 of the Public Health Law did not expressly deal with access to birth records, another provision of the Freedom of Information Law would in my opinion authorize a denial of the marriage and birth information sought. 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 personal 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". 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]. It appears that you are seeking names and addresses of persons married and newborns for commercial purposes. As such, I believe that the information in question could likely be withheld.

The foregoing is not intended to suggest that you cannot request the information from the appropriate agencies; rather, I have attempted to describe provisions of law in New York that enable agencies to withhold records.

If you continue to be interested in requesting the information in question, I point out that the Bureau of Vital Records at the State Health Department maintains duplicates of birth and marriage records for all municipalities except New York City, where they are kept by the New York City Health Department. Original records are maintained by town and city clerks.

A request 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.

In view of the provisions of New York statutes described earlier, your requests for the information of interest would, in my opinion, likely be fruitless. Nevertheless, should you choose to seek the records, the address for the New York State Health Department is Corning Tower, Empire State Plaza, Albany, NY 12237; the address for the Vital Records section of the New York City Department of Health is 125 Worth Street, New York, NY 10013.

I hope that the foregoing serves to clarify your understanding of the law in New York. If you would like to discuss the matter, 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- 6442

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

January 28, 1991

Mr. Dana Steven 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:

I have received your letter of January 17 and the materials attached to it. As in the case of previous correspondence, you have requested an advisory opinion concerning rights of access to records reflective of the gross wages of public employees, particularly as that information appears in W-2 forms. The records sought have been denied by the Town of Milton.

In this regard, the same issue was the subject of an advisory opinion prepared at your request on November 26, 1990. Although the ensuing commentary will in some respects reiterate points made in that opinion, I will attempt to deal with the issue more expansively.

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, 102 AD 2d 92, aff'd 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].

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 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.

Second, records related to those in question are in my view clearly available. One of the few instances in the Freedom of Information Law in which an agency is required to prepare 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..."

Further, even prior to the enactment of the Freedom of Information Law, payroll records were found to be available, for it was held that those records:

> "...represent important fiscal as well as operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In addition, in a decision cited earlier rendered by the Court of Appeals, the State's highest court, it was 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]" [Capital Newspapers, supra, 67 NY 2d 565-566].

In short, I believe that insofar as records maintained by the Town indicate employee's wages, they must be disclosed.

In an effort to enhance compliance with the Freedom of Information 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: William Mevec, Town Clerk
Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6443

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

January 28, 1991

Cornelius O'Connell, Ed.D.
Superintendent of Schools
East Hampton Union Free School District
76 Newton Lane
East Hampton, NY 11937

Dear Dr. O'Connell:

I appreciate having received your letter of January 16 and your determination of an appeal made under the Freedom of Information Law.

According to your determination, the records sought include:

> "name, gender, age when hired, date hired, years of previous teaching experience credited, years of teaching experience not credited, and the initial placement on the salary schedule for all teachers presently employed in the East Hampton Union Free School District."

The appeal was denied on the grounds that:

> "1. The record you request does not exist and the school district is not obligated to create such a record.
>
> 2. The information requested would constitute an invasion of personal privacy under Sec. 96 of the Public Officers Law."

For purposes of clarification, I offer the following comments.

First, section 96 of the Public Officers Law is part of the Personal Privacy Protection Law. In this regard, it is noted that the Personal Privacy Protection Law pertains only to state agencies. 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 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, the Personal Privacy Protection Law excludes from its coverage "any unit of local government", such as a school district.

Second, it is unclear whether the applicant requested a list containing the information sought. If there is no such list, for example, I would agree that the District would not be obliged to create a new record in response to the request, for section 89(3) of the Freedom of Information Law states in part that an agency need not create or prepare a record to comply with a request.

Third, to the extent that a record or records exist containing the information sought and can be located by the District, with certain exceptions, I believe that they would be available 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 greatest significance concerning the information sought is 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); 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].

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)."

It is also noted that in the decision cited initially, Steinmetz, supra, the issue involved a variety of items concerning teachers, including the "step hired on", "year hired" and "present step & column" as of a certain date, and the court held that those items were available. While I believe that an employee's gender and age could be withheld, for those items are unrelated to the performance of one's official duties, it appears that the remaining materials would be available.

I hope that the foregoing serves to clarify the Freedom of Information Law. 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-6444

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

January 28, 1991

Mr. Francis Brozzo
[redacted]

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

Dear Mr. Brozzo:

I have received your letter of January 16 concerning the Freedom of Information Law.

According to your letter, on January 16, you made a request to the Village of Gouverneur Police Department to inspect [redacted]. The complaint was located and its contents were read to you. Thereafter, you requested a copy of the complaint. In response, however, the Chief of Police denied you the right to have a copy and indicated that a subpoena must be used to obtain a copy.

You have asked for assistance in the matter. 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. Although this office cannot compel an agency to grant or deny access to records, it is my hope that the following remarks will be persuasive.

Second, 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 inspection and copying all records", unless records or portions of records may be withheld pursuant to the grounds for denial that following. As such, if a record is available under the Freedom of Information Law, it must be made available for inspection and copying. Further, section 89(3) of the Freedom of Information Law states in part that: "Upon payment of, or offer to pay, the fee prescribed therefor", an agency must make a photocopy of an

accessible record. That fee cannot ordinarily exceed twenty-five cents per photocopy [see Freedom of Information Law, section 87(1)(b)(iii)]. I point out, too, that 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 In Re Becker, 200 AD 178 (1922)].

Under the circumstances, if the record in question was read to you, it was effectively disclosed. If that is so, I believe that you have the right to inspect it and that the Village is obliged to make a copy upon payment of the appropriate fee.

Third, as suggested earlier, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record 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 (h) of the Law. In this instance, since the record was read to you and since you are aware of the identity of the complainant, it does not appear that any ground for denial could properly be asserted. Based upon the facts as I understand them, the record would be available under the Freedom of Information Law, and that statute, rather than a subpoena, would serve as a basis for requiring that the Village copy the record.

Lastly, when records are 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 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: David Whitton, Chief of Police
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6445

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

January 30, 1991

Mr. Alan Jay Todd
AFSCME Council 66
1515 Lyell Avenue
Rochester, NY 14606

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

Dear Mr. Todd:

I have received your letter of January 11, which reached this office on January 23.

According to your letter, you serve as a public employee union representative of a person who was recently terminated by the City of Batavia for the alleged possession and sale of marijuana. At a grievance hearing held in October, the City Administrator, Mr. William Reemtsen, "revealed the existence of a 'police affidavit'." Having requested that document, Mr. Reemtsen's assistant denied the request on the ground that disclosure would identify a "confidential police informant". You amended your request and asked for the records following the deletion of "all identifying references to the informant". Mr. Reemtsen denied the request on the basis that "the specificity of the information contained in the police affidavit would be sufficient to reveal the identity of the deponent even if deponent's name were deleted...". He added that it was his understanding that you could appeal his determination "by petitioning the NYS Committee on Open Government."

You added that, since the criminal charges against the former employee involve activities alleged to have occurred at his home, while the affidavit in question alludes to conduct that allegedly occurred at the City's filtration plant, the charges leading to his termination are unrelated to the criminal matter. You wrote further that the City "must produce this so called confidential informant at [the] up coming arbitration hearing..., thus revealing his identity", and that "Mr. Reemtsen has confirmed...the City's intent to subpoena this individual".

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office is not empowered to compel an agency to grant or deny access to records, nor can it render a binding determination concerning the propriety of an agency's denial of access.

Second, the provisions relating to the right to appeal a denial of a request appear 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, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

As such, although agencies must forward copies of appeals and the ensuing determinations to this office, an appeal may be made to a person or body within the government of the City of Batavia. Based upon the initial denial of your request by Michael Consadine, it appears that the amended request was considered as an appeal by Mr. Reemtsen.

Third, 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 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 may be available.

Under the circumstances, it appears that the most relevant basis for denial 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". Among the references in the correspondence is section 89(2)(c), which states in part that, unless there is a different basis for denial, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details would permit disclosure of the remainder of a record in a manner that protects the privacy of the person or persons whose names have been deleted. Therefore, if the deletion of identifying details would permit disclosure of the remainder of the record in a manner that protects the privacy of a person or persons whose names have been deleted, I would agree that the remainder of a record would be required to be disclosed. However, it has been advised in a variety of contexts that if the deletion of identifying details would not serve to protect privacy, an agency may be justified in withholding other aspects of or perhaps the entire record. For example, if the informant is a fellow employee at the filtration plant, and if there are few employees stationed there, the deletion of identifying details from a record would not likely serve to protect the privacy of the informant, for the recipient of the record might have the ability, by means of logic, to determine who the informant might be. I have no personal knowledge of whether the example described above is analogous to the situation at issue. Nevertheless, I believe that there may be situations in which the deletion of identifying details alone would not protect against unwarranted invasions of personal privacy.

Finally, although the informant's identity may be disclosed at an upcoming hearing, that possibility would not in my opinion require the disclosure of that person's identity prior to the hearing. In a case involving a criminal proceeding in which a request was made for records maintained by an office of a district attorney, it was found 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 the FOIL (see Matter of Knight v. Gold, 53 AD 2d, 694, dismd 43 NY 2d 841), 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)].

In that context, records based upon statements by witnesses and others could properly have been withheld prior to a judicial proceeding; however, following the use of those statements in a public judicial proceeding, the records became available. In this instance, while the name of the informant might be disclosed to your client during a hearing, the Freedom of Information Law in my opinion would not necessarily require disclosure prior to the hearing.

I hope that I have 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 Reemtsen, City Administrator
Michael Consadine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6446

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

January 31, 1991

Mr. Stephen L. D'Andrilli, President
Mr. Roger J. Katz, General Counsel
Guardian Group International Corp.
21 Warren Street, Suite 3-E
New York, New York 10007

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

Dear Messrs. D'Andrilli and Katz:

I have received your letter of January 21, as well as the correspondence attached to it. You have requested an advisory opinion concerning the "merits" of five requests made under the Freedom of Information Law for records of the New York City Police Department. Four of the requests were made in November, 1990; the fifth was made in December.

The first request involved an attempt to obtain statistical information concerning the issuance of pistol licenses by type, the number of denials of licenses and the bases for the denials, as well as information concerning lost or stolen firearms, the justifiable use and the misuse of firearms, and accidental discharges of firearms. The second pertains to statistics relating to illegal shipments of firearms, the possession of firearms used by "criminals" in the commission or contemplated commission of crimes, and figures concerning the use of specific kinds of firearms in the commission of various crimes. The third request involves Department forms identified in its Administrative Guide. The fourth concerns studies, evaluations and surveys conducted for or on behalf of the Department "pertaining to the possibility of replacing the standard issue revolver with a semi-automatic." In the fifth, you sought statistical information "on a variety of specific matters involving licensing procedures and criminal sentences imposed on individuals who had been convicted of crimes who had used firearms in the commission of a crime."

The receipt of one request was acknowledged by the Department's records access officer, who indicated that you would be notified "as soon as a determination is reached." It appears that no determination of any of the requests had been made as of the date of your letter to this office.

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 records in response to a request. I am unaware of whether the Police Department has prepared the kinds of statistics or estimates that you requested. If no such records are maintained, the Department would not, in my opinion, be obliged to create or prepare such records on your behalf to comply with your requests. Similarly, in one of your requests, the letter of December 18, you sought to elicit information by raising a series of questions. From my perspective, although agency officials may answer questions, the Freedom of Information Law does not require officials to do so. Rather, agencies must provide access to existing records to the extent required by the Law.

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.

Third, to the extent that your requests involve existing records, I believe that one of the grounds for denial is likely of particular relevance. It is emphasized, however, that the provision, due to its structure, often requires the disclosure of records or perhaps portions of records. 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.

As the foregoing pertains to your requests, existing statistics or estimates, for example, would be available, unless a different ground for denial may be asserted, for section 87(2)(g)(i) requires the disclosure of inter-agency or intra-agency materials consisting of "statistical or factual tabulations or data."

The same provision would apply with respect to studies or analyses prepared by the Department or consultants retained by the Department to prepare such documentation. 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 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, studies prepared by the Department or a consultant for the Department would be accessible or deniable, in whole or in part, depending on its contents, in accordance with section 87(2)(g).

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 ap-

> plying 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.

The remaining request involves forms identified in the Administrative Guide. While those forms might be viewed as inter-agency or intra-agency materials, many are apparently prepared for the purpose of being distributed to the public. In my opinion, those forms would be available, for none of the grounds for denial would apply. Some appear to consist of "instructions to staff that affect the public," which would be available under section 87(2)(g)(ii). Others appear to be used internally or forwarded to other agencies. However, those forms would generally appear to involve the transmission of statistical or factual data.

Lastly, 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 division 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

For your information, the person designated to determine appeals for the Department is Ms. Susan R. Rosenberg, Assistant Commissioner for Legal Matters.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Sgt. Louis J. Capasso, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6447

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

January 31, 1991

Ms. Mina Friedman
[redacted]

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

Dear Ms. Friedman:

I have received your letter of January 18. You wrote that a series of requests made under the Freedom of Information Law to the State Department of Motor Vehicles and the New York City Police Department made several months ago "remain outstanding." You requested an advisory opinion concerning the matter, particularly in view of a decision referenced in an article attached to your letter.

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 division 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

For your information, the person designated to determine appeals for the Police Department is Ms. Susan R. Rosenberg, Assistant Commissioner for Legal Matters; the appeals officer at the Department of Motor Vehicles is Mr. Joseph Murphy, Chairman of the Administrative Appeals Board.

Second, the decision to which you alluded is, in my view, unrelated to your situation, for it dealt not with Freedom of Information Law, but rather with the release of police officers' personnel records in conjunction with section 50-a of the Civil Rights 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

OML-AO-1880
FOIL-AO-6448

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

February 1, 1991

Mr. Richard Griola
[redacted]

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

Dear Mr. Griola:

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

According to your letter, in October of 1989, a member of the Cicero Town Board "raised an ethics question concerning the conduct" of another member of the Board, Ms. Patricia Rizzo. In September of 1990, you requested minutes of the meetings of the Town Ethics Board and "correspondence to and from" the Board concerning the matter. Although some information has apparently been disclosed, it is unclear whether the records in which you are interested exist. Nevertheless, if "an ethics investigation was done," it is your view that you are entitled to:

> "1. The written complaint wherein the allegation against Mrs. Rizzo was referred to the Cicero Ethics Board, as required by the ethics code.
>
> 2. Minutes of the Ethics Board meeting that investigated the charges against Mrs. Rizzo, as required by law.
>
> 3. A copy of the rendered decision from the Cicero Board of Ethics.

> 4. A copy of the record of the vote of each member taken at the Cicero Ethics Board meeting that determined the charges against Mrs. Rizzo, as required by law.
>
> 5. A copy of the public notice that advertised the public meeting wherein the investigation was conducted, as required by law."

You wrote that the records described above have been denied "in a de facto manner," and you asked that this office "intervene."

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law and the Open Meetings Law. This office can not enforce either of those statutes, nor is it empowered to compel an agency to grant or deny access to records. Nevertheless, in conjunction with the issues raised, 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. Two of the grounds for denial are, in my opinion, relevant to rights of access to the records sought.

A complaint or allegation transmitted from a member of the Town Board to the Town Board or to the Board of Ethics could be characterized as "intra-agency material." Section 87(2)(g) of the Freedom of Information Law pertains to such materials and states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Based upon the foregoing, a complaint in the nature of that described above could in view be denied, for it does not consist of any of the kinds of material required to be disclosed pursuant to subparagraphs (i) through (iv) of section 87(2)(g).

Also relevant is section 87(2)(b), which enables an agency to withhold records 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 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. However, 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 complaints or charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Since you requested the "decision" rendered by the Board of Ethics, I point out that the materials attached to your letter indicate that the Board cannot render a "decision"; rather the Board "shall render advisory opinions." Therefore, following its review of a complaint, for example, the Board provides advice. Based upon section 87(2)(g), a record containing advice or an opinion could in my view be withheld.

Second, at this juncture, I direct your attention to the Open Meetings Law. That statute 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."

A town board of ethics in my view is subject to the Law, for it is created by a town board, 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 town. Further, the definition makes a specific reference to committees, subcommittees and "similar" bodies.

Although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally by conducted open to the public, section 105(1) of the Law lists eights grounds for entry for entry into executive session.

Relevant 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.

With regard 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, 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 no action is taken, there is no requirement that minutes of an executive session be prepared. It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. For reasons described earlier, records concerning the issue could apparently be withheld under the Freedom of Information Law.

Lastly, section 104 of the Open Meetings Law requires that every meeting of a public body be preceded by notice given to the news media and by means of posting. However, subdivision (3) of section 104 specifies that a public body is not required to pay to advertise a meeting or provide a legal notice. However, if a copy of a notice of the meeting in question exists, I believe that it would be available under the Freedom of Information Law.

I hope that the foregoing clarifies your understanding of the Freedom of Information Law and the Open Meetings Law. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Jay L. McElvain, Chairman, Board of Ethics
Town Board
Carol Himes, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6449

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

Feburary 1, 1991

Mr. Hector Dionisio
90-A-5916
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. Dionisio:

I have received your letter of January 16 in which you wrote that you have requested records under the Freedom of Information Law from the New York City Police Department, but that no response has been provided. 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 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 division 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

For your information, the person designated to determine appeals for the Police Department is Ms. Susan R. Rosenberg, Assistant Commissioner for Legal Matters.

In an effort to enhance compliance, a copy of this opinion will be forwarded to Sgt. Louis Capasso, the Department's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Sgt. Louis J. Capasso, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6450

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

February 1, 1991

Mr. Mike Grogan
The Post Standard
Clinton Square
P.O. Box 4915
Syracuse, New York 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, unless otherwise indicated.

Dear Mr. Grogan:

I have received your letter of January 24, as well as correspondence of January 25 in which you amended one of the earlier letters. Although you characterized your letters as "appeals," based upon our conversation of January 25, you asked that I consider them as requests for advisory opinions under the Freedom of Information Law.

The first letter involves the Health Department's "policy of redacting all references to quality assurance in hospital surveys conducted by the department and released to the media." You added that Wayne Osten, the Department's director of hospital services, told you that the information had been withheld pursuant to sections 2805-j through 2805-m of the Public Health Law. You have questioned the propriety of the Department's policy, for it is your view that release of the information could be beneficial to hospitals and the public.

In this regard, the Department's policy appears to be based upon statutory guidance. Section 2805-j of the Public Health Law states in part that:

> "1. Every hospital shall maintain a coordinated program for the identification and prevention of medical, dental and podiatric malpractice. Such program shall include at least the following:

> (a) The establishment of a quality assurance committee with the responsibility to review the services rendered in the hospital in order to improve the quality of medical, dental and podiatric care of patients and to prevent medical, dental and podiatric malpractice. Such committee shall oversee and coordinate the medical, dental and podiatric malpractice prevention program and shall insure that information gathered pursuant to the program is utilized to review and to revise hospital policies and procedures. At least one member of the committee shall be a member of the governing board of the hospital who is not otherwise affiliated with the hospital in an employment or contractual capacity."

Other provisions of section 2805-j involve the development of procedures concerning competence, the periodic review of credentials, and the collection of information concerning a hospital's experience with "negative health care outcomes and incidents injurious to patients." Section 2805-k involves investigations undertaken by hospitals prior to the granting or renewal of professional privileges. Section 2805-l requires that hospitals report certain kinds of "incidents" to the Health Department, and that investigations be performed and reported to the Department concerning those incidents.

Perhaps most important in terms of rights of access is section 2805-m, which states in part that:

> "1. The information required to be collected and maintained pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-k of this article, reports required to be submitted pursuant to section twenty-eight hundred five-l of this article and any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be kept confidential and shall not be released except to the department or pursuant to subdivision four of section twenty-eight hundred five-k of this article.

> 2. Notwithstanding any other provisions of law, none of the records, documentation or committee actions or records required pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-k of this article, the reports required pursuant to section twenty-eight hundred five-l of this article nor any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be subject to disclosure under article six of the public officers law or article thirty-one of the civil practice law and rules, except as hereinafter provided or as provided by any other provision of law."

Article six of the Public Officers Law is the Freedom of Information Law. Therefore, if the records in question relating to quality assurance in hospitals are collected by the Department pursuant to sections 2805-j, k or l of the Public Health Law, they must be kept confidential, notwithstanding the provisions of the Freedom of Information Law.

Your second letter concerns the "deletion of the names, gender, dates of admission or treatment mentioned in hospital surveys conducted by the department." You wrote that Mr. Osten indicated that those details are withheld under the Freedom of Information Law and its provision involving unwarranted invasions of personal privacy. You added that a recent survey that you obtained under the Freedom of Information Law indicated that three of the seven persons mentioned in the survey "are dead," and that you "cannot imagine how a dead person's privacy could possibly be invaded." Moreover, you stated that a person's gender, age, or date of admission would not identify a patient and, therefore, could not result in an unwarranted invasion of personal privacy, and that "A reporter could not deduce the patient's identity based on such scant information."

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. Among the grounds for denial is section 87(2)(b), which enables an agency to withhold records or portions thereof which "if disclosed would

constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section 89 of this article." Section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first of two of which pertain to:

> "i. disclosure of employment, medical or credit histories or personal references of applicant for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility...."

Further, section 89(2)(a) states that, to protect privacy, "an agency may delete identifying details when it makes records available," and section 89(2)(c) provides that, unless a different ground for denial may be asserted:

> "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:
>
> i. when identifying details are deleted...."

Based upon the foregoing, the issue involves whether the disclosure of a person's gender, age or date of admission, following the deletion of that person's name, could identify the person. If the disclosure of those details would not serve to identify a person, I believe that they must be disclosed. It is noted, however, that I am unfamiliar with the surveys that contain the information sought. If there are circumstances in which the disclosure of one or more of the items in question would identify a person, such an item or items could in my view be withheld. If, as you suggest, disclosure of those items could not enable the public to "deduce the patient's identity," the Freedom of Information Law would in my opinion require disclosure.

With respect to the privacy of deceased persons, in the only decision of which I am aware that dealt with the issue in conjunction with the Freedom of Information Law, it was held that "when rights of personal privacy are involved, the exercise of the rights are limited to the living..." [Tri-State Publishers v. City of Port Jervis, 523 NYS 2d 954 (1988)]. While I am not an

expert with respect to the Public Health Law, I believe that there are statutes that protect the identities of patients, living or dead. For instance, section 4174 of the Public Health Law generally prohibits the disclosure of death certificates and related records and specifies that those records are not subject to disclosure under the Freedom of Information Law.

Lastly, a person denied access to records 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."

The person designated to determine appeals at the Health Department is Mr. Peter Slocum.

I hope that 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: Wayne Osten, Director, Bureau of Hospital Services
Don MacDonald, Records Access Officer
Peter Slocum, FOIL Appeals Officer

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

February 1, 1991

Mr. Wayne Grega
89-A-1124
Marcy Correctional Facility
P.O. Box 3600
Marcy, New York 13403-3600

The staff of the Committee 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. Grega:

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

According to your letter, you are interested in obtaining "copies of letters, both positive and negative," that are contained in your parole file.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 when disclosure would constitute "an unwarranted invasion of personal privacy." On that basis, I believe that the letters in question could be withheld. Further, having discussed the matter with an attorney for the Division of Parole, I was informed that the materials in question, which often include statements from victims, are withheld due to considerations of personal privacy and the "chilling effect" that would arise if such materials were disclosed.

I hope that the foregoing enhances 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-6952

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

February 4, 1991

Mr. Albert F. Rielly
89-T-4182 E7-37
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. Rielly:

I have received your letter of January 28, which you characterized as a request made under the Freedom of Information Law.

You asked how the Committee on Open Government "is activated, to prevent violations of requestors FOIL rights to public information", for several agencies have in your view failed to respond to requests in a timely manner. Further, you cited provisions of law under which "the violating agency" is required to notify the Committee "of its failure to comply" by forwarding copies of appeals. Although you did not identify any agency, you requested "documents pertaining to the denials by the agency listed above". However, you attached copies of correspondence with a variety of entities to which requests for records were made.

In this regard, I offer the following comments.

First, the Committee on Open Government was created by the Freedom of Information Law [see Public Officers Law, section 89(1)(a)]. The Committee cannot enforce the provisions of the Law, nor can it compel an agency to grant or deny access to records. Rather, the Committee is authorized to advise with respect to the Freedom of Information Law.

Second, when an agency denies access to records, a denial does not necessarily indicate that the agency is "violating" the Freedom of Information Law. Often requests are withheld with justification in accordance with the grounds for denial appearing in paragraphs (a) through (i) of section 87(2) of the Law.

Third, the Freedom of Information Law pertains 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 apply to the courts or court records.

Most of the materials attached to your letter involve requests for court records that would fall beyond the requirements of the Freedom of Information Law. Further, although court records may be available under other provisions of law (i.e., Judiciary Law, section 255), the procedural requirements of the Freedom of Information Law would not apply. For example, the time limitations for response [Freedom of Information Law, section 89(3)] and the provisions concerning the right to appeal [Freedom of Information Law, section 89(4)(a)] would not be applicable to the courts in relation to requests for court records.

The only "agencies" identified in your correspondence are the offices of the New York City Medical Examiner and the Queens County District Attorney. Since you requested copies of appeals, it is noted that the Committee on Open Government receives thousands of appeals annually. Those documents are filed chronologically rather than by agency. Further, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought in order that agency officials can locate the records. Under the circumstances, without additional detail, appeals that may have been sent to this office by the two agencies cited above could not be located without reviewing each and every appeal, and I do not believe that this office is required to do so. If you could provide additional information, such as the approximate dates of appeals forwarded by particular agencies, a search would be undertaken.

Lastly, as it applies to agencies, the Freedom of Information Law provides direction concerning the time and manner in 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 the foregoing serves to clarify 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

FOIL-AO. 6453

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

February 4, 1991

Mr. Gary Cornell
[redacted]

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

Dear Mr. Cornell:

I have received your letter and the materials attached to it, which reached this office on January 25.

Among the attachments are requests for records directed to certain law enforcement agencies in which you sought accident reports prepared by those agencies during calendar year 1990, as well as "all records, files, reports and/or other documents relating to disabled vehicles, recovered vehicles, impounded vehicles, and vehicles whose owners or operators were locked out of the vehicle and required assistance in this regard, in connection with which a private towing service or tow truck operator was summoned by or at the instance of any personnel" from those agencies. You specified that the request "covers and includes both those situations in which the vehicle owner" did or did not "express a preference for any particular tow truck service or operator".

You wrote that you are in the business of towing cars and trucks, and that you frequently tow vehicles "at the request or direction of police agencies and personnel". In addition, you indicated that the purpose of your requests is to determine whether you are "getting [your] fair share of police-generated or police-allocated towing business", that the records sought specify "which, if any, tow truck operator has towed vehicles at police request or direction", that it is necessary to obtain the names and addresses of individuals involved in accidents, or whose vehicles required towing in order to "find out the circumstances involved", and that the information can only be obtained "by contacting on a selective basis, a representative sampling of the people involved".

In conjunction with the foregoing, you have requested an advisory opinion concerning the following questions:

> "(1) are the accident and other reports subject to disclosure to this requester for the purposes herein mentioned?
>
> (2) may the police agency or agencies involved properly delete or blank out the names and addresses of the individuals named in the report?"

In this regard, I offer the following comments.

First, before considering your specific questions, I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. In construing that provision, 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 certain aspects of your request, I am unaware of the nature of the agencies' record-keeping systems, and it is unclear whether there is a means of retrieving records concerning "disabled vehicles" or situations in which owners were locked out of their vehicles, for example. Further, your request for "all records" concerning certain classes of records may be so broad that it fails to reasonably describe the records sought.

Second, 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 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, 297; 491 NYS 2d 289, 291 (1985)].

Third, notwithstanding the foregoing, 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, 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 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.

Moreover, in a decision cited earlier, Sardano, supra, the issue involved a request for motor vehicle accident reports maintained by a police department that were sought by a law firm for the purpose of soliciting accident victims. Although the Court held that accident reports are generally available, irrespective of the status or need of an applicant for those records, it was found 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 petitioner should be expunged to protect the privacy of the accident victims...As one of the eight categories of exceptions, the Freedom of Information Law exempts from disclosure 'record or portions thereof that *** if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article'. (Public Officers Law [section] 87[2][b] [emphasis added].) In turn, section 89(2) precludes, inter alia, as such an 'unwarranted invasion', the release of names and addresses to be used for commercial purposes. It permits, however, disclosure of the re-

> cords involved where those identifying details are deleted. ([section] 89[2][a], [b][iii]; [c][i].)
>
> "In view of petitioner's stated intention - i.e., direct mail solicitation of accident victims - the application of these privacy-protective provisions cannot be gainsaid. Consequently, as the Appellate Division correctly held, while the accident reports cannot be withheld from petitioner, the names and addresses of the victims must be deleted before the reports are made available" [Sardano, supra, 298-299].

Based upon the preceding analysis, and in view of your intent to contact persons identified in the records sought, which appears to involve a commercial purpose, it is my view that the names and addresses found in the records could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy".

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Elmira Heights Police Department
Records Access Officer, Chemung County Sheriff's Office
Records Access Officer, New York State Police - Horseheads

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-645-4

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

February 4, 1991

Hon. Charles D. Cook
Member of the Senate
District Office
Box 351
Delhi, NY 13753

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

Dear Senator Cook:

I have received your letter of January 28 and the materials attached to it. You have sought my views concerning rights of access to records requested by one of your constituents from the Palisades Interstate Park Commission.

The records sought involve "appraisals and surveys of the Lake Minnewaska property", which were denied on the basis of section 87(2)(g) 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. 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 indicates that a single record or report may be both accessible and deniable in part. I believe, too, that it imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

Second, section 87(2)(g) pertains to the authority to withhold "inter-agency or intra-agency materials," depending on their contents. If an appraisal or survey is prepared by Commission officials, it could be characterized as "intra-agency material." Further, the Court of Appeals, the state's highest court, has held that appraisals and other reports prepared by

consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of section 87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

More specifically, section 87(2)(g) states that an agency may withhold records that:

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

Again, I believe that appraisals and surveys, whether prepared by Commission staff or consultants, could be characterized as "intra-agency materials" and that perhaps portions may be withheld under section 87(2)(g). However, other aspects of the record may be available. It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, 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 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)].

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, may available.

Similarly, the Court of Appeal in Xerox Corporation, supra, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in 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)].

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

Lastly, it appears that the Commission, by means of its response, sought to give effect to the Freedom of Information Law. However, in a technical sense, it may not be subject to that statute. The Freedom of Information Law 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, as a general matter, the Freedom of Information Law is applicable to entities of state and local government in New York. The Palisades Interstate Park Commission was created by the enactment of Chapter 170 of the Laws of 1937, which provided for an interstate compact involving a joint corporate municipal instrumentality of the States of New York and New Jersey. The Commission consists of ten members, five from New York and five from New Jersey, and its jurisdiction includes lands located in both states. Since New York cannot extend its laws beyond its

borders, it is unlikely in my view that the Commission is technically an "agency" subject to the New York Freedom of Information Law. Further, in a case involving a different interstate entity, it was held that the entity was not subject to the State 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 and that the foregoing commentary serves to provide clarification. 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-6455

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

February 4, 1991

Ms. Marie A. Coville
Town Clerk
Town of Schroeppel
Box 9B
Route 57A R.R. 3
Phoenix, NY 13135

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

Dear Ms. Coville:

I have received your letter of January 31 in which you requested that an advisory opinion be prepared and transmitted in time for a meeting to be held on February 7 by the Town Board of the Town of Schroeppel.

Specifically, you asked that I inform the Town bookkeeper that the Town "must have available to the public the name, title and annual salary of each employee". In this regard, I offer the following comments.

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

Second, with certain exceptions, the Freedom of Information Law is does not require an agency 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 information in question is included among the records required to be kept pursuant to "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, a payroll record that identifies all Town officers or employees by name, public office address, title and salary must be prepared by an agency to comply with the Freedom of Information Law. Further, I believe that the payroll record must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

Copies of this opinion will be forwarded to the bookkeeper, acting Town Supervisor 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: Peg Staring, Bookkeeper
Robert Bortels, Acting Supervisor
Walter Farnholtz, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6456

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

February 5, 1991

Mr. Donald B. McKay
Staff Writer
The Saratogian
20 Lake Avenue
Saratoga Springs, 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. McKay:

I have received your letter of January 25, as well as the correspondence attached to it.

According to the materials, you requested that the City of Saratoga Springs provide access to records concerning its Department of Public Works, specifically payroll records and "employee W-2" forms for a particular period. The request was denied by Anthony J. Izzo, Assistant City Attorney, on the ground that disclosure would constitute an "unwarranted invasion of personal privacy". He also cited and apparently relied upon the decision rendered in Bahlman v. Brier, 462 NYS 2d 381 (1983).

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

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

Second, with certain exceptions, the Freedom of Information Law is does not require an agency 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, a payroll list of employees is included among the records required to be kept pursuant to "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, a payroll record that identifies all City officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Further, I believe that the payroll record and portions of W-2 forms must be disclosed for the following reasons.

As Mr. Izzo indicated, one of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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 [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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

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 address, net pay, etc. 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 City 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.

Lastly, although in Bahlman v. Brier it was held that the Freedom of Information Law does not require the release of personally identifiable sick leave information concerning individual employees, the holding in Bahlman was essentially reversed by the Court of Appeals in Capital Newspapers v. Burns, 109 AD 2d 292, affirmed 67 NY 2d 562 (1986). That decision dealt with records involving sick leave claimed by a particular employee. In holding that the records must be disclosed, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the right of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of personal privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively

> available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985); aff'd 67 NY 2d 562 (1986)].

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

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know,' affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers (Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571 [citing Public Officers law section 84]).
>
> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (see, Public Officers Law section 87[2]; Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 79-80, supra). This presumption specifically extends to intra-agency and inter-agency materials, such as the report sought in this proceeding, comprised of 'statistical or factual tabulations or data' (see, Public Officers Law section 87 [2][g][i]). Exemption s are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification

> for denying access (see Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75, 80, supra; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566).

On the basis of the decision rendered in Capital Newspapers, supra, it is my view that Bahlman was superseded, and that the records sought, subject to the qualifications discussed earlier, must be disclosed.

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

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: Anthony J. Izzo, Assistant City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6457

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

February 5, 1991

Mr. Peter Grishman
Attorney at Law
194 Deerfield Lane North
Pleasantville, NY 10570-1433

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

Dear Mr. Grishman:

I have received your letter of January 21 and the materials related to it, which reached this office on January 28.

According to your letter, you wrote to the Village of Scarsdale and requested "a copy of the property cards as kept on their computer system". The request was "summarily denied" by the Village Manager. You added that you appealed the denial to the Village Manager because he "failed to specify an administrative appellate process". Further, although you expressed a desire to avoid the initiation of litigation, it is your view that the Village's actions are "improper and illegal".

You have requested advice on the 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 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 Village of Scarsdale, is the Board of Trustees, and I believe that the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

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..."

With respect to the right to appeal a denial, section 89(4)(a) of the Freedom of Information Law provides that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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 of the regulations promulgated by the Committee on Open Government states 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."

I point out, too, that in a situation in which a records access officer designated by a district attorney denied a request but failed to advise the applicant of the right to appeal, the Court of Appeals held that:

> "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 appeal had, in fact, even been established (see, Public Officers Law, [sec.] 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)].

Second, 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 state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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, it is clear in my view that inventory records, such as computer tapes of property record cards that are "kept" or "filed" by the Village, 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)].

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

Fourth, 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)].

For example, index cards containing a variety of information concerning specific parcels of real property were found to be accessible. 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 names 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, whether they are maintained on paper or electronically, 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 under the Freedom of Information Law.

In an effort to share my views and information concerning the judicial interpretation of the Freedom of Information Law with the Village, a copy of this opinion will be sent to the Village Manager.

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: Lowell J. Tooley, Village Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1458

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

February 5, 1991

Ms. F.J. Thompson
[redacted]

Dear Ms. Thompson:

I have received your recent correspondence in which you indicate that a number of agencies have failed to respond to your appeals, and you asked whether those agencies forwarded copies of the appeals to this office as required by the Freedom of Information Law. You also allege that the New York City Office of the Actuary has failed to comply with section 87(3)(c) of the Freedom of Information Law, which requires that each agency maintain a "subject matter list" of its records.

In this regard, first, having searched several months of files pertaining to appeals, we have been unable to locate any of the appeals to which you referred.

Second, I have contacted Ms. Ellen Katine-Fox, records access officer at the Office of the Actuary. She informed me that a subject matter list has been prepared and that it will be made available to you upon receipt of your written request and payment of the requisite fee.

Lastly, as you are aware, the Freedom of Information Law prescribes a specific time within which agency officials must determine appeals. 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, 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 addi-

> tion, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Moreover, it has 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 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

cc: Ellen Fox-Katine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6459

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

February 6, 1991

Mr. and Mrs. John Uciechowski
[redacted]

The staff of the Committee 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. and Mrs. Uciechowski:

I have received your letter of January 25 in which you raised a question concerning the Freedom of Information Law.

As in the case of previous correspondence, you indicated that you requested records indicating the names, titles and salaries of employees hired by the Town of Fallsburg in 1990. You wrote that the Supervisor has not responded and asked whether he is "breaking the law by not answering [y]our letter...".

In this regard, I have contacted the Supervisor, Mr. Darryl J. Kaplan, on your behalf. Mr. Kaplan indicated that the request at issue is one among a series of requests that have generally been honored by the Town. He indicated, however, that you owe the Town $5.25 for copying records that you have requested and that the records sought will be made available upon payment of what you owe the Town.

I point out that section 87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy. Mr. Kaplan informed me that twenty-one pages were copies at your request, and that, accordingly, you owe the amount indicated above. In my view, which is based upon information provided by the Supervisor, he has not failed to respond; rather he has delayed disclosing the records until you pay the appropriate fee. Again, upon payment, I believe that the records will be made available to you.

I hope that the foregoing serves to clarify the matter and will serve to resolve the issue.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Darryl J. Kaplan, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6460

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

February 6, 1991

Mr. John B. Nesbitt
Nesbitt & Williams
605 Mason Street
P.O. Box 226
Newark, NY 14513

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

Dear Mr. Nesbitt:

I have received your letter of January 28 in which you requested an opinion concerning the Freedom of Information Law.

In your capacity as town attorney for the Town of Marion, you wrote that the Town has a "practice of requiring a town employee to supervise a member of the public when he or she inspects town records" in order "to ensure the integrity of town records". You added that, on occasion, "this requires town personnel to be deployed away from their normal activities for protracted periods of time", and that it "would be cost-effective for the Town to simply duplicate the requested records at its expense and provide certified copies to the requesting party, who can then examine them at their leisure".

It is your view that the proposed practice "would not violate the law", for "providing a certified copy of original documents at no expense to the requesting party is substantial if not literal compliance" with the Freedom of Information Law.

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

First, as you are aware, 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 contents by taking notes, for example, at no charge.

Second, I agree that town officials are required to ensure the integrity of Town records. 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 its records.

Third, in general, so long as the Town provides copies of requested records and certifies that they are true copies, at no charge to the applicant, I would agree that doing so would constitute substantial compliance with the Freedom of Information Law. However, there may be circumstances in which it may be unreasonable to do so. In some instances, an applicant may not know precisely which records are of interest and may seek to review a variety of records in order to determine those of specific interest. In others, a request may be made for a voluminous document, such as a budget or an audit prepared by the State Comptroller. An audit might consist of hundreds of pages, but the applicant may be interested in reviewing or copying small portions of the document. In such a case, town officials and the applicant may be better served by enabling the applicant to inspect a record, rather than making copies.

Lastly, due to the specific language of section 87(2) of the Freedom of Information Law, which guarantees the right to inspect and copy available records, as well as the judicial interpretation of the Law, it is doubtful in my opinion that an applicant could be compelled to accept copies of records in lieu of inspecting them. As the Court of Appeals has stated, compliance with the Freedom of Information Law represents the "fulfillment of a governmental obligation" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)]. It is suggested that applicants for records be given the option of accepting copies free of charge as a substitute for inspection. While I would conjecture that most would not object to such an arrangement, due to the specific language of the Law, I do not believe that a person could be precluded from inspecting records required to be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6461

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

February 6, 1991

Mr. Thomas Crowe
Senior Claims Representative
CIGNA Property and Casualty Companies
P.O. Box 1926
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. Crowe:

I have received your letter of January 28 in which you requested advice concerning a matter arising under the Freedom of Information Law.

According to your letter, in your capacity as a claims representative, you requested a "photostatic copy" of an arson report prepared by the Monticello Fire Department. You were informed that the charge for a copy of the "one-page report would be $10.00". Further, having discussed the matter with the Village business manager, you were advised that "other nearby fire districts charge up to $25.00 for reports, and therefore, they feel that their $10.00 charge is not excessive."

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) state 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 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: Robert Norris, Village Business Manager
Stephen Oppenheim, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6462

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

February 7, 1991

Mr. Steven Abrams
[redacted]

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

Dear Mr. Abrams:

I have received your letter of January 31, as well as various materials related to it. You have requested an advisory opinion indicating "that the Nassau County Department of Public Works (DPW) is not complying with the New York State Freedom of Information Law...".

According to your correspondence, you and others belonging to a citizens group have been attempting since November 5, 1990, to obtain records concerning the activities of the DPW "in a remediation effort of a sewage treatment plant on the site of the Nassau County Jail in East Meadow". A request was made on that date to DPW's records access officer. Having received no response to the request, you contacted the DPW and were informed that the request was "too vague", and that you "would have to identify a specific document that [you] wanted to see". On January 24, you submitted a new request, which in your view "does identify specifically the documents" in which you are interested. However, in a letter dated January 28 prepared by DPW's Deputy Commissioner, you were informed that DPW's application form "must be completed and returned" to the agency. He added that "time can be saved if you are specific in identifying the information you seek", and that, if an application is approved, "duplication of records can be made at 25 [cents] per page for size 8 1/2 x 11, and $1.00 per square foot for photocopying maps".

You have asked that this office inform the DPW and the County Attorney that the practices described above are "improper". 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. Although 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)], both the Law and the regulations are silent concerning the use of forms prescribed by agencies. 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.

Second, 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)].

Third, 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. As indicated earlier, 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)]. In my view, whether a request reasonably describes the records sought 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 records on the basis of an inmate's name and identification number.

Lastly, with respect to the substance of your request of January 24, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all record 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 (h) of the Law.

In my view, contracts, work orders and similar documents or communications between the County and various firms engaged by the County would likely be available, for none of the grounds for denial could appropriately be asserted.

The remainder of the records sought consist of communications between entities of County government or between those entities and the State Department of Environmental Conservation. I believe that rights of access to those records would be governed by section 87(2)(g). That provision, although it is one of the grounds for denial, often requires disclosure due to its structure and language. Specifically, 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, unless a different ground for denial could 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.

As suggested earlier, the contents of materials falling with the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, 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)].

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, may be available.

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)].

Lastly, since Deputy Commissioner Sanzoverino referred to fees for copies of records, I point out that section 87(1)(b)(iii) of the Freedom of Information Law requires that agencies, such as Nassau County, must in their 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 the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

In my view, Mr. Sanzoverino's statement regarding fees is somewhat inconsistent with the provision quoted above.

In accordance with your request, in an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to Nassau 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: Joseph E. Sanzoverino, Deputy Commissioner, DPW
Owen B. Walsh, Office of the County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6463

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

February 7, 1991

Mr. Timothy J. Gengler
Editor/Publisher
F.W. Dodge Regional Information
Services Division
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. Gengler:

I have received your letter of January 29 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, one of your employees "who regularly visits the White Plains Building Department was recently asked to pay a fee when he asked to view several building department files submitted for building permits". You were later informed "this was policy since one of their employees would have to take time away from their other duties to help [you] out."

In this regard, I offer the following comments.

First, in my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for searching for the records, no such fee may be assessed.

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 search fee or 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, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so in conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Second, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be 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."

The regulations promulgated by the Committee state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Phillip Amicone, Building Department
Anthony Grant, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6464

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

February 8, 1991

Mr. Charles Hili
89-A-7044
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. Hili:

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

According to your letter, you made requests for "a copy of the District Attorney file on [you]" to the Nassau County Office of the District Attorney, the freedom of information officer at your facility and the Office of Counsel at the Department of Correctional Services. The records were denied on the basis of section 87(2)(e) and (f) of the Freedom of Information Law. It is your view that you are entitled to see the file, and you sought advice concerning the steps that you might take to pursue the matter.

In this regard, I offer the following comments.

First, I am unfamiliar with the nature or contents of the records in which you are interested. However, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record 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 (h) of the Law.

Second, the provisions upon which the denials were based authorize an agency to withhold records that:

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

> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
>
> (f) if disclosed would endanger the life or safety of any person..."

Third, 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 records the reasons for further denial, or provide access to the record sought."

Therefore, if you have not already done so, you may appeal in accordance with section 89(4)(a). Although I am unaware of the identity of the appeals officer for the Office of the Nassau County District Attorney, the person designated to determine appeals by the Department of Correctional Services is Counsel to the Department.

Lastly, if an appeal is denied, section 89(4)(b) of the Freedom of Information Law provides that a proceeding for review of the denial may 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1885
FOIL-AO-6465

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

February 8, 1991

Mr. William Wolar
[redacted]

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

Dear Mr. Wolar:

I have received your letter of January 30. You have asked "whether a public body, such as a school board, is permitted to have a closed vote at a public meeting."

It is noted at the outset that it is unclear whether your question involves public bodies' ability to vote behind closed doors during an executive session, or their ability to cast their votes by secret ballot. Consequently, I will attempt to deal with both of those issues. In this regard, I offer the following comments.

First, by way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, public bodies must conduct their meetings in public, except to the extent that the subject matter may be discussed in closed or executive sessions. 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, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may properly be considered in an executive session.

Second, 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 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 626 (1982)]. Consequently, 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.

Since I am not familiar with each of the provisions of the Education Law and other statutes that relate to the functions of a school board, I cannot specify each situation in which a school board may vote during an executive session. However, the following situations are, in my opinion, most common. One involves a so-called 3020-a proceeding in which a board must vote in executive session to determine whether charges should be filed with respect to a tenured employee. The other generally pertains to situations involving particular students, for certain federal Acts prohibit the disclosure of information identifiable to students without the consent of the parents [see e.g., the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g]. Therefore, if, for instance, disciplinary action is taken concerning a particular student, I believe that a vote may be taken behind closed doors. Similarly, in situations in which the vote may identify a handicapped student, I believe that, due to requirements of federal law, a vote should occur in private. While there may be other situations in which a vote may be taken in an executive session of which I am not aware, those described above are in my opinion the situations that arise most frequently in which a board of education may vote during a closed session.

Third, I direct your attention at this juncture to the Freedom of Information Law, which governs rights of access to records. Since that statute 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 school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. 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 listen 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-6466

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

February 8, 1991

Mr. Philip C. Sweet
Records Access Officer
County of Nassau
Office of Consumer Affairs
160 Old Country Road
Mineola, NY 11501-4394

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

Dear Mr. Sweet:

I have received your letter of January 29 in which you requested advice concerning the Freedom of Information Law.

According to your letter, the Nassau County Office of Consumer Affairs is "the licensing agency for home improvement contractors doing business" in the County. You wrote that, in order to obtain a license, contractors must complete an application in which your agency seeks "both a business address and a home address for each of the corporate officers". In situations in which a corporation ceases to do business, consumers are unable to contact the corporation at any business address known to your agency, and your question is whether you "can disclose the home address of any of these officers". You wrote that, to date, you have withheld home addresses on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law 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 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 record may be available 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.

Second, pursuant to section 87(2)(b) of the Law, to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", records may be withheld. That standard in my opinion is flexible and agency officials must, in some instances, make subjective judgments when issues of privacy arise. However, it is clear that not every aspect of a record that identifies an individual may be withheld. Disclosure of intimate details of peoples' lives or personal information irrelevant to the work of an agency might, if disclosed, constitute an unwarranted invasion of personal privacy; nevertheless, other types of personal information maintained by an agency, particularly those types of information that are relevant to the agency's duties, would if disclosed often result in a permissible rather than an unwarranted invasion of personal privacy.

In addition to section 87(2)(b), section 89(2)(b) of the Freedom of Information Law includes a series of examples of unwarranted invasions of personal privacy. Of relevance to your inquiry is section 89(2)(b)(iv), which states that an unwarranted invasion of personal privacy includes:

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

In my opinion, if a record concerning a licensee includes a business address, as well as home addresses, the home address could generally be withheld. When a firm is engaged in business activity, its relationship with the public and, in all likelihood, with your agency, is carried out through a business address. The home address is personal and is likely of little or no relevance to the work of the agency.

I point out that in a decision involving a request for records containing similar information, it was inferred that disclosure of home addresses of directors, stockholders and officers of check cashing licensees would result in an unwarranted invasion of personal privacy. In that decision, it was stated that:

> "Respondent argues that revealing the identities of the principals of check cashing licensees would be an invasion of their personal pri-

> vacy (Sec. 89[2][b][i]). With the possible exception of their home addresses, it would not. After all, the applicants sought, by license, the patronage of the public-at-large. In supplying this information to the agency, the licensees' reasonable expectation probably was that this information would be available to the public. Nor is there any indication by rule or otherwise that the applicants had any expectation or had received any assurance that this information as to their principals would be shrouded from disclosure" [American Broadcasting Companies, Inc. v. Siebert, 442 NYS 2d 855, 858, (1981)].

Therefore, in most instances, particularly those involving corporations as licensees, home addresses could in my view be withheld or deleted from a record prior to disclosure.

Nevertheless, if a corporation, for example, has ceased doing business and there is no way to contact such a firm, it is possible in my view that a court would determine that the home addresses in question must be disclosed. It is assumed that among the functions of the Office of Consumer Affairs is the protection of consumers. Although home addresses of officers of a firm are largely irrelevant to the work of the agency when a firm is doing business, the home addresses may become relevant to its work, i.e., the protection of consumers, when it ceases doing business and can no longer be located. I would contend, therefore, that under those circumstances, disclosure of home addresses would result in a permissible rather than an unwarranted invasion of personal privacy.

Moreover, the language of the Freedom of Information Law indicates that an agency may withhold records, but that it is generally not required to do so. Specifically, the introductory language of section 87(2) states in relevant part that: "Each agency shall...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof" that fall within the grounds for denial that follow (emphasis added). Further, the Court of Appeals has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory

> language, and it is within the agency's discretion to disclose such records with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, even if disclosure would constitute an unwarranted invasion of personal privacy, a municipal agency, such as the Office of Consumer Affairs, may withhold, but it is not obliged 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-6467

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

February 11, 1991

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 January 29. You referred to my letter to you of December 17, 1990, a copy of which was sent to David N. Ross, Supervisor of the Town of Westfield. You indicated that, following his receipt of my letter, Mr. Ross said that you "had been slapped down on that one" and that he would not provide any document he is not required to disclose. Based upon his comments, it is your view that he does not understand the law.

You explained your understanding of the Freedom of Information Law, and you asked that I confirm or clarify your understanding.

In this regard, based upon your statements, I concur with your view of the requirements of the Freedom of Information Law. Further, although I believe that I dealt with the issues exhaustively in my letter of December 17, I offer the following comments, which will be sent to the Supervisor, for purposes of clarification. Some of my remarks will essentially reiterate those offered in the earlier letter.

The major problem appears to involve section 87(2)(g) of the Freedom of Information Law, which pertains to "inter-agency or intra-agency materials". As indicated previously, 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."

Therefore, "inter-agency" materials are communications between two or more agencies. A memorandum sent by a Town official to a County official, for example, would constitute "inter-agency" material. "Intra-agency" materials are communications that are prepared by an agency official and are communicated to officials of the same agency. A memorandum from the Supervisor to members of the Town Board, therefore, would constitute "intra-agency" materials. Communications between agency officials and the public or private firms, for instance, would not be inter-agency or intra-agency materials, because neither members of the public nor private firms are "agencies" as defined in section 86(3). Consequently, communications between Town officials and members of the public or a firm, such as Containerboard, would not consist of inter-agency or intra-agency materials, and section 87(2)(g) would not serve as a basis for withholding those kinds of records.

Even when records are inter-agency or intra-agency materials, the content of those materials serves as the key factor in determining the extent to which the materials must be disclosed or may be withheld. To reiterate, assuming that section 87(2)(g) is the only possible bassis for a denial of access, the Freedom of Information Law specifies that, within inter-agency or intra-agency materials, those portions consisting of statistical or factual information, instructions to staff that affect the public, final agency policies or determinations or which are external audits must be disclosed. Further, often inter-agency or intra-agency materials consist of opinions, as well as factual information. In those cases, an agency is required to review the materials and disclose those portions that consist of factual information. Therefore, even though some aspects of certain records may be withheld, other aspects of the same records must be disclosed.

I hope that the foregoing serves to clarify the Law and enable Town officials to comply. As you requested, a copy of this opinion will be sent to the Supervisor in an effort to enhance his understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. David N. Ross, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6468

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

February 13, 1991

Mr. Dan Getman
Managing Attorney
Farmworker Legal Services
of New York, Inc.
Manheim Professional Building
52 South Manheim Boulevard
New Paltz, NY 12561

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

Dear Mr. Getman:

I have received your letter of January 30 in which you requested assistance.

According to the materials attached to your letter, you submitted a request under the Freedom of Information Law for "rules and regulations of the Putnam County Sheriff's Dept. as well as any special rules applicable to the narcotics squad". The request was denied on the basis of the federal Freedom of Information Act, 5 U.S.C. section 552(b)(2). It is your view that the statute cited to justify the denial is inapplicable.

In this regard, I offer the following comments.

First, the federal Freedom of Information Act, 5 U.S.C. section 552, pertains to records maintained by federal agencies. The Putnam County Sheriff's Office is a municipal agency and, as such, I believe that the federal Act is, under the circumstances, irrelevant. I point out that the provision upon which the Department specifically relied states that rights conferred by the federal Act do not apply to matters that are "related solely to the internal personnel rules and practices of an agency".

Second, the statute governing rights of access to the records in question is, in my opinion, the New York 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 upon the foregoing, I believe that a county sheriff's department is clearly an "agency" subject to the State's Freedom of Information Law.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, 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 records in question consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that rules and regulations 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 of 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, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, 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 the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to

enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by those so inclined. Disclosing to unscrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility 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)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed"(id. at 573).

While I am unfamiliar with the records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. 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.

Lastly, the remaining 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 of safety of any person." To the extent that disclosure would endanger the life of safety of law enforcement officers or others, it appears that section 87(2)(f) would be applicable.

In sum, while some aspects of the records sought might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary. Further, in an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the Sheriff's 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:jm

cc: Records Access Officer, Sheriff's Department
Appeals Officer, Sheriff's Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1886
FOIL-AO - 6469

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

February 14, 1991

Mr. Arthur Bechhoefer
Friends of Keuka Lake, 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.

Dear Mr. Bechhoefer:

I have received your letter of February 1 in which you requested an advisory opinion.

According to your letter, on December 12, the Town Board of the Town of Jerusalem entered into an executive session after completion of its regular business to discuss pending litigation. Four persons who attended indicated that they understood that the Board "did not contemplate doing any further business following the executive session". However, the minutes of the meeting indicate that, after the executive session, the meeting was re-opended and the Board approved a motion to settle two lawsuits that had been discussed during the executive session. On January 8, you requested minutes of the meeting in question. In response to the request, you received draft minutes "without the proposed settlement of the lawsuits, even though the minutes showed that this proposed settlement was part of the resolution adopted by the board". Later, you made another request for the proposed settlement and related records. However, you wrote that you were "denied access to all of those documents until 4:00 pm, February 1, 1991, by the Attorney to the Town, notwithstanding the fact that [you] had made a proper, written request to the Town Clerk, who is the records access officer".

In this regard, I offer the following comments.

First, to put the issues in perspective, the Open Meetings Law generally requires that meetings of public bodies be conducted in public, unless there is a basis for entry into executive session. The phrase "executive session" is defined in section 102(3) of the Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive

session is not separate from a meeting, but rather is a part of an open meeting. Further, section 105(1) of the Law requires that a procedure be accomplished during an open meeting before an executive session may be held. That 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..."

Second, section 105(1) of the Open Meetings Law permits a public body to conduct an executive session to discuss "proposed, pending or current litigation". Therefore, the Board apparently had a valid basis for conducting an executive session.

Third, although the Board at its December 12 meeting approved a motion to settle litigation after its executive session, I believe that such a motion could have been acted upon either during the executive session or after the executive session. As section 105(1) suggests, a public body may vote during a proper executive session, unless the vote is to appropriate public money. Further, section 106(2) of the Law specifies that action may be taken during a proper executive session.

Fourth, with respect to minutes of meetings, section 106 of the Open Meetings Law provides what might be characterized 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. 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, minutes must, at a minimum, consist of a "record or summary" of motions, proposals, resolutions and the like; I do not believe that minutes in this instance were required to have included the entirety of a proposed settlement.

Fifth, the duties of a records access officer are described in regulations promulgated by the Committee on Open Government [21 NYCRR section 1401.2(a)], which states in relevant part that the records access officer has "the duty of coordinating agency response to public requests for access to records". Therefore, while the records access officer is not necessarily required to provide direct access to records, he or she is responsible for ensuring that agency personnel act in compliance with applicable procedures.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies response 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 and the foregoing serves to enhance your understanding of the law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Town of Jerusalem
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6478

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

February 20, 1991

Mr. Gary Edison
90-B-2934
P.O. Box AG
Fallsburg, 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. Edison:

I have received your letters of February 5 and February 10, both of which pertain to access to medical records maintained at your correctional facility. You have requested guidance concerning the issue.

In this regard, I offer the following comments.

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

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personal could be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

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

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

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

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6471

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

February 20, 1991

Mr. Ismael Del-Valle
88-B-1596
Southport Correctional Facility
Box 2000
Pine City, NY 14871

Dear Mr. Del-Valle:

I have received your letter of February 11 in which you requested "information or an address of who [you] can write to get copies of [your] criminal proceedings". You wrote that you were arrested and convicted in Albany and have unsuccessfully requested documents from the court clerk.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. That statute applies to agency records, and section 86(3) defines the term "agency" to include:

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

In turn, section 86(1) defines "judiciary" to mean:

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

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

Second, although the Freedom of Information Law is inapplicable, other provisions of law often require the disclosure of court records (see e.g., Judiciary Law, section 255).

It is suggested that you write again to the clerk of the court in which the proceeding was conducted and that you provide sufficient detail, such as dates, indictment and docket numbers, etc., to enable court personnel to locate the records. In the alternative, it may be worthwhile to confer with your attorney.

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-6472

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

February 20, 1991

Mr. Wiley W. Lavigne
[redacted]

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

Dear Mr. Lavigne:

I have received your letter of February 4, as well as the materials attached to it.

According to the correspondence, you directed a request under the Freedom of Information Law to the Clinton County Health Department (CCHD). In response to the request, you received a form letter in which it was indicated that you would be required to complete the County's application form. You were further informed later that the requirement is the Department's "policy". In conjunction with the foregoing, you raised the following questions:

> "1. Is it lawful for the Clinton County Health Department to require an application be submitted to obtain documents in their possession in view of the fact that a written request had been made that provided a reasonable description of the information sought?
>
> 2. If this practice by the CCHD is unlawful can your agency take the necessary steps to see that this policy is discontinued?
>
> 3. If this policy is unlawful yet your agency cannot act to see that this policy is discontinued what recourse do I have in this regard?

> 4. If the CCHD continues to ignore my request for information and/or drags this process out to hinder access to the records I seek what recourse do I have?"

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. Although 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)], both the Law and the regulations are silent concerning the use of forms prescribed by agencies. 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.

Second, 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)].

Third, the Committee on Open Government is not empowered to enforce the Freedom of Information Law or compel an agency to comply with its provisions; rather the Committee on Open Government is authorized to advise. However, in an effort to enhance compliance, copies of this opinion will be forwarded to Clinton County officials.

Lastly, I point out that section 89(4)(c) of the Freedom of Information Law authorizes a court to award attorney's fees and other litigation costs to a member of the public who initiates a lawsuit under certain circumstances. 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: John Andrus, Director, CCHD
Chairman, Clinton County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6473

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

February 20, 1991

Mr. Carmelo Morales
78-A-2488
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

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

Dear Mr. Morales:

I have received your letter of February 4 in which you requested assistance.

You wrote that you have attempted unsuccessfully to obtain "unusual incident reports" from the New York City Police Department and the New York County Office of the District Attorney prepared in relation to your arrest and conviction, which appear to have occurred in 1978. Despite having made numerous requests, you have not received timely responses.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office is not empowered to enforce the law or compel agencies to grant or deny access to records.

Second, 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)].

For your information, the person designated to determine appeals for the New York City Police Department is Ms. Susan R. Rosenberg, Assistant Commissioner for Civil Matters. The Appeals Officer for the New York County District Attorney is Mr. Irving Hirsch.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unaware of whether the records sought exist; similarly, I am unfamiliar with the contents of any such such records that do exist. Therefore, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of rights of access.

Of potential significance is section 87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself.

Perhaps the most relevant provision concerning access to 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. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6474

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

February 20, 1990

Mr. Angelo Dellolio
[redacted]

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

Dear Mr. Dellolio:

I have received your letter of February 2, which pertains to problems that you have encountered with the Rockland County Department of Personnel.

In brief, it is your belief that persons less qualified than you have been able to apply for and obtain positions with Rockland County. As such, you are attempting to obtain information concerning applicants and employees, as well as their occupations.

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 record 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.

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 others, 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, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986); 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]. On the other hand, if records or portions of records are irrelevant to the performance of one's official duties, it has been held that those records may be withheld as an unwarranted invasion of personal privacy [see 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 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 of a person who has been hired , for instance, 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 or educational accomplishments as a condition precedent to serving in an 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 records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents 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)]. However, 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.

As you requested, enclosed is a copy of "Your Right to Know".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Director, Department of Personnel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1675

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

February 20, 1991

Mr. Frank L. Gennuso
85-C-0127
Auburn Correctional Facility
Box 618
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. Gennuso:

I have received your letter of February 7 addressed to Laura Rivera, a member of the Committee on Open Government. As indicated above, the staff of the Committee is authorized to render advisory opinions on its behalf.

Your inquiry concerns a response to a request suggesting that you write to the State Department of Health to seek a birth certificate. The response indicates that the fee for a copy would be $15.00. You have asked whether the fee is "excessive" and whether you can "request sanctions for that".

In this regard, I offer the following comments.

First, access to birth records is governed by the Public Health Law rather than the Freedom of Information Law. Under the circumstances, the applicable provision would be section 4174 of the Public Health Law, which authorizes disclosure of birth records:

> "only (1) upon order of a court of competent jurisdiction, or (2) upon 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, or (3) upon specific request therefor by a department of a state or the federal government of the United States" [section 4174(1)(b)].

Second, with respect to the fee, section 4174(2) states that:

> "Each application for a certification of birth or death, certificate of birth data or for a certified transcript of a birth or death certificate or certificate of birth data shall remit to the commissioner with such application of a fee of fifteen dollars in payment for the search of the files and records and the furnishing of a certification, certified copy or certified transcript if such record is found or for a certification that a search discloses no record of a birth or of a death."

Based upon the foregoing, the fee of fifteen dollars would be valid, for it is authorized by statute.

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-6476

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

February 27, 1991

Mr. Prince Cuba
84-A-72 LF-2-33
Clinton Correctional Facility
Box 367B
Dannemora, NY 12929

Dear Mr. Cuba:

I have received your letter of February 20 in which you "appealed" to this office concerning an unsuccessful attempt to obtain a tape recording of an administrative hearing prepared at a correctional facility.

It is noted in this regard 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 appeals, nor is it empowered to compel an agency to grant or deny access to records.

The provisions concerning the right to appeal a denial of access to records are found in 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 addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

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

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-6477

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

February 27, 1991

Mr. Ira Everett
89-A-0598
Auburn Correctional Facility
135 State Street
Auburn, NY 13021

Dear Mr. Everett:

I have received your letter of February 14, which reached this office today. You have requested copies of your rap sheet and time computation sheets, as well as your "parole information printout" for particular years.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not have possession of the records in question nor is it empowered to compel an agency to grant or deny access to records. Nevertheless, I offer the following suggestions.

First, as a general matter, a request for records should be directed to the records access officer at the agency that maintains the records sought. In the case of the Department of Correctional Services, its regulations indicate that a request for records kept at a correctional facility may be directed to the facility superintendent or his designee.

Second, the regulations specify that a rap sheet or "DCJS report" may be requested by an inmate at the facility. Consequently, again, it is suggested that a request for your rap sheet be directed to the appropriate person at your facility.

Third, I believe that the Division of Parole has designated access officers to accept requests for records at correctional facilities. Therefore, a request for that record should be made to the Division's staff person at the facility.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6478

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

February 28, 1991

Mr. Clifford E. Wexler
Columbia Greene Community College
Box 1000
Hudson, NY 12534-0327

Dear Mr. Wexler:

I have received your letter of February 22. As you requested, enclosed is a supply of "Your Right to Know".

You alluded to a situation in which you apparently requested a list containing certain information and in which you were informed the College was not required to supply the information because "it does not exist in a report per se, but must be generated out of available records".

In this regard, as a general matter, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that nothing in the Law "shall be construed to require any entity to prepare any record not possessed or maintained by such entity...". As such, the Freedom of Information Law does not require that an agency create a record in response to a request. In the context of the situation that you described, if, for example, no list or record exists containing the information sought, I do not believe that the agency would be obliged to create a new record containing the information on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6479

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

February 28, 1991

Mr. Daniel J. Haggerty
[redacted]

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

Dear Mr. Haggerty:

I have received your letter of February 5. As in the case of earlier correspondence, you wrote that the New York City Parking Violations Bureau has failed to respond to or acknowledge the receipt of your request made under the Freedom of Information Law.

While there is little that I can add to comments previously offered, it is reiterated that a failure by an agency to respond to a request within the appropriate time, five business days from its receipt of a request, constitutes a constructive denial of access that may be appealed in accordance with section 89(4)(a) of the Freedom of Information Law. Again, 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."

Therefore, if you have not already done so, it is suggested that you appeal the constructive denial of your request.

The only other measure that I can suggest, if your intent is not to initiate an Article 78 proceeding, is to contact the Office of the President of the City Council. The President of the Council serves as the New York City Ombudsman, and in that capacity reviews complaints and attempts to solve problems involving City programs. The Office of the Ombudsman can be reached by phone at (212) 669-7635.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Parking Violations Bureau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1889
FOIL-AO-6480

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

March 5, 1991

Mr. William G. Murray
[redacted]

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

Dear Mr. Murray:

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

According to your letter, at a meeting of the Lansingburgh Board of Education held on January 22, candidates were interviewed for the purpose of filling a vacancy on the Board. Following the interviews, the Board president, Kathleen M. Tivnan announced that the Board would hold an executive session to discuss negotiations. You wrote, however, that during the executive session, the candidates were discussed, votes were cast, and one of the candidates was selected. Further, the candidates were informed later in the week of the Board's decision. At the ensuing meeting held on January 29, "the name of the elected candidate appeared on the agenda", and a "roll call vote was held and the new member was sworn in". When you requested "a written accounting of the votes cast by each board member during the executive session" held on January 22, the request was denied. Further, the President of the Board wrote that "'formal' votes are taken at a meeting of an Executive Session and it would be inappropriate to disclose the positions taken by individual Board members in such a session."

In this regard, I offer the following comments.

First, the Open Meetings Law requires that a procedure be accomplished by a public body during an open meeting prior to conducting 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 or areas of the subject

> or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Therefore, if the Board intended to discuss two subjects during its executive session, one of which involved a review of the relative merits of the candidates, I believe that its motion to enter into executive session should have so indicated. If there was an intent to discuss only "negotiations", the Board in my opinion should have returned to an open meeting following its consideration of that issue. Thereafter, a new motion to enter into executive session to discuss the candidates could have been made.

Second, I believe that a discussion of candidates' credentials could validly have been discussed during an executive session. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

Under the circumstances, the Board would have discussed a matter leading to the appointment of a particular person, a proper subject for consideration in an executive session.

Third, as a general rule, a public body 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) of the Law. If no action is taken, there is no requirement that minutes of the 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 session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922

(1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. 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.

In my view, based upon the facts that you provided, the Board took final action at the executive session held on January 22. It is noted, too, that in a situation in which a board of education contended that it was not required to prepare minutes because it did not formally vote, but rather reached a "consensus", it was determined that:

> "The fact that respondents characterized the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute" [Previdi v. Hirsch, 524 NYS 2d 643, 646 (1988)].

Lastly, 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 school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

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 listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

Lastly, in an Appellate Division decision, it was found that "The use of a secret ballot for voting purposes was improper". In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law (section) 87[3][a]; (section) 106[1], [2]" [Smithson v. Ilion Housing Authority, 130 Ad 2d 965, 967 (1987)].

In an effort to enhance understanding of and compliance with the Freedom of Information Law and the Open Meetings Law, a copy of this opinion will be forwarded to the President of the Board.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen M. Tivnan, President, Cansingburgh
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6481

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

March 5, 1991

Mr. Charles May
90-A-4423
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. May:

I have received your letter of February 11 in which you requested assistance in obtaining "criminal records germane to [your] current commitment" from the New York City Police Department. You added that the Department has "constantly ignored [your] numerous letters requesting the reasons for their denial or, the agency upon which [you] could take an appeal."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office is not empowered to enforce the law or compel agencies to grant or deny access to records.

Second, 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)].

For your information, the person designated to determine appeals for the New York City Police Department is Ms. Susan R. Rosenberg, Assistant Commissioner for Civil Matters.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unaware of whether the records sought exist; similarly, I am unfamiliar with the contents of any such such records that do exist. Therefore, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of rights of access.

Of potential significance is section 87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself.

Perhaps the most relevant provision concerning access to 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. 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.

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-6482

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

March 5, 1991

Hon. Alice A. Roth
Mayor
City of Tonawanda
City Hall
200 Niagara Street
Tonawanda, NY 14150

The staff of the Committee on 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 Roth:

I have received your letter of February 26 and the correspondence attached to it.

You referred to a conversation between a member of your staff and me during which it was suggested that certain aspects of records relating to "residential loans to low-income families from the Community Development Agency" need not be disclosed under the Freedom of Information Law, and you asked that I confirm that advice in writing. In addition, you asked that I review the requests attached to your letter and provide "written guidance addressing each of them individually". The requests, which appear in a single letter delivered to you, in your capacity as Chairman of the Community Development Agency, involve:

> "1) A listing of all loans, including amounts, and borrowers, made by the agency since January 1, 1989.
>
> 2) A listing of all grants made by the agency since January 1, 1989.
>
> 3) Copies of any and all agency 'Urban Development action area project(s),' including specifications, proposals and plans for the same, which the agency has adopted or followed since January 1, 1989.

4) A list of all agency administrative expenses, including salaries of officers, members, employees and consultants, since January 1, 1989.

5) A statement, certified and sworn under penalty of law, identifying bank accounts, certificates of deposits, or value of other secured assets of the agency, at close of business on February 15, 1991. (See Public Officers Law Sec. 87).

6) A listing of all agency accounts receivable, (i.e. outstanding loans); identify whether such loans are secured or unsecured, If secured, identify the security.

7) A list of all delinquent loan accounts, include outstanding principal and interest balance."

You added that "when private individuals, as well as our business persons offer their financial information to the Agency when seeking loans, confidentiality is one of their major concerns."

In this regard, I offer the following comments.

First, I point out that requests for confidentiality by a submitter of records or promises of confidentiality made by an agency in receipt of records 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)]. Under the circumstances, I do not believe that any statute would prohibit disclosure.

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. 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.

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 or other personal details of "low income" persons, it is likely that disclosure of portions of records indicating their identities could justifiably be withheld.

I point out that the provisions concerning the protection of privacy pertain to records relating to natural persons, rather than entities, such as business corporations, for example. In the case of records concerning those entities, a different ground for denial may be relevant. 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 submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enter-

> prise 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 a firm's competitive position, I believe that section 87(2)(d) could properly be asserted as a basis for withholding records.

Third, several of the requests involve "listings" of certain information. In this regard, it is emphasized that the Freedom of Information Law pertains to existing records, and that section 89(3) of the Law states in part that: "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity...". Therefore, an agency need not create a new record in response to a request in order to comply with the Freedom of Information Law. In the context of the request, if, for example, there is no "listing" of grants or loans made since

a certain date, I do not believe that a City agency would be obliged to prepare such a list on behalf of an applicant. Similarly, with respect to item 5 of the request, I do not believe that the City would be required to prepare a sworn statement identifying its assets as of a certain date. While records reflective of assets would in my opinion be available, again, there is nothing in the Freedom of Information Law that requires the preparation of such a statement. Further, I would conjecture that it would be difficult if not impossible to determine the value of all such assets on a particular date.

Insofar as the records sought exist, I believe that they would be available, subject to the qualifications described earlier, i.e., that portions of the records may be withheld on the ground that disclosure could constitute an unwarranted invasion of personal privacy, or that records pertaining to entities might in appropriate circumstances be withheld when disclosure would cause substantial injury to the competitive position of those entities.

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-6483

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

March 5, 1991

Ms. Elizabeth Gibson
[redacted]

The staff of the Committee 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. Gibson:

I have received your letter of February 7, as well as the correspondence attached to it. You have requested an advisory opinion concerning your right under the Freedom of Information Law to obtain records reflective of "the names of the individuals who receive payment vs. their subscribing to the health insurance plan at the Columbia-Greene Community College".

The correspondence indicates that your initial request was denied by J. Theodore Hilscher, counsel to the College, who wrote that "releasing these records would be an unwanted invasion of personal privacy under section 89 of the Public Officers Law". You appealed the denial, and I have received from the College a copy of the determination of the appeal. In short, the Board of Trustees affirmed the denial based upon considerations of personal privacy.

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 record 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 (h) of the Law.

Second, the only ground for denial of apparent significance is section 87(2)(b), which permits an agency to withhold records when disclosure "would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article" (the Freedom of Information Law). Further, section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

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 others, reasoning that public employees are to be held more accountable than others. In a variety of contexts, 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, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986); 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]. On the other hand, if records or portions of records are irrelevant to the performance of one's official duties, it has been found that those records may be withheld as an unwarranted invasion of personal privacy [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, if the records sought merely indicated which employees participate in the health plan, without more, it is likely that disclosure of the identities of those employees would constitute an unwarranted invasion of personal privacy. However, as I understand the matter, employees may choose either to participate in the plan or not to do so, and if they choose not to participate, they receive payment. While the manner in which the employees receive payment is not stated in your letter, it is clear in my view that records reflective of payments made to public employees by their employers, through salary, overtime or otherwise, are public. As an aside, it is noted that one of the few instances in the Freedom of Information Law in which an agency is required to maintain a record involves what may be characterized as payroll information. Specifically, section 87(3)(b) requires that each agency shall maintain "a record setting forth the name, public office address, title and salary of every officer of employee of the agency". When payment, in whatever form, is made to public employees, records of such payments would in my opinion be relevant to the work of the em-

ployees as well as the agency. Therefore, I believe that records indicating payment would, if disclosed, constitute a permissible rather than an unwarranted invasion of personal privacy.

Further, the examples of unwarranted invasions of personal privacy appearing in section 89(2)(b) that are most pertinent to the issue suggest that disclosure would not constitute an unwarranted invasion of personal privacy. Those provisions state that an unwarranted invasion of personal privacy includes:

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

While the information sought may be of a somewhat "personal nature", due to the possibility of payment, an expenditure of public monies, I believe that it is clearly relevant to the work of the agency. Therefore, under the circumstances, it appears that the records sought should be made available under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terry A. Cline, President
Board of Trustees
Theodore Hilscher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6484

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

March 5, 1991

Mr. Robert Brodie
87-T-1458
Box 700
Wallkill, NY 12589

Dear Mr. Brodie:

I have received your letter of February 25 in which you appealed to this office.

By way of background, you wrote that you submitted a request under the Freedom of Information Law to the New York City Police Department on January 24, but that the Department has failed to comply with the Law. As such, you "appealed" to the Committee on Open Government.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to render determinations following appeals or to compel agencies to grant or deny access to records.

The provisions concerning the right to appeal a denial of access to records are found in section 89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

> the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6485

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

March 5, 1991

Mr. Robert J. Williams
84-A-8006
Auburn Correctional Facility
135 State Street
Box 618
Auburn, NY 13024

Dear Mr. Williams:

I have received your letter of February 6, as well as the correspondence attached to it. The materials involve requests for court records under the Freedom of Information Law that apparent have not been answered.

In this regard, 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."

Based upon the foregoing, the Freedom of Information Law does not apply to the courts or court records. As such, the procedural requirements imposed upon agencies by the Freedom of Information Law, including the provisions concerning administrative appeals, are not applicable to the courts.

This is not to suggest that court records might not be public, for there are various statutes that confer public rights of access to court records (see e.g., Judiciary Law, section 255). It is recommended that you renew your request to the clerk of the court in which the proceedings in question were conducted.

I hope that the foregoing serves to clarify 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

FOIL-AO-6486

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

March 5, 1991

Ms. Sonia Dusza
[redacted]

Dear Ms. Dusza:

Your letter of February 22 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee is a unit of the Department of State upon which the Secretary serves, and the staff is authorized to respond on behalf of the Committee and its members.

According to the correspondence attached to your letter, on January 28, you requested copies of "certificate[s] of occupancy and/or certificate[s] of zoning compliance" regarding applications for building permits for certain sites in the City of North Tonawanda. In addition, you asked to review the City's "Zoning Ordinance with map, prior to [the] current Zoning Ordinance (with map) adopted in December 1959". As of the date of your letter to the Secretary, it appears that you received no response to the request. As such, you requested assistance in the matter.

In this regard, I offer the following comments.

First, although the Committee on Open Government is not empowered to enforce the Freedom of Information Law or compel an agency to grant access to records, the Committee is authorized to advise. Further, it is hoped that the advice provided herein will serve to encourage and enhance compliance.

Second, 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)].

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record 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 (h) of the Law. Insofar as the records sought exist, I believe that they must be made available, for none of the grounds for denial would apparently be applicable. I point out, however, that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that an agency is not required to create a record in response to a request. Therefore, to the extent that the records sought do not exist, I do not believe that the Freedom of Information Law would be applicable.

In an effort to enhance compliance, copies of this opinion will be forwarded to the City Clerk and the City 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: Adam A. DeSimone, City Clerk
Jeffrey N. Mis, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6487

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

March 5, 1991

Mr. John Ward
[redacted]

Dear Mr. Ward:

I have received your postcard in which you raised questions concerning the Putnam Association for Retarded Children/Citizens and rights of access to records pertaining to the Association. You also requested a list of New York State agencies and asked whether there is "an affirmative action or civil rights agency...for handicapped people."

In this regard, I offer the following comments.

First, enclosed is a copy of a state agency directory.

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 governmental 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 pertains to records maintained by entities of state and local government. It is my assumption that the Association is a not-for-profit entity and that it is not subject to the Freedom of Information Law. Although I lack expertise concerning the oversight, funding, inspection or certification of such entities, the Association in question likely has relationships with a variety of government agencies, such as Putnam County and particularly the Office of Mental Retardation and Developmental Disabilities. Records maintained by those agencies concerning the Association are subject 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 record 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 (h) of the Law.

Lastly, the Office of the Advocate for the Disabled provides a toll-free information service to disabled persons and their families.

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-6488

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

March 6, 1991

Ms. Edna Braham
[redacted]

Dear Ms. Braham:

I have received your letter of February 19, which concerns a request for records pertaining to you directed to the Office of Court Administration.

In response to the request, you were informed that certain records would be made available upon payment of the appropriate fee, while others would be withheld pursuant to section 87(2)(g) of the Freedom of Information Law. As of the date of your letter to this office, you had not received the records determined to be available, and you expressed interest in knowing which aspects of the file were being withheld. You asked that I contact Mr. John Eiseman, for it is your belief that you are "entitled to the information within 10 days".

In this regard, I have contacted Mr. Eiseman on your behalf, who informed me that the records have been sent to you and explained that the records were not forwarded to you until payment had been received. I point out that it has been held that an agency may require payment prior to reproducing requested records [Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982].

Mr. Eiseman also indicated that you received the entire content of your file, with the exception of written advice or recommendations made by staff of the agency. Those records could in my view properly be withheld under section 87(2)(g), for they constitute intra-agency materials that do not include the kinds of information required to be disclosed under subparagraphs (i) through (iv) of that provision.

Finally, Mr. Eiseman added that your file consists of relatively few documents because your period of employment was brief.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Eiseman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6489

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

March 7, 1991

Mr. Michael Grant
90-B-2850
[redacted]

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

Dear Mr. Grant:

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

According to your letter, you made two requests for records to the City of Syracuse. Although their receipt was acknowledged, you have received no further response. As I understand the matter, the records sought involve the results of tests obtained in a law enforcement investigation.

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 division 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

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 unaware of the contents of the records sought or the effects of disclosing them. Therefore, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of rights of access.

Of potential significance is section 87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself.

Perhaps the most relevant provision concerning access to 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. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Corporation Counsel, City of Syracuse

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6490

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

March 7, 1991

Ms. Barbara Martinez
[redacted]

The staff of the Committee 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. Martinez:

I have received your letter of February 15, which concerns your efforts as a journalism student to review gun permits issued in New York City.

By way of background, you requested the records in November of 1990, and in response, you were informed by the Department's records access officer that there is a list of licensees that consists of 1300 pages, and that you could obtain a copy for a fee of $325. You were told later that "the list's pages were reduced to 894 and the list cost is now $223". You were also told that there are 48,259 names on the list of current holders of permits. Further, when you asked whether equivalent information was maintained electronically, you were informed that it is maintained on disk and that its cost is $178. Finally, you asked to inspect the list, but the records access officer informed you that you "couldn't see the police copy that they have on hand because that copy includes confidential information".

You have requested my views on the matter. In this regard, I offer the following comments.

First, rights of access to approved pistol license applications have been confirmed by the State's highest court, the Court of Appeals. In a case in which a reporter for the Wall Street Journal sought to inspect approved applications on file with the New York City Police Department, it was held that the records must be made available [Kwitny v. McGuire, 53 NY 2d 968 (1981)]. The basis for the decision was section 400.00 of the Penal Law, which pertains to "Licenses to carry, possess, repair and dispose of firearms". Subdivision 5 of that statute, en-

titled "Filing of approved applications", states in relevant part that: "The application for any license, if granted, shall be a public record". As such, it is clear, in my view, that the information sought is generally accessible to the public.

Second, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) provide direction concerning fees that may be charged by agencies. When copies of records are requested, an agency may charge up to "twenty-five cents per photocopy not in excess of nine by fourteen inches", or, when a record cannot be photocopied, as in the case of information stored on a computer disk, an agency may assess a fee based on "actual cost" of reproduction.

It is unclear how the figure of $178 was determined concerning the cost of reproducing information stored on a disk. If, for example, a request involves making a printout from a disk, I believe that actual cost would involve computer time and paper. If the request involves transferring the data from one disk to another, actual cost would involve computer time and the cost of a disk, unless the requester supplies the disk. I point out that section 1401.8(c)(3) of the Committee's regulations provides that the actual cost of reproduction does not include "fixed costs of the agency such as operator salaries". In short, the figure of $178, whether the request involves a printout or the preparation of a duplicate disk, appears to be high and, therefore, may be inconsistent with the Freedom of Information Law.

Third, the introductory language of section 87(2) of the Freedom of Information Law states that records accessible under the Law must be made available "for public inspection and copying". As such, I believe that the public generally has the right not only to seek copies of accessible records, but also to inspect accessible records. Moreover, the Freedom of Information Law does not authorize the assessment of a fee for inspection, and the regulations specify that no fee shall be charged for the inspection of records [1401.8(a)(1)].

Lastly, while I am unaware of the manner in which the records are maintained, there appears to be inconsistency in the variety of responses that you received from Department officials. On one hand, Sgt. Capasso indicated that you could not inspect the "police copy that they have on hand because that copy includes confidential information". On the other hand, you were offered a list identifying licensees at an initial cost of $325, which was later found to be $223; both figures were based upon a per page photocopy fee of twenty-five cents per photocopy. No mention was apparently made of any "confidential information"

contained in those lists. If the lists offered to be photocopied do not require deletions to be made prior to their reproduction, presumably they could be inspected. In such a circumstance, I believe that you would have the right to inspect the list at no charge.

Further, when we discussed the matter, I asked whether you are aware of the information which Sgt. Capasso characterized as confidential. In your response, you expressed the belief that he was referring to information indicating applicants' reasons for needing or carrying firearms, for example. If that is so, it is reiterated that the Penal Law states that approved applications are public records. If the information considered to be confidential is derived from "approved applications", which are public, the claim of confidentiality would appear to be erroneous.

In an effort to enhance compliance and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Sgt. Capasso.

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: Sgt. Louis Capasso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6491

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

March 7, 1991

Mr. Thomas Bertolone
[redacted]

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

Dear Mr. Bertolone:

I have received your letter of February 14 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter and the materials attached to it, you were denied access to records indicating the names and addresses of students in grades 7 to 12 in the West Islip Union Free School district and resumes submitted to the District by certain persons when they were considered for the positions they now hold. You have requested my views concerning the propriety of the denial of your requests.

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. In my opinion, the phrase quoted in the preceding sentence indicates that a single record might contain both available 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. Following such a review, I believe that the agency would be required to disclose records, after having made deletions or redactions to the extent permitted by the Law.

Insofar as your inquiry pertains to access to resumes, one ground for denial, the provision cited in the correspondence, is relevant. Specifically, section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

In addition, section 89(2)(b) of the Law includes a series of examples of unwarranted invasions of personal privacy, the first of which pertains to the authority to withhold employment histories. While that provision and section 87(2)(b) may be cited to withhold portions of a resume, for example, I do not believe that they could necessarily be cited to withhold those kinds of documents in their entirety.

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. In general, 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].

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 resume or 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 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 a resume concerning a person appointed contains information pertaining to the requirements that must have been met to hold to a position, it should be disclosed, for I believe that disclosure of those as-

pects 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.

Second, with respect to your request for students' names and addresses, although the Freedom of Information Law deals with records in possession of government in New York, rights of access to student records are governed by a provision of federal law, the Family Educational Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as the Buckley Amendment."

In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality.

The regulations promulgated by the U.S. Department of Education pursuant to the Buckley Amendment define "personally identifiable information" to include "the name of the student's parent or other family member" or "the address of the student or student's family." [34 C.F.R. section 99.3] Therefore, records identifying parents of students would, in my opinion, constitute "education records" that may be considered confidential.

However, an exception to the rule of confidentiality in the Buckley Amendment involves "directory information." Directory information is defined in the regulations of the Department of Education to include:

> "....information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended."

Prior to disclosing directory information, educational agencies must provide notice to parents of students in order that the parents may essentially prohibit any or all of the items from being disclosed. Therefore, if an educational agency or institution has adopted a policy on directory information, those items designated as directory information would be available to any person. If, however, an educational agency or institution has not adopted a policy on directory information, it would in my view be prohibited from disclosing records identifiable to students without the written consent of the parents of the students, or the students as the case may be.

As requested, copies of this opinion will be forwarded to the persons identified in your letter.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. William Bernhard
Barbara Milne
Kevin Crumlish
Jay VanCott
Richard Lazio
Ms. Gilfedder
Ms. Ehlman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1893
FOIL-AO-6492

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

March 7, 1991

Mr. Vincent Trocchia
[redacted]

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

Dear Mr. Trocchia:

I have received your letter of February 26 in which you requested advice in your capacity as a member of the West Hempstead School District Board of Education. The issue involves your contention that minutes of Board meetings must be available to the public within two weeks of the meetings.

In this regard, as you are aware, the issue has been addressed previously concerning the Board's policy. Based upon the ensuing comments, I believe that it is inconsistent with law.

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; 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.
>
> 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. The Open Meetings Law is silent with respect to the approval of minutes, and the language of section 106(3) is clear, in that minutes must be made available "within two weeks of the date of such meeting".

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, reviewing the issue from a different vantage point, the Freedom of Information 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)]. Further, minutes often reflect final agency determinations, which are available under section 87(2)(g)(iii), irrespective of whether minutes are "approved". 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.

As you requested, a copy of this opinion will be forward to Alfred C. Ver Pault, President of the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alfred Ver Pault

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6493

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

March 7, 1991

Mr. Daniel Lynch
82-A-6183
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

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

Dear Mr. Lynch:

I have received your letter of February 12 which concerns unanswered requests made to the Division of Parole. You have asked whether you may obtain a copy of the Division's "Guideline Scoring System...used for determining an inmate's time guideline range under 9 NYCRR 8001.3". You also asked that this office "make sure that the Division of Parole keeps within compliance with 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. This office is not empowered to compel an agency to comply with the Freedom of Information Law or require that agencies disclose records.

Second, section 8001.3(b)(1) of the regulations states in part that the guidelines "represent the policy of the board", and section 8001.3(b)(3) includes "Guidelines for Parole Board Decisionmaking". Further, section 8001.3(d) states that the Board may revise the guidelines and that: "Periodic revisions shall be made available by the office of the chairman...". Therefore, I believe that the guidelines in which you are interested must be disclosed. Enclosed is a copy of section 8001.3.

The foregoing is in my view consistent 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 record 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 (h) of the Law.

Relevant to the issue of rights of access in this instance is section 87(2)(g)(iii), which requires that intra-agency materials consisting of "final agency policy" must be disclosed.

In an effort to enhance compliance, copies of this opinion will be forwarded to the records access officers at your facility and at the Division's main office.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: William Altschuller
Roger G. Wilson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1891
FOIL-AO-6494

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

March 7, 1991

Mrs. 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.

Dear Mrs. Haliasos:

I have received your letter of February 14, which concerns access to minutes of meetings of the West Hempstead School District Board of Education.

According to your letter, the Board has adopted a policy that effectively precludes the public from gaining access to minutes of meetings "until two weeks after they have been adopted". You added that, since board meetings are held once a month, the minutes are not available "for almost 6 weeks after a given meeting".

In this regard, as you are aware, the issue has been addressed previously concerning the Board's policy. Based upon the ensuing comments, I believe that it is inconsistent with law.

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; 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.
>
> 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. The Open Meetings Law is silent with respect to the approval of minutes, and the language of section 106(3) is clear, in that minutes must be made available "within two weeks of the date of such meeting".

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, reviewing the issue from a different vantage point, the Freedom of Information 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)]. Further, minutes often reflect final agency determinations, which are available under section 87(2)(g)(iii), irrespective of whether minutes are "approved". 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.

As you requested, copies of this opinion will be forwarded to Mr. Guercio, the Board's attorney, and Mr. Ver Pault, the President of the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gregory Guercio
Alfred Ver Pault

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6495

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

March 7, 1991

Mr. Mika'il A. 'Abdul-Malik
88-A-8521 C-7-13
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

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

Dear Mr. 'Abdul-Malik:

I have received your letter of February 11 and the correspondence attached to it.

You referred to requests made under the Freedom of Information Law to the Erie County District Attorney that have apparently been unanswered. In this regard, having reviewed my letter to you of December 19, I do not believe that I can add to the advice offered in that opinion.

It is reiterated, however, that a failure to respond to a request within the appropriate time constitutes a constructive denial of access that may be appealed pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

Further, if a determination of an appeal is not rendered within ten business days of its receipt, such failure may also be construed as a denial. In such a circumstance, the person requesting the records would have exhausted his administrative remedies and may seek judicial review 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)].

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Kevin M. Dillon, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6496

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

March 7, 1991

Mr. John W. Kane
[redacted]

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

Dear Mr. Kane:

I have received your letter of February 13. You referred to an earlier opinion rendered by this office concerning the status of the Fulton County Development Corporation under the Freedom of Information Law. Because that entity recently denied a request made under the Freedom of Information Law, you have asked that I "update" the previous opinion on the matter.

In this regard, I offer the following comments.

First, local development corporations, such as the entity in question, are created under section 1411 of the Not-for-Profit Corporation Law. As a general matter, it is my view that not-for-profit corporations are not agencies subject to the Freedom of Information Law, for they are not governmental entities. Nevertheless, section 1411 of the Not-for-Profit Corporation Law states that local development corporations perform "an essential governmental function". On that basis, and in view of judicial decisions dealing with somewhat analogous issues, it was advised that such corporations are subject to the Freedom of Information Law.

Second, two judicial decisions have been rendered concerning the issue, both at the same level. A decision rendered in Supreme Court, Albany County, adopted the reasoning of advisory opinions prepared by this office and found that the Albany Local Development Corporation is subject to the requirements of the Freedom of Information Law [Legal Aid Society v. Albany Local Development Corporation, Supreme Court, Albany County, January 27, 1989]. Nevertheless, characterizing the Buffalo Economic

Development Corporation as a "hybrid organization", it was recently held that the corporation was not subject to the Freedom of Information Law [Buffalo News, Inc. v. Buffalo Enterprise Development Corporation, 561 NYS 2d 406 (1990)].

Since two courts have considered the issue but have reached different conclusions, I believe that the matter remains unresolved.

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-6497

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

March 7, 1991

Mr. F.P. Martino
Appeals Officer
Fashion Institute of Technology
Seventh Avenue at 27 Street
New York, NY 10001-5992

Dear Mr. Martino:

I have received a copy of your determination rendered following an appeal made under the Freedom of Information Law by Mr. Lou Stoller and appreciate that you forwarded the appropriate documentation to the Committee on Open Government.

One aspect of the determination sustained an earlier decision to deny access to records reflective of fees paid to a law firm in conjunction with collective bargaining and arbitrations. I believe, however, that the Freedom of Information Law, based upon judicial interpretations, generally requires that those kinds of records be disclosed. 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, 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.'" Most recently, it was found that records concerning payment to a law firm by an agency that "reveal the date, general nature of service rendered and time spent" are accessible [Knapp v. Board of Education, Canisteo Central School District, Supreme Court, Steuben County, November 23, 1990].

In sum, subject to the qualifications discussed above, I believe that the records sought should be disclosed.

I hope that I have been of some assistance. 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-6498

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

March 7, 1991

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 February 11 in which you requested assistance in obtaining "criminal records germane to [your] current commitment" from the New York City Police Department. You added that the Department "has been constantly denying" your requests.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office is not empowered to enforce the law or compel agencies to grant or deny access to records.

Second, 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)].

For your information, the person designated to determine appeals for the New York City Police Department is Ms. Susan R. Rosenberg, Assistant Commissioner for Civil Matters.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unaware of whether the records sought exist; similarly, I am unfamiliar with the contents of any such such records that do exist. Therefore, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of rights of access.

Of potential significance is section 87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself.

Perhaps the most relevant provision concerning access to 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. 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.

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-6499

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

March 8, 1991

Mr. Wayne D. Shepherd
86-A-7335
Box 1245
Beacon, NY 12508

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

Dear Mr. Shepherd:

I have received your letter, which reached this office on February 21. You wrote that you are trying to locate your daughter, who was born in New York, whose mother is deceased and who now resides "someplace in North Carolina with her aunt".

In this regard, I do not know whether I can assist you without additional information. Nevertheless, I offer the following comments.

First, the New York Freedom of Information Law generally pertains to records maintained by entities of state and local government in this state. Further, a request for a record should be made 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.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request must contain sufficient detail to enable agency officials to locate the records.

Third, if you know where your daughter attended school, you might be able to locate her through school records, including those indicating her transfer from one school district to another. 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.

I point out that 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 under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes those rights."

Based on the foregoing, in the case of divorce or separation, a school district must, in my view, provide access to both natural parents, custodial and non-custodial, unless there is a legally binding document that specifically removes a parent's rights under the Buckley Amendment. I believe that a legally binding document would include a court order or other legal paper that prohibits access to educational records, or removes the parent's rights to have knowledge about his or her child's education. I point out that it has been held judicially that a non-custodial parent enjoys rights conferred by 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 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-6500

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

March 8, 1991

Mr. Damon Hawkins
90-B-1993
P.O. Box 1186
Moravia, NY 13118

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

Dear Mr. Hawkins:

I have received your letter of February 19 in which you requested assistance in obtaining a death certificate or obituary concerning a person who died in 1969 in New York City.

In this regard, section 4174(1)(a) of the Public Health Law, which pertains to access to death records, states that such records are available:

> "(1) when a documented medical need has been demonstrated, (2) when a documented need to establish a legal right or claim has been demonstrated, (3) when needed for medical or scientific research approved by the commissioner, (4) when needed for statistical or epidemiological purposes approved by the commissioner, (5) upon specific request by municipal, state or federal agencies for statistical or official purposes, (6) upon specific request of the spouse, children, or parents of the deceased or the lawful representative of such persons, or (7) pursuant to the order of a court of competent jurisdiction on a showing of necessity; except no certified copy or certified transcript of a death record shall be subject to disclosure under article six of the public officers law..."

Article six of the Public Officers Law is the Freedom of Information Law. As such, based upon the provision quoted above, death records, when accessible, are available under the circumstances prescribed in the Public Health Law.

The source of death records regarding deaths occurring in New York City is the New York City Department of Health, Bureau of Vital Records, 125 Worth Street, New York, NY 10003.

With respect to obituaries, it is suggested that you attempt to review newspapers published in the area or areas where the death was known soon after the date of death.

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-6501

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

March 8, 1991

Mr. Keith D. Zulko
Civil Service Employees Association, Inc.
Local 441
425 Robinson 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 Mr. Zulko:

I have received your letter of February 12, which reached this office on February 21.

You have questioned the propriety of fees assessed by the Binghamton Psychiatric Center under the Freedom of Information Law. Attached to your letter is a copy of a memorandum on the subject prepared by Paul Carroll, Business Officer at the Center. In brief, Mr. Carroll contended that fees could be assessed for "labor" and photocopying.

In this regard, I offer the following comments.

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 or 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 or labor involved in making copies or searching for records, for example. Further, there is nothing in the Freedom of Information Law that permits

an agency to charge for inspection of records, or for search, review time, clerical costs or other "labor" 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, computer tapes or disks, etc., or those records that are larger than nine by fourteen inches. With respect to those records, an agency may charge on the basis of the actual cost of reproduction. It is noted that 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 photocoies 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. Further, in such cases, an agency may, pursuant to the regulations promulgated under the Freedom of Information Law, charge up to twenty-five cents per photocopy, whether the actual cost is above or below that amount. It is reiterated that in those instances, an agency cannot in my opinion charge for labor costs.

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: Paul Carroll, Business Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6502

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

March 8, 1991

Mr. Raphael Perez
89-A-0579 U-H-10-44
Clinton Correctional Facility
Box 367B
Dannemora, NY 12929

Dear Mr. Perez:

I have received your letter of January 27, which did not reach this office until February 21. Please accept my apologies for the delay in response.

You have appealed to this office concerning a denial of a request for records by the Legal Aid Society. In this regard, I offer the following comments.

First, it is emphasized 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 that there are a variety of entities within New York that use the name "Legal Aid Society". Some are 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 agencies 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 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 are outside the scope of public rights of access. In view of the foregoing, it is suggested that you discuss the matter with an attorney.

Second, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office can neither render determinations following appeals nor compel agencies to grant or deny access to records. The provisions concerning the right to appeal an agency's denial of a request are found in 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 addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

I hope that the foregoing serves to clarify the Freedom of Information Law and its application.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6503

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

March 11, 1991

Mr. Aaron Talley
73-A-1113
Box 1245
Beacon, NY 12508-0901

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

Dear Mr. Talley:

I have received your letter of February 22, as well as the correspondence attached to it.

According to the materials, on January 22, you directed a request to the Department of Correctional Services "in conjunction with a public research project", in which you sought a variety of information, particularly statistical data. For instance, in item (1) you requested "The number of all life term prisoners appearing before the parole board within the past six years (1984-1990), by year, race and percentage-comparable to non life term prisoners". As of the date of your letter to this office, you had apparently received no response, and you requested assistance in the matter.

In this regard, I offer the following comments.

First, 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)].

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed by such entity..."

Therefore, insofar as the Department does not maintain the information that you requested in the form of a record, it would not be obliged to create new records or prepare statistical data on your behalf in response to your request. The principle that an agency is not required to create records was addressed in a recent decision that also dealt with a request for statistical information from the Department of Correctional Services. In the discussion of the matter, it was stated that:

"At issue on this appeal is whether the Freedom of Information Law (Public Officers Law art 6) (hereinafter FOIL) requires an agency to comply with an applicant's request for statistical information, when the data necessary to compile the statistical information is included in the data maintained by the agency in its computer, but the agency does not compile or maintain the particular statistical information requested by the applicant. We agree with Supreme Court that, in the circumstances of this case, respondent is not required to produce the information requested by petitioner.

"In the particular request at issue, petitioner sought 'statistical information [showing] [t]he number of inmates sentenced for the crime of murder in the Work Release Program.' The record establishes that respondent does not compile or maintain in any form the specific statistical information requested by petitioner. Respondent does, however, maintain data in its computerized records from which the requested statistical information could be compiled. In particular, it appears that respondent maintains a listing of inmates participating in work release programs (or such a listing could be generated by the computer), and included in the data maintained for each inmate under respondent's supervision is information concerning the crime or crimes for which he or she has been placed with respondent. Respondent does not, however, have a computer program that would analyze the relevant data and compile statistical information showing the number of inmates involved in work release programs who were convicted of murder.

"Except for those records required to be maintained by Public Officers Law [section] 87(3) and [section] 88(3), FOIL does not 'require any entity to prepare any record not possessed or maintained by such entity' (Public Officers Law [section] 89[3]). If the statistical information requested by petitioner had to be compiled from written documents or records, respondent clearly would not be required to do so (see, Matter of Gannett Co. v. County of Monroe, 59 AD2d 309, 313, affd on opn below 45 NY2d 954; see also, Matter of Gannett Co. v. James, 86 AD2d 744, 745, lv denied 56 NY2d 502; Matter of Kryston v. Board of Educ. of East Ramapo Cent. School Dist., 77 AD2d 896, 897). Because FOIL does not differentiate between records that are maintained in written form and those maintained in the form of computerized tapes or discs (see, Public Officers Law [section] 86[4]), the same result should occur here where the statistical information requested by petitioner has to be compiled from data stored in respondent's computer. Petitioner contends that it would be a very simple matter to tell the computer to count the number of inmates in temporary release programs who have been convicted of murder. The fact remains, however, that respondent does not compile or maintain this information, and FOIL does not require respondent to do so for the purpose of complying with petitioner's request (see, Public Officers Law [section] 89[3])" Guerrier v. Hernandez-Cuebas, Appellate Division, Third Department, NYLJ, February 25, 1991).

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

With respect to the records sought that do exist, I point out that "statistical or factual tabulations or data" found within "inter-agency or intra-agency materials" must be disclosed [see section 87(2)(g)(i)]. The only information that could apparently be withheld from existing records falling within the scope of your request would involve those portions that identify individuals by race. In my opinion, although names of Parole Commissioners, for example, would be public, a record or portion of a record indicating the race of an individual could be withheld as "an unwarranted invasion of personal privacy" [see section 87(2)(b)].

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-6504

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

March 11, 1991

Mr. Elwyn E. Vaughan
[redacted]

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

Dear Mr. Vaughan:

I have received your letter of February 21 and the materials attached to it.

According to your correspondence, you submitted a request to the Chemung County Sheriff's Office on January 28 for various records. The receipt of the request was acknowledged on January 30, and it was stated in that letter that the records sought would be disclosed, and that it would take some time to gather the information. On February 19, you were informed that the Sheriff's Department had gathered much of the information, but that the District Attorney had never closed your case. As such, you were told that some of the records sought remain "part of an active investigation" and would be denied. You were informed of your right to appeal and that the accessible records falling within the scope of the request would be forwarded upon receipt of a check in the amount of $27 for 108 pages.

It is your view that the response of February 19 "is beyond the time limits", and you complained that various law enforcement agencies are acting in concert, "comprising a conglomerate conspiracy". You have requested an opinion concerning the matter.

In this regard, I offer the following comments.

First, it appears that the records access officer acted appropriately. Under section 89(3) of the Freedom of Information Law, an agency in receipt of a request must respond to the request in some manner within five business days of the receipt of the request. The agency may, within that period, grant access to records, deny a request, or if more than five business days are needed to search for and review records to determine rights of access, the receipt of a request may be acknowledged.

Second, since you referred to various sections of the Criminal Procedure Law, I point out that rights of access conferred by those provisions are based upon one's status as a defendant or a litigant. Under the Freedom of Information Law, rights of access are conferred to a person as a member of the public. Therefore, rights under the Freedom of Information Law may be different from rights conferred under discovery statutes, such as those in the Criminal Procedure Law.

Third, with respect to your claim that a conspiracy exists among certain agencies, there is nothing in the Freedom of Information Law that precludes an employee of one agency from seeking advice or information from employees of other agencies. Often advice is sought in order to obtain information concerning the status of an investigation and the effects of disclosing certain records.

Fourth, it has been held that an agency my require payment in advance of making copies of records available to an applicant [Sambucci v. McGuire, Sup. Ct., New York County, Nov. 4, 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. I am unaware of whether all of the records sought exist; similarly, I am unfamiliar with the contents of the records that do exist. Therefore, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of rights of access.

Of potential significance is section 87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself.

Perhaps the most relevant provision concerning access to 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 sub-paragraphs (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, such as a police or sheriff's 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Fleisher
Ransom P. Reynolds Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6505

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

March 11, 1991

Mr. Harry Elmore
78-A-0723 C-2-134
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. Elmore:

I have received your letter of February 11, which reached this office on February 25. You have requested assistance with respect to requests directed to the Office of the New York County District Attorney, the New York City Police Department and the New York City Correctional Institution for Men.

According to your letter and the materials attached to it, despite an "exhaustive search", representatives of the District Attorney indicated that the records sought from his office could not be found. You asked what your "options" might be.

In this regard, under section 89(3) of the Freedom of Information Law, when a record cannot be located, an applicant may request a certification to that effect. That provision 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".

Since you indicated that many of the records in question were introduced during your trial as exhibits or evidence, your other option would involve making a request for the records from the clerk of the court in which the proceeding was conducted. Although the Freedom of Information Law does not apply to the courts or court records, those records are often available under other provisions of law [see e.g., Judiciary Law, section 255).

The receipt of your request made to the Police Department was acknowledged, but no indication of the date when the request would be granted or denied was given. Here I point out that 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

For your information, the person designated to determine appeals at the Department is Susan R. Rosenberg, Assistant Commissioner for Civil Matters.

Lastly, you wrote that your requests to the Correctional Institution for Men have not been answered. While I believe that the request should have been answered in a timely manner or for-

warded to the appropriate agency official for response, I point out that requests should generally be made to an agency's records access officer. The records access officer has the duty or coordinating an agency's response to requests. Since the Correctional Institution is part of the New York City Department of Correction, it is suggested that you resubmit your request to the Department's records access officer. The name and address of the records access officer are as follows: Ruby Ryles, Records Access Officer, Department of Correction, 60 Hudson Street, New York, NY 10013.

Two aspects of that request involve "listings" of persons who visited you between certain dates and of dates on which you were "escorted to court". It is noted in this regard 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. Therefore, if no such lists exist, the agency would not, in my view, be required to create such records on your behalf. Further, while I am unaware of the manner in which any such records are maintained, if records of visitation, for example, are not kept separately by inmate name, but rather in the chronological order of all visits to inmates, it may be all but impossible to locate the information sought.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nina Keller
Irving B. Hirsch
Janice B. James
Bruce Sullivan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1896
FOIL-AO-6506

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

March 11, 1991

Mr. R.C. Smith
[redacted]

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

Dear Ms. Smith:

I have received your letter of February 20.

According to your letter, you are conducting research in preparation of a book on "the Amy Rowley case, the only legal action under the Education for all Handicapped Children Act of 1975 to reach the Supreme Court". In conjunction with your research, you wrote that you have examined files pertinent to the case maintained by the Hendrick Hudson School District for period of 1978 to 1982 after having obtained a waiver from the Rowley family. Nevertheless, you indicated that you have been unable to find any reference in School Board minutes or other records to "a vote at any point by the board of education, either to defend against the Rowley's suit at the district court level, or to appeal the case to higher courts later". You pointed out that members of the Board with whom you have spoken "recall going into executive session to discuss those matters and have no recollection of ever taking a formal vote."

Based on the foregoing, you raised the following questions:

> "(1) Were board of education in New York State required during the years mentioned above to vote to take actions involving expenditure of public funds for legal defense in suits brought against them by parents desirous of getting more service for their children in school? If so, could these votes be recorded elsewhere than in the formal school board minutes and, if so, am I entitled to see them?

> (2) Am I entitled to a break-out of the expenses of the Hendrick Hudson School District in the Rowley case, including a separate listing of costs of counsel and any expenses that might have been incurred for travel, hotel stays or entertainment of school board members or anyone else involved in court hearings of other business associated with the case?"

In this regard, I offer the following comments.

First, putting the matter in perspective, the Freedom of Information Law pertains to all records of an agency, such as a school district. Further, section 86(4) of that statute defines the term "record" to include:

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

Based upon the foregoing, information, in whatever physical form, maintained by an agency, would constitute a "record" 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.

Of relevance to the inquiry is the first ground for denial, section 87(2)(a), which 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 1232g), which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of

the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under the Buckley Amendment define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

As such, assuming that the records in question include information personally identifiable to a student, they would be confidential, unless the parents of students waive their right to confidentiality, which apparently is so in this instance. Under the circumstances that you described, the Buckley Amendment does not appear to be an impediment to your ability to obtain records, for the parents of the student apparently authorized the District to disclose to you.

Third, I believe that in order to take action, the Board was required to do so by means of an affirmative vote of a majority of its total membership. My belief is based in part upon 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."

In my opinion, the provision quoted above permits a public body, such as a board of education, 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. Further, 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.

Fourth, the Freedom of Information Law generally pertains to existing records. Section 89(3) of that statute provides in part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

Based upon the foregoing, subdivision (3) of section 87 requires that agencies prepare certain records. Relevant to your inquiry, that provision states in part that:

> "Each agency shall maintain:
>
> (a) a records of the final vote of each member in every agency proceeding in which the member votes..."

Therefore, the Freedom of Information Law generally precludes secret ballot voting by members of public bodies and affirmatively requires that a voting record be prepared when final votes are cast.

While a record of votes by the Board pertaining to a particular student would ordinarily be confidential insofar as it includes information personally identifiable to a student, due to

the receipt of a waiver of confidentiality from the parents of the student, I believe that such a records must have been prepared pursuant to section 87(3)(a) of the Freedom of Information Law, and that you would have the right to obtain them.

Although I believe that records of votes taken by members of the Board of Education must be disclosed, ordinarily in the form of minutes, it is unclear whether minutes must exist. As a general matter, when a public body takes action, whether during an open meeting or an executive session, minutes reflective of the nature of the action taken, the date and the vote of the members must be recorded (see Open Meetings Law, section (106). Nevertheless, when a matter is "exempted", the Open Meetings Law does not apply. Specifically, section 108 of the Open Meetings Law states in relevant part that:

> "Nothing contained in this article [the Open Meetings Law] shall be construed as extending the provisions hereof to...
>
> 3. any matter made confidential by federal or state law."

Therefore, when a board of education discusses a topic identifiable to a particular student derived from education records, the Open Meetings Law would not apply, for the topic would involve a matter made confidential by federal law. Further, in such a circumstance, the Open Meetings Law would apparently not require the preparation of minutes. Whether there is such a requirement in the Education Law in unknown to me.

In sum, while it is unclear whether records characterized as minutes must exist in conjunction with the Open Meetings Law, as discussed earlier, I believe that the Freedom of Information Law would require the preparation of voting records pursuant to section 87(3)(a) of that statute.

Lastly, 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. Again, although records reflective of expenditures would by confidential to the extent that they would or could identify a student, a waiver from the parents would remove that barrier. 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.'" Most recently, it was found that records concerning payment to a law firm by an agency that "reveal the date, general nature of service rendered and time spent" are accessible [Knapp v. Board of Education, Canisteo Central School District, Supreme Court, Steuben County, November 23, 1990].

Since the Freedom of Information Law generally pertains to existing records, if no "break out" of expenses exists, the District would not be required to prepare such a record on your behalf. However, I believe that individual records, such as bills or vouchers, for example, would be available in conjunction with 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: Charles Eible, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6507

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

March 11, 1991

Ms. Shirley Furtick
82-G-45 113 B14
P.O. Box 1000
Bedford Hills, NY 10507

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

Dear Ms. Furtick:

I have received your letter of February 21 in which you requested advice concerning your ability to gain access to medical records from your correctional facility.

In this regard, I offer the following comments.

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

With respect to medical records, the Freedom of Information Law, in my view, likely permits some of those records to 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, as you are aware, section 18 of the Public Health Law generally grants rights of access to medical records to the subjects of the records. 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."

In view of the foregoing, it is clear in my view that the subject of medical records has the right to inspect and copy those records upon payment of the appropriate fee.

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

> Access to Patient Information Coordinator
> New York Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> Empire State Plaza
> Albany, New York 12237

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Barbara Taylor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1895
FOIL-AO-6508

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

March 11, 1991

Hon. Joseph B. Moskaluk
Town Supervisor
Town of Gallatin
RD 1 - Box 457
Pine Plains, NY 12567

The staff of the Committee on 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 Moskaluk:

Your letter of February 28 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State upon which the Secretary serves, is authorized to advise with respect to the Open Meetings Law, and the Secretary asked that I respond to you on her behalf.

You have requested an opinion concerning section 106 of the Public Officers Law, and you expressed particular interest in subdivision (2) of that provision. In this regard, I offer the following comments.

Section 106 pertains to minutes of meetings of public bodies 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
>
> 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, 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.

I point out 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 one week or two weeks, as the case may be, and that if the minutes have been 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, 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 school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

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 listen 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."

Further, 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 assistance and appreciate your interest in compliance with the Open Meetings Law. 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-6509

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

March 11, 1991

Mr. Clifford N. Fooks
85-A-7741 23/30
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

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

Dear Mr. Fooks:

I have received your letter of February 20 in which you requested assistance in obtaining records from the East Hampton Town Court.

In this regard, the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, 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."

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

It is noted, however, that other provisions of law often grant rights of access to court records. The court in question appears to be a justice court, and I point out that section 2019-a of the Uniform Justice Court Act 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...". As such, it is suggested that you renew your request, directing it to the clerk of the court, pursuant to the provision cited above.

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-6510

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

March 12, 1991

Mr. Michael J. Skoney
Lewis & Lewis, P.C.
800 Cathedral Park Tower
37 Franklin Street
Buffalo, NY 14202-4107

Mr. Joseph J. Cassata
City Attorney
City of Tonawanda
City Hall
200 Niagara Street
Tonawanda, NY 14150

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

Dear Messrs. Skoney and Cassata:

I have received your letters, respectively dated February 27 and March 8, concerning a request for records of the City of Tonawanda.

According to Mr. Skoney, at a meeting of the Common Council, a request was made for "a copy of the city's 1991 budget". However, in response to the request, he wrote that "the Council unanimously passed a resolution calling the budget a 'working document' and denied the request", without offering a "legal basis" for the denial. Mr. Skoney contends that the record in question consists of "statistical or factual tabulations" accessible under section 87(2)(g)(i) of the Freedom of Information Law, that it is "no longer tentative", but rather is a "final proposed budget", and that "it is not a mere recommendation, opinion or policy option".

Mr. Cassata, who did not attend the meeting, contends that the Council "has no legal obligation or mandate to disclose a public document during the course of a public meeting unless and until such time as a legal written request is made pursuant to FOIL".

Both of you have requested my views of the matter. In this regard, I offer the following comments.

First, although many public bodies make records that are the subjects of discussions available prior to or during meetings, there is currently no requirement, in my opinion, that they must do so. Under section 89(3) of the Freedom of Information Law, an agency may require that a request for records be made in writing. That provision also states that an agency has up to five business days to respond to a request. Further, the procedural regulations promulgated by the Committee on Open Government state that agencies shall accept requests "during all hours they are regularly open for business" [21 NYCRR section 1401.4(a)]. Therefore, if, for example, the meeting was not held during regular business hours, I believe that, technically, the Council could have asked Mr. Skoney to submit a request during those hours on an ensuing day.

Second, the Committee has recognized that many members of the public have been frustrated by the inability to view documents that are being discussed at meetings. Consequently, among its recommendations to the Governor and the State Legislature is a requirement that records that are the subjects of discussions by public bodies at open meetings, with certain exceptions, be made available either prior to or at the meetings. Legislation based on the Committee's proposal was passed by the Assembly earlier this month and is now before the Senate.

Third, in view of the Council's denial of access to the record based on its characterization as a "working document", it is worthwhile, in my opinion, to address substantive issues concerning rights of access in order to enhance the understanding of the Freedom of Information Law.

It is emphasized at the outset that the Freedom of Information Law pertains to all agency records. 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, whether the material is characterized as a "working document" or otherwise, if it is maintained by the City, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

Further, 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.

The only ground for denial of relevance under the circumstances 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 NY 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:

> "It 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 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.

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" [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, a65 NY 2d 131, 490 NYS 2d 488 (1985)].

In short, even though statistical or factual information contained within a record may be "intertwined" with opinions, the statistical or factual portions, if any, would in my opinion be available under section 87(2)(g)(i), unless a different ground for denial applies.

With respect to Mr. Skoney's contention that the record is no longer tentative and does not constitute a recommendation, I am not sufficiently familiar with the function of the record or the City's budget process to effectively comment.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Vincent J. Harmon, President, Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6511

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

March 12, 1991

Mr. Ken Gaston
77-C-591
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

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

Dear Mr. Gaston:

I have received your letter of February 24 in which you requested advice concerning the use of the Freedom of Information Law. Specifically, you expressed interest in obtaining "all information maintained by the District Attorney's office and used at your trial...".

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. 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 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, 151 AD 2d 677, 679 (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.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6512

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

March 12, 1991

Ms. F.J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of February 24 and various materials attached to it.

The issue appears to involve a response to your request for a "subject matter list" from the Office of the Actuary. In a letter of February 15 addressed to you, Ms. Ellen Fox-Katine indicated that she had spoken with me, and that "What [she] had made available to you was the procedure for the public inspection of records pursuant to the Freedom of Information Law". She added that, in order to comply with your request, the Office "must have specifically detailed information regarding just which 'records' you wish to access".

For purposes of clarification, I offer the following comments.

First, section 89(3) of the Freedom of Information Law states in relevant part that, with certain exceptions, agencies are not required to create or prepare records. One of those exceptions involves the preparation of a subject matter list. Specifically, section 87(3)(c) of the Freedom of Information Law requires that each agency shall maintain:

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

In my view, an agency's subject matter list is not required to identify each and every record of an agency. However, it is required to include reference, by category, to all records maintained by an agency, whether or not the records are available to

the public. Further, in my opinion, the purpose of the subject matter list is to enable the public to know of the categories of records maintained by an agency. With that knowledge, requests for records can be made by means of a category of records appearing in the list. As stated in the regulations promulgated by the Committee on Open Government, which have the force of law: "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [see 21 NYCRR 1401.6(b)].

Second, while it may be beneficial to provide "specifically detailed information" when seeking records, section 89(3) of the Law also states that an applicant must "reasonably describe" the records sought. Further, based upon the judicial interpretation of the Law, a request reasonably describes the records when an applicant provides sufficient detail to enable agency officials to locate and identify the records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)].

A copy of this letter will be forwarded to Ms. Fox-Katine.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ellen Fox-Katine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6513

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

March 12, 1991

Mr. Kenneth Johnson
#349-90-34735
Dorm. 5L C-76
10-10 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. Johnson:

I have received your letter of February 21.

Your initial question involves where appeals may be sent "when non-responses or denials are made to freedom of information requests by the New York City Department of Corrections, and New York City Jails".

In this regard, I offer the following comments.

First, the provisions concerning the right to appeal a denial of access to records are found in section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

I believe that the person designated to determine appeals at the Department of Corrections is Robert Daly, General Counsel.

Second, while I believe that your requests should have been answered in a timely manner or forwarded to the appropriate agency official for response, I point out that requests should generally be made to an agency's records access officer. The records access officer has the duty or coordinating an agency's response to requests. Since City jails are part of the New York City Department of Correction, it is suggested that you might resubmit your requests to the Department's records access officer. The name and address of the records access officer are as follows: Ruby Ryles, Records Access Officer, Department of Correction, 60 Hudson Street, New York, NY 10013.

In your remaining area of inquiry, you asked whether the New York City Department of Correction rule book and rules and regulations governing inmate disciplinary procedures have been filed in the Department of State. While I am not an expert with respect to such matters, I do not believe that a municipal agency's rules and regulations must be filed with the Department of State; only state agencies' regulations are published in the New York Code of Rules and Regulations.

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-6514

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

March 12, 1991

Mr. Roy Williams Myers
#67517
3 DD #11 SC
CN 861
Trenton, NJ 08625

The staff of the Committee on Open 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 February 21 in which you wrote that you are interested in obtaining a misdemeanor conviction record concerning your spouse.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. That statute applies to agency records, and section 86(3) defines the term "agency" to include:

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

In turn, section 86(1) defines "judiciary" to mean:

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

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

Second, although the Freedom of Information Law is inapplicable, other provisions of law often require the disclosure of court records (see e.g., Judiciary Law, section 255).

Based upon the information contained in your letter, it is suggested that you write to the clerk of the court in which the proceeding was conducted and that you provide sufficient detail, such as names, dates, charges, etc., to enable court personnel to locate the records. It appears that the request may be addressed to Alturo Hassell, Chief Clerk, Court and Records Division, Office of the New York County Clerk, New York County Courthouse, Centre and Pearl Streets, New York, NY 10007.

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-6515

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

March 12, 1991

Mr. Matthew Lee
Coordinator
Inner City Press Community
on the Move
P.O. Box 416
Hub Station
Bronx, NY 10455

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

Dear Mr. Lee:

Your letter addressed to Lieutenant Governor Stan Lundine was recently received by the Committee on Open Government. The staff of the Committee is authorized to advise on behalf of its members.

Attached to your letter is a copy of an appeal addressed to the Freedom of Information appeals officer for the New York City Department of Housing Preservation and Development. The appeal is based upon a determination by the Department's records access officer that "purports to condition access...upon the submission of additional information". It is your view that the law does not require that you do so, and that the response imposes what may be an impossible condition upon you, for you "do not have access to the additional information". You added in your appeal that "it is patently without merit to suggest that [your] request lacks sufficient specificity". Although I am unfamiliar with the request, for you did not forward a copy, you wrote that "a request for 'any and all records' has repeatedly been held to be sufficient...".

In this regard, I offer the following comments.

First, as you may be aware, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. In construing that provision, 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. Again, I am unfamiliar with your request, and I am unaware of the means by which the Department maintains and retrieves records falling within the scope of your request. In sum, based upon the information that you forwarded, it is unclear whether your request "reasonably described" the records sought.

Second, I agree that some of the responsibility for ascertaining which records fall within your request rests with agency officials. The regulations promulgated by the Committee on Open Government state in part that the records access officer has the duty to assist the requester in identifying requested records if necessary [see 21 NYCRR, section 1401.2(b)(3)]. The same requirement appears in section 3 of the Uniform Rules and Regulations promulgated by the Mayor of New York City under the Freedom

of Information Law. It is suggested that you confer with the records access officer in an effort to ensure that the request reasonably describes the records sought and to attempt to ensure compliance.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the Department's records access and appeals officers.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Stan Lundine
Joseph Fiocca, Appeals Officer
Alfred Schmidt, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 6516

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

March 13, 1991

Mr. David Leitch
[redacted]

The staff of the Committee 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. Leitch:

I have received your letter of February 20, which reached this office on March 4.

According to the letter and the correspondence attached to it, you requested a "preliminary report (audit) prepared by Roy F. Weston Company of the management of Chautauqua County's Sanitary Landfill and the county's solid waste program". The request was denied by the County's public information officer, who wrote that "the document is only a preliminary working audit". She specified, however, that the final audit would be made available.

Although the audit has likely been disclosed as of the date of this response, you requested an advisory opinion concerning the propriety of the County's denial of access to the preliminary audit.

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."

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.

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. 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, only one of the grounds for denial would have been 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.

When the report becomes final, I believe that it could be characterized as an external audit and should be disclosed in its entirety pursuant to section 87(2)(g)(iv). At the time of your request, when the report was preliminary, those portions consisting of statistical or factual information would, in my opinion, have been available.

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 was not a completed external audit at the time that your request was made, I believe that it would consist of intra-agency material, and that it should have been disclosed to the extent that it includes statistical or factual information.

In addition, in a situation in which opinions and factual materials were "intertwined" within intra-agency materials, 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" [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, a65 NY 2d 131, 490 NYS 2d 488 (1985)].

In short, even though statistical or factual information contained within a record may be "intertwined" with opinions, the statistical or factual portions, if any, would in my opinion be available under section 87(2)(g)(i), unless a different ground for denial applies.

I hope that I have 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. Lance Spicer, Chairman, County Legislature
Claire A. Penfold, Public Information Officer
Betsy Seger, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6517

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

March 13, 1991

Ms. Nancy A. Gudz
[redacted]

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

Dear Ms. Gudz:

I have received your letter of February 24 in which you requested assistance concerning access to student records.

According to your letter, in November of 1990, you asked to review your son's "confidential file" at Fairport High School. When you inspected its contents, you discovered that certain records that had previously been in the file or which should have been in the file were not included in the file. Having questioned a guidance counselor on the matter, you wrote that she "pulled out another file", which contained the information in which you were interested. It is your understanding that "when a parent requests a student's confidential file, all the information maintained for that student must be made available upon parental request".

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" 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.

The regulations promulgated by the U.S. Department of Education pursuant to the Buckley Amendment 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..." (34 C.F.R. section 99.3)

Based upon the foregoing, as a general matter, if documentation is "directly related to a student", and it is shared by school officials with persons other than substitutes for the maker of the record (i.e., substitute teachers), it constitutes an "education record" that should be disclosed to you as the parent of the student.

Second, there is no reference in the Buckley Amendment to the maintenance of particular files or their contents. Further, I know of no provision that deals specifically with the manner or filing systems in which education records must be kept. Nevertheless, if a parent requests education records pertaining to his or her child, I believe that federal law would require the disclosure of all such records, irrespective of the characterization of "files" or the system under which the records are kept.

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: Superintendent, Fairport School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1899
FOIL-AO-6518

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

March 14, 1991

Mr. Thomas A. Conniff
Cusack & Stiles
Attorneys at Law
61 Broadway
New York, NY 10006

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

Dear Mr. Conniff:

I have received your letter of February 27 in which you requested an advisory opinion concerning the Open Meetings Law.

You wrote that your firm represents the Student Activities Corporation at Queens College, which was created in 1973 as a not-for-profit corporation. By way of background, you indicated that:

> "Pursuant to an agreement with the Board of Higher Education of the City of New York, now known as the Board of Trustees of the City University of New York, the Student Activities Corporation is to fund programs for the student body at Queens College of an educational, recreational, social or cultural nature and to operate and fund the cafeteria, book store and other auxiliary enterprises which serve the needs of the students at Queens College.
>
> "The Board of Higher Education agreed to collect student activities fees and student government activity fees and to transfer these funds to the Student Activities Corporation for distribution in accordance with the agreement.

> "The Student Activities Corporation is managed by a Board of Members who are selected from various student constituencies at the College and includes two (2) Faculty Members."

The question is whether, in my opinion, the Student Activities Corporation (hereafter "the Corporation") constitutes a "public body" subject to the Open Meetings Law.

In this regard, I offer the following comments.

As you are aware, 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."

I am unaware of any judicial decisions that deal with the status of entities similar to the Corporation that have been rendered under the Open Meetings Law. Nevertheless, for the following reasons, if the actions of the Corporation represent necessary or required steps in determining the manner in which mandatory student fees are distributed at a public educational institution (such as Queens College), I believe that it is a public body that falls within the scope of the Open Meetings Law.

First, presumably the Board of the Corporation consists of two or more members.

Second, I believe that the Board of the Corporation is 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 act that created it. 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 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 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 the Board of the Corporation 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 Corporation conducts public business and performs a governmental function for Queens College, which is clearly a governmental entity, for its duties in my opinion are reflective of a governmental function. In essence, it appears that the Corporation performs a function for Queens College that would otherwise be performed by officials of the College. If my assumptions are accurate, the Corporation would constitute a public body subject to the Open Meetings Law.

Further, the fact that the entity in question 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 Queens College and the Corporation is similar to that of a volunteer fire company and a municipality, it would appear that the Corporation, 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 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 possession of a governmental agency and as such maintained by a governmental agency under Public Officer's Law Section 86(3)(4). (Capital Newspapers v. Whalen, 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.

I believe that the Corporation should be viewed in much the same fashion. If the Corporations exists due to its relationship with the College, and if the College would perform the functions of the Corporation if the Corporation had not been created, it could be concluded in my opinion that such an entity conducts public business and performs a governmental function for the College.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6519

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

March 14, 1991

Mr. Frederic M. Gang
[redacted]

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

Dear Mr. Gang:

I have received your letter of March 8 in which you requested advice concerning access to records.

According to your letter, at a recent "budget work session" held by the Syosset School District Board of Education, you asked whether "the administration could determine the operating cost of a particular school". The Assistant Superintendent for Business and the District's records access officer "indicated that the information was available". Nevertheless, you wrote that "[s]everal Board members objected to divulging that information, and the Board President ruled that since the Board did not want the information, the administration could not give it to [you]".

You requested my views on the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records of an agency, such as a school district. Further, section 86(4) of the Law defines the term "record" 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 includes within its scope information "in any physical form whatsoever" maintained by an agency. In my opinion, if records in which you are interested exist, they are subject to rights conferred by the Freedom of Information Law, irrespective of whether "the Board did not want the information".

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

Under the circumstances, I believe that one of the grounds for denial, section 87(2)(g), is relevant to your inquiry. Due to its structure, however, that provision 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, 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.

From my perspective, records reflective of the operating cost of a school would likely constitute "intra-agency material". Nevertheless, they would likely consist solely of "statistical or factual tabulations or data" that must be disclosed pursuant to section 87(2)(g)(i) of the Law.

Lastly, 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. If, for example, records are not maintained in a manner that indicates the operating costs of a particular school, agency officials would not be obliged to prepare new records containing that information on your behalf. Nevertheless, if the records in question do exist, I believe that they would be available under the Law in accordance with my earlier 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: Board of Education
Dan Bryan, Assistant Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6520

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

March 14, 1991

Mr. John Ruzas
75-C-385
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. Ruzas:

I have received your letter of February 26. In brief, you wrote that you were "involved in the tragic slaying of a N.Y. State trooper" approximately sixteen years ago, and you were subsequently convicted. Your inquiry pertains to rights of access to "administrative, personnel & medical records" relating to the deceased trooper.

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 is generally applicable to records maintained by entities of state and local government. It would not apply to records of a private hospital or physician, for example.

Second, as it applies 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.

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". 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..."

With regard to the privacy of deceased persons, I am aware of but one decision dealing with the issue rendered under the Freedom of Information Law. In that case, in which the court granted access to a death certificate, it was held that "when 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 deaths...Such rights as exist, generally, are creatures of legislative statutes whose provisions alone set out is perimeters" [Tri-State Publishers v. City of Port Jervis, 523 NYS 2d 954 (1988)]. That decision dealt with a particular record, and the holding today would be different due to the recent enactment of legislation dealing with access to death records (see Public Health Law, section 4174). In my view, the issue of rights of access to records pertaining to a deceased remains unclear, and there may be valid considerations of privacy relat- ing to family members of a deceased. As such, unless an agency chooses to disclose, it appears that the issue could be resolved only by means of litigation.

I point out, too, that statutes other than the Freedom of Information Law deal with medical records, and it is likely in my opinion that those statutes would serve to preclude the public disclosure of medical records pertaining to a deceased (see e.g., Public Health Law, sections 17 and 18).

With respect to "personnel and administrative" records, assuming that section 87(2)(b) remains applicable as a basis for denial, 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 Monore, 45 NY 2d 954 (1978); Montes 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)].

Another ground for denial, which would be applicable irrespective of whether a person is living or deceased 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.

Lastly, 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. I have no knowledge of the content of the records in which you are interested, nor am I aware of the extent to which any such records continue to exist.

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-6521

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

March 14, 1991

Mr. Andrew R. Adesman
[redacted]

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

Dear Mr. Adesman:

I have received your letter of March 1, which relates to a denial of a request for records by the Village of East Hills.

According to your letter, the Village "requires a zoning variance to erect a fence more than 4 feet tall", and your "request for a variance to erect a 5 foot fence was denied". Subsequently, you requested records concerning "the nature and disposition of variance requests pertaining to fences for the past 10 years". The request was denied based upon the claim that Village records are "not maintained in such manner as to permit compliance".

You have sought my views on the matter. In this regard, I offer the following comments.

First, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. In construing that provision, 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. I am unaware in this instance of the nature of the Village's record-keeping system, whether separate files are kept concerning applications for variances regarding fences, the number of variances sought over a ten year period, or whether the records sought can be identified and retrieved without reviewing each application for a variance made during the past ten years.

If the Village can locate and identify the records in question, I believe that your request was appropriate and that Village officials would be obliged to retrieve them. On the other hand, if the records cannot be located without "retracing a path already trodden", it appears that the request would not have reasonably described the records. If that is so, it is suggested that you confer with the Village's records access officer. I point out that the regulations promulgated by the Committee on Open Government indicate that the records access officer has the duty to "assist the requester in identifying requested records, if necessary" [21 NYCRR section 1401.(b)(2)]. Alternatively, it may be possible to inspect minutes of meetings of the Board of Appeals for the purpose of identifying cases involving variances concerning fences, thereby enabling you to make a more precise request.

Second, when records can be found, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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, decisions rendered by Village agencies on the subject in question would be public, 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:jm

cc: Victoria Siegel, Records Access Officer
Hon. Leonard Nadel, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6522

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

March 14, 1991

Mr. Kenneth Johnson
85-A-4503
Loc. 2C-14
Box F
Fishkill, NY 12524-0445

Dear Mr. Johnson:

I have received your letter of March 8 in which you "appealed" to the Committee on Open Government.

According to your letter, you submitted a request to Barbara Sabol, Commissioner of the New York City Human Resources Administration, for records indicating "entitlements which were promulgated by...Social Service or Legislative Laws for all welfare advocates in New York City, therefore which would inform Welfare Recipients what the Human Resource Administration is obligated to provide for people receiving public assistance". Since your request was not answered, you view the failure to do so as a denial, and you appealed to his office.

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 grant or deny access to records, nor it is empowered to render a determination following an appeal. 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."

Although Ms. Sabol is the head of the agency, I am unaware of who might be designated to determine appeals at the Human Resources Administration.

Second, a request should ordinarily be made to an agency's "records access officer", rather than the head of the agency. 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. From my perspective, your request may be so broad that agency officials may not be able to identify the specific records in which you are interested. Further, based upon the terms of your request, I believe that the information sought would appear in the Social Services Law and the regulations promulgated by the State Department of Social Services in the New York Code of Rules and Regulations, both of which could be reviewed in your facility library.

Lastly, as you are likely aware, I addressed the issue raised in your correspondence with Secretary of State Shaffer in a letter dated March 12.

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-6523

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

March 15, 1991

Ms. Elaine Werbell
Freedom of Information Officer
New York City Consumer Affairs
80 Lafayette Street
New York, New York 10013

Dear Ms. Werbell:

I have received your letter of February 27 and appreciate having the opportunity to consider the determination of an appeal concerning a request for names and addresses of "cabaret licensees". The request was denied.

In this regard, I offer the following comments.

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

Second, of relevance to the matter is section 87(2)(b) of the Freedom of Information Law, which 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)]. 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).

In sum, assuming that the request involved a list of commercial entities, I believe that it should have been disclosed.

If you would like to discuss the matter, please feel free to contact me. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Schrader, Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1901
FOIL-AO-6524

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

March 15, 1991

Hon. Manuel M. Martinez
Supervisor
Town of Geddes
1000 Woods Road
Solvay, NY 13209

<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 Supervisor Martinez:

I have received your letter of February 28 in which you requested an advisory opinion.

Having attended my presentation at the recent meeting of the Association of Towns, you expressed the belief that "anything that is discussed in Executive Session, such as labor negotiations, should not, and cannot be discussed with anyone else". The issue has arisen due to the possibility that information was inappropriately disclosed in the course of negotiations with representatives of town employees.

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is permissive. Stated differently, although a public body "may conduct an executive session" to discuss certain matters [see Open Meetings Law, section 105(1)], there is no requirement that an executive session must be held, even when a basis for entry into executive session exists. Similarly, even when there is a ground for entry into executive session, an affirmative vote of the majority of a public body's total membership must be carried as a condition precedent to conducting an executive session. If such a motion fails to carry, an issue might be discussed in public, even though there might have been a valid reason for conducting an executive session.

Second, the Open Meetings Law is generally silent with respect to the disclosure of information considered during an executive session. Consequently, there is nothing in the Open Meetings Law that would prohibit a person present at an executive

session from disclosing information discussed at the executive session. Further, there may be instances in which a public body must disclose the result of an executive session. Section 106(2) of the Open Meetings Law pertains to minutes of executive sessions and states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

Further, section 106(3) requires that minutes of executive session be prepared and made available, to the extent required by the Freedom of Information Law, within a week of an executive session. I point out that if a public body merely discusses a subject during an executive session, but takes no action during the executive session, there is no requirement that minutes of the executive session be prepared.

It is also noted that the grounds for entry into an executive session appearing in section 105(1) of the Open Meetings Law are not necessarily consistent with the grounds for denial of access to records appearing in section 87(2) of the Freedom of Information Law. In some cases, although the discussion of a particular topic might justifiably be conducted during an executive session, records related to that topic would not necessarily fall within any ground for denial in the Freedom of Information Law. For instance, if a public body discusses the possible appointment of a particular individual to a position, an executive session would likely be proper, for section 105(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

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

Since such a discussion would involve matters "leading to the appointment...of a particular person", an executive session would in my view be appropriate. Nevertheless, if a public body chooses to appoint an individual to a position, records reflective of the appointment would be made available as minutes re-

quired to be prepared under section 106 of the Open Meetings Law. Moreover, section 87(3)(b) of the Freedom of Information Law requires each agency to maintain and make available a payroll record indicating the name, public office address, title and salary of all officers or employees of the agency. As such, even though a discussion resulting in the appointment of an individual to a position might be closed under the Open Meetings Law, a record indicating the appointment of the individual would be accessible under the Freedom of Information Law.

The foregoing is not intended to suggest that disclosures of information acquired during executive sessions are proper. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, speak freely and develop strategies in situations in which some degree of secrecy is permitted, and inappropriate disclosure could work against the interests of the public body as a whole and perhaps the public generally.

Lastly, section 805-a of the General Municipal Law states in part that no municipal officer or employee shall "disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests". That prohibition is found in the provisions relating to considerations of ethics. While I am unaware of whether a more precise response could be given, you might want to raise the issue with the New York State Temporary Commission on Local Government Ethics. The Commission is located at 54 North Central Avenue, Elmsford, NY 10523.

I hope that my comments serve to enhance your understanding of the Open Meetings Law. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6525

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

March 15, 1991

Mr. William H. Caulfield
Attorney-at-Law
56-49 215th Street
Bayside, NY 11364

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

Dear Mr. Caulfield:

I have received your letter of February 26 and the materials attached to it.

You wrote that your client is a teacher assigned to Community Board 25 in New York City and that, following a "3020-a hearing", she was disciplined by the Board last year. When the teacher decided to appeal the determination, she sought records "concerning penalties levied on other teaching personnel" for the years 1987 through 1989. You specified that you and your client are not interested in the names of those disciplined. In response to the request, a representative of the Office of Legal Services wrote that "except for formal disciplinary proceedings under [section] 3020-a, any other disciplinary action is private and is not revealable". That person added that "[w]ith regard to [section] 3020-a's, you may seek such information from the State Education Department". When you contacted that agency, you were referred to his office. Based upon the foregoing, it is your understanding that any disclosure must first be approved by this office.

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 the Committee nor its staff is empowered to compel an agency to grant or deny access to records. It is our hope, however, that advice rendered by this office is educational and persuasive, and copies of this opinion will be forwarded to the agencies involved in the matter. With the role of the Committee clarified, I offer the following comments concerning the substantive aspects of the issue.

First, as you may be aware, the Freedom of Information Law pertains to 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."

In view of the breadth of the definition, information in any physical form maintained by an agency would be subject to rights conferred by the Law.

Second, even if records are maintained by a variety of agencies, each agency in possession of the records sought would, in my opinion, be obliged to respond to a request made under the Freedom of Information Law.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is emphasized that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial. Based upon the language quoted in the preceding sentence, I believe that a single record may be accessible or deniable in whole or in part. Moreover, that language, in my view, imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In my opinion, two of the grounds for denial are relevant to rights of access to the records in question. However, in conjunction with the ensuing analysis, I believe that records reflective of determinations to discipline public employees, including the names of the employees, must be disclosed.

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 decision that pertain to the privacy of public employees. In brief, the courts have held that public employees enjoy a lesser degree of privacy than others,

for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 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 is section 87(2)(g), which states that an agency may withhold records that:

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

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

Based upon the judicial determinations cited earlier, I believe that 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 15, 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 decision adopted by a board of education to impose disciplinary action or a penalty upon a tenured teacher is 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 Co. v. School District of City of Syracuse, 430 NYS 2d 460 (1989)]. Further, to the extent that charges are dismissed, I believe that they may be withheld. As you are aware, section 3020-a(4) states in part that, following a hearing: "If the employee is acquitted he shall be restored to his position with full pay for nay period of suspension and the charges expunged from his record".

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

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

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

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

> "the citizen's right to know that public servants are held accountable whey 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 rights to inspect personnel files was unenforceable as contrary to statuses and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531)
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Esdras Tulier
Eugene Snay
Records Access Officer, Community School District 25

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6526

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

March 18, 1991

Mr. Daniel Lynch
82-A-6183
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

Dear Mr. Lynch:

I have received your letter of March 13 in which you wrote that you are attempting "to research [your] family tree" and that you have requested your grandparents' birth certificates from the New York City Municipal Archives. As such, you have requested assistance and copies of certain advisory opinins prepared by this office.

In this regard, I offer the following comments.

First, enclosed are copies of the opinions that you requested. I point out that they were drafted several years ago and that they may be out of date.

Second, access to birth records is governed by statutes other than the Freedom of Information Law. Most relevant in my view is section 4173 of the Public Health Law, which states in part that "a birth record shall be issued only by 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". Based upon the foregoing, birth records are generally not public; rather, access is conditional.

Third, I believe that the Bureau of Vital Records at the State Department of Health has adopted regulations or guidelines concerning access to birth records sought for genealogical purposes. It is possible that the New York City Archives has prepared similar provisions. Since I do not possess copies of those provisions, it is suggested that you seek them from the agencies identified above.

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-6527

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

March 18, 1991

Ms. Matilda Tomeo
[redacted]

The staff of the Committee 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. Tomeo:

I have received your letter of February 28, as well as the materials attached to it.

In brief, following a series of events relating to the treatment of your mother at the Beth Israel Medical Center in New York City, a statement of deficiencies was issued, and the Medical Center prepared a "revised plan of correction". That document was made available to you, but only after a paragraph was deleted. No reason for the deletion was given. Although you attempted to obtain the entire document from the Medical Center, your efforts were unsuccessful. 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 that statute defines the term "agency" to mean:

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

Based on the foregoing, the Beth Israel Medical Center, a private entity, would not be subject to the Freedom of Information Law. The State Department of Health, however, is clearly required to comply with the Freedom of Information Law.

Second, in an initial response to a request for records sought under the Freedom of Information Law, an agency may make records available or deny a request in whole or in part. In the case of a denial, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that the reason or reasons for the denial be made in writing and that the applicant be informed of his or her right to appeal. 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."

Third, having spoken with an associate of Mr. Abramson, the person who responded to your inquiry, it was suggested that you appeal to the Department's Freedom of Information Appeals Officer, Mr. Peter Slocum. Mr. Slocum's address is New York State Department of Health, Corning Tower, Empire State Plaza, Albany, NY 12237. Although more than thirty days have passed since Mr. Abramson's response, since you were not informed of the right to appeal, it is my hope that Mr. Slocum will accept an appeal.

Lastly, while Mr. Abramson's representative did not retrieve or review the record in question, during our conversation she suggested that the deletion involved commentary concerning the Medical Center's "quality assurance review system". If that is so, the deletion might have been proper, for that kind of information is generally considered confidential under section 2805-m of the Public Health Law. Nevertheless, it is suggested that you appeal to Mr. Slocum.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Slocum
Mary Stevens

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6528

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

March 18, 1991

Mr. Julio R. Hunt
89-T-0062 B6-18
Clinton Correctional Facility
Box 367-B
Dannemora, NY 12929

Dear Mr. Hunt:

I have received your recent letter, which reached this office on March 15. You requested particular "policy and procedures" from this office under the Freedom of Information Law.

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 records generally, and this office is not empowered to compel an agency to grant or deny access to records. In short, I cannot provide the materials that you requested, because the Committee does not maintain those records.

As a general matter, a request should be made to the agency that possesses the records in which you are interested. In this instance, since the records would apparently be kept by the Department of Correctional Services, I point out that the Department's regulations indicate that a request for records kept at a correctional facility may be made to the facility superintendent or his designee.

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-6529

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

March 19, 1991

Mr. Paul M. Perfetti
[redacted]

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

Dear Mr. Perfetti:

I have received your letter of March 2, as well as the materials attached to it. You have sought an "evaluation" of a response to a request made under the Freedom of Information Law. In brief, identifying details pertaining to a person who made a complaint were deleted pursuant to section 87(2)(b) of the Law.

In this regard, I offer the following comments.

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.

When a written complaint is made to an agency, 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.

I hope that the foregoing serves to enhance 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-6538

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

March 19, 1991

Mr. Gerald C. Engles
88-A-8207 CE-17 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 March 3 in which you requested assistance.

According to your letter, when you were being treated at the Erie County Medical Center, you fell and incurred an injury. You are interested in obtaining policies or procedure "for returning an inmate who has been injured."

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 is not required to create or prepare a record in response to a request. Therefore, if no written policies or procedures exist concerning the issue, the Freedom of Information Law would not apply.

Second, assuming that such records do exist, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In my view, any such records would likely be available, at least in part.

Relevant 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 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. Therefore, if a "final agency policy" has been prepared, I believe that it would be available, subject to the following qualification. Section 87(2)(f) permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person". If, for example, disclosure of certain aspects of a policy or procedure would result in a security risk, those portions of the records could in my opinion be withheld.

Lastly, the regulations promulgated by the Department of Correctional Services indicate that a request for records maintained 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1902
FOIL-AO-0531

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

March 19, 1991

Ms. Marie A. Coville
Town Clerk
Town of Schroeppel
Box 9B - RD #1
Route 57A
Phoenix, NY 13135

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

Dear Ms. Coville:

I have received your letter of March 1, as well as the materials attached to it.

Your initial area of inquiry involves a meeting recently held by the Village of Phoenix Board of Trustees and the Schroeppel Town Board. You included a copy of the notice posted by the Phoenix Village Clerk, which stated that:

> "Please take notice that a meeting of the Village of Phoenix Board of Trustees with the Town of Schroeppel Board will be held in the Sweet Memorial Building on Thursday, February 28, 1991 at 7:00 pm, to consider terms for the water and sewer supply to the PUD north of the village."

Although Town residents contacted you prior to the meeting to ask whether a joint meeting has been scheduled, you were not notified of any such meeting by the Town Board, and the Board apparently gave no notice of the meeting. You added that a member of the Town Planning Board contacted a member of the Town Board and was told that "it was a meeting just for the Village Board and the Town Board". It is also your understanding that the Town Board members "all sat around the Village Table with the Village Board members".

In this regard, the Open Meetings Law applies to meetings of public bodies, and it is emphasized that the courts have interpreted the term "meeting" expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to vote or take actions, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Court affirmed a decision rendered by the Appellate which dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also referred specifically to what might be described as preliminary gatherings, stating that:

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'" (id. at 416).

In addition, in its consideration of the characterization of meetings as "informal," the court found that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id. at 415).

Based upon the judicial interpretation of the Open Meetings Law, a gathering of a quorum of a public body, held for the purpose of conducting public business, constitutes a "meeting" that falls within the requirements of the Open Meetings Law.

In the context of your letter, if the Board convened for the purpose of conducting public business collectively, as a body, I believe that its gathering was a "meeting," irrespective of whether the Board met on its own initiative or at the request of others, such as Village officials. I point out that it has been held that joint meetings held by two or more public bodies are subject to the Open Meetings Law [Oneonta Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)].

It is noted, too, that in a recent decision, it was that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the council was asked to attend by a city official who was not a member of the city council [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the gathering in question might have been held at the request of the Village, I believe that it was a meeting, assuming that a quorum of the Board was present for the purpose of conducting public business, which appears to have been so.

With respect to notice, 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.

Further, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings must be conducted open to the public, unless there is a basis for entry into an executive session. Paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may properly be discussed during an executive session. Under the circumstances described in your letter, it appears that none of the grounds for entry into executive session would have applied.

The second area of inquiry involves a request for payroll records and the custody of Town records generally.

First, section 30(1) of the Town Law states that the town clerk "[s]hall have the custody of all the records, books and papers of the town". Therefore, even though you, as town clerk, may not have physical possession of some town records, I believe that you have legal custody of the records.

Second, as we discussed, a payroll record of Town employees must be prepared and made available. 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..."

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-6532

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

March 20, 1991

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 February 28, as well as the materials attached to it.

In brief, you have raised questions concerning notices of claims, when those documents become public records, and the name of the agency from which you may request them. You also questioned the adequacy of the "Application for Public Access to Records" form used by the Town of Ticonderoga. In addition, you inquired as to the responsibilities of the Town's records access officer in relation to notices of claim.

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, once a notice of claim is kept, held or filed by, with or for an agency, I believe that it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. Therefore, whether a notice of claim is served upon or kept by the clerk, the supervisor, or a town attorney acting on behalf of a town, once it is maintained by or on behalf of the town, in my view, it is a record that falls within the scope of the 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.

While certain records relating to litigation or the legal process may be exempted from disclosure by statute and deniable under section 87(2)(a) of the Freedom of Information Law, I believe that notices of claim are ordinarily available under the Freedom of Information Law. Material prepared solely for litigation, attorney work product and communications prepared in conjunction with an attorney-client relationship may be privileged (see e.g., sections 3101 and 4503 of the Civil Practice Law and Rules). However, those privileges apply when records are not disclosed to anyone other than a client. Notices of claim are obviously not prepared by the Town, its officials or its agents. Rather they are prepared by potential adversaries in judicial proceedings and their contents are known to the parties in any such proceedings. Therefore, I do not believe that they could be characterized as privileged or confidential. On the contrary, since none of the grounds for denial could apparently be asserted, notices of claim in my opinion are generally available under the Freedom of Information Law.

Second, with respect to the form to which you referred, 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 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.

While the Law does not preclude an agency from developing a standard form, 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.

The particular form attached to your letter appears to be out of date. For example, the portion of the form indicating the possible reasons to deny requests appear to relate to the provisions of the Freedom of Information Law as originally enacted in 1974. That statute was repealed and replaced with the current version of the Law, which became effective in 1978. Similarly, although the Law used to require agencies to determine appeals with seven business days of their receipt, the Law now provides that determinations be made within ten business days [see section 89(4)(a)].

Lastly, I am unaware of provisions concerning the location for filing of notices of claim, for any such provisions are beyond the scope of the advisory jurisdiction of this office. However, the regulations promulgated by the Committee on Open Government describe the duties of agencies' records access officers. 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..."

In view of the foregoing, the records access officer has the "duty of coordinating an 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, that person would be responsible for coordinating responses to requests for records physically kept or maintained by any office or by any person acting for or on behalf of 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 response in a manner consistent with the Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6533

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

March 20, 1991

Ms. Mary-Ellen Lynch
[redacted]

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

Dear Ms. Lynch:

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

You have alleged that you were "under an extensive investigation by the White Plains Police Dept's Internal Affairs Division", and you wrote that "they were investigating their own police, that were allegedly harassing [you]", and that "there was an unlawful wiretap put on [your] phone with the intent to entrap their officers". Nevertheless, you indicated that you "do not know any of these people". Further, you wrote that records concerning the investigation have been made available to the public, but that your request to view the file has been denied.

The correspondence attached to your letter presents different facts. In a letter to you, the Acting Chief of Police wrote that:

> "Our inquiry revealed that you were never the subject of any internal or external investigation by any member of our agency. We are unable to comply with your request for tapes and documents since no such records exist on activity which we did not conduct. Your father was interviewed as a direct result of your complaint to determine if he could shed any light on the matter after it had become clear that none of our personnel had conducted any inquiry into or surveillance of your activities or conversations. He was unable to supply

> any further avenues to be explored. Our investigative records were transferred intact to the new Public Safety Building, and were not adversely affected by the move.
>
> "As a result of the information outlined above, the matter has been closed in our files. Any further inquiries on this subject should be directed to other agencies, since our Department is clearly not responsible for any of the conduct which you allege has taken place."

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 is not obliged to create records in response to a request. Therefore, to the extent that information in which you are interested does not exist in the form of a record or records, the Freedom of Information Law would not be applicable.

Second, since you referred to disclosures to the public, assuming that records were made available under the Freedom of Information Law, I believe that you would enjoy the same rights as other members of the public [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)].

Third, insofar as records exist and are maintained by an agency of the City, 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. Since I am unfamiliar with the contents or the existence 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 rights of access to any such records.

Of potential significance is section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". It might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or persons other than yourself, 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, since the records might pertain to the activities of police officers, I point out that initial 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 records prepared in conjunction with an investigation of police officers' 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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edmund G. Kardauskas, Acting Chief

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6534

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

March 21, 1991

Ms. Diana L. Danin
[redacted]

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

Dear Ms. Danin:

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

According to your letter, you have made several requests for records of the Mount Vernon Civil Service Commission. Those requests were directed to Rita Roque, Secretary to the Commission, who referred them to Counsel for review. You added that "[a]ll responses came from counsel, but they never instructed [you] to direct inquiries directly to their department", and that, when you contacted Counsel concerning "some missing items", you were "referred back to the Municipal Civil Service Commission".

Most recently, you followed the procedure described above and sent a request to Ms. Roque, including a check to cover the cost of copies. Ms. Roque responded by advising you to contact Anthony Cerreto, the records access officer. You attempted to do so, but Mr. Cerreto was out, and your call was transferred to Michael Lentini of the City's Law Department. When you asked whether your request would be answered by Counsel or the Civil Service Commission, Mr. Lentini responded in the negative and said that you should resubmit your request to Mr. Cerreto. Although you suggested that "he should walk across the hall and get the letter", you wrote that he hung up the phone. Later you were apparently told that the agency "did not have to respond within five days".

You have requested an advisory opinion concerning the 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 general regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, section 87(1) requires the governing body of a public corporation, i.e., a city council, to adopt uniform rules for all agencies with the public corporation that are consistent with the Law and the Committee's regulations.

Relevant to your inquiry is section 1401.2 of the regulations, which 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..."

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 request. In this instance, coordination in my opinion would have involved the step that you suggested, forwarding your request to the proper person. Further, the regulations specify that despite the designation of a records access officer, such a designation should not be construed to preclude other officials from continuing to respond to requests. Since you had directed requests to Ms. Roque in the past, I believe that it was reasonable to assume that ensuing requests could be made in the same manner.

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)].

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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

I hope that I have 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 Avstreih
Anthony Cerreto
Michael Lentini
Rita Roque

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6535

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

March 21, 1991

Mr. Michael O'Shea
[redacted]

The staff of the Committee on Open 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'Shea:

I have received your letter of March 3, as well as the materials attached to it.

You have sought assistance concerning requests for records of the Springs Union Free School District. Based upon the District's response to your requests and its regulations, you wrote that:

> "1. they do not accept a letter of request for information, only their own form (enclosed) is accepted.
>
> 2. duplicate request forms must be submitted.
>
> 3. requests are accepted only during certain limited hours.
>
> 4. they limit the types of records available."

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, neither the Law nor the regulations refer to or authorize 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 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, section 1401.4(a) of the Committee's regulations state that: "Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Lastly, one of the attachments to your letter refers to records available under the Freedom of Information Law pursuant to "Chapter 578, Laws of New York State", and lists five categories of records that are accessible. Chapter 578 of the Laws of 1974 was part of the Freedom of Information Law as originally enacted. However, Chapter 578 was repealed by means of Chapter 933 of the Laws of 1977, the current version of the Freedom of

Information Law, which became effective in 1978. Further, although the original enactment granted rights of access to certain enumerated records to the exclusion of all others, the current Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more 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 and the Law will be forwarded to Ms. Nassauer, the person who responded to your request. A copy of the Freedom of Information Law is enclosed 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Ann S. Nassauer, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6536

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

March 21, 1991

Mr. Robert M. Porterfield
Newsday
235 Pinelawn Road
Melville, NY 11747

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

Dear Mr. Porterfield:

I have received your letter of March 4, as well as the materials attached to it. You have requested an advisory opinion concerning the propriety of a denial of access to records by the Office of the State Comptroller.

By way of background, the correspondence indicates that you requested records "showing loans from the New York Business Development Corporation ('NYBDC') to individuals, companies, or other business entities by its loan agreement with the New York State Common Retirement Fund...". You wrote that NYBDC's primary functions appear to involve "economic development and lending to higher-than-normal-risk borrowers", and that a portion of its funds that may be lent is derived through a loan agreement with the New York State Common Retirement Fund. The request was denied pursuant to section 87(2)(d) of the Freedom of Information Law, which authorizes an agency to withhold records 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..."

It is your view that the records sought should be disclosed, because the NYBDC, although technically a private entity, is largely funded by "public sources of money or protected by federal guarantees"; because its customers are generally "business enterprises that cannot qualify for conventional financing and must rely upon loan programs funded from public

sources or guaranteed by the Small Business Administration", thereby making it difficult to envision how disclosure would "cause any injury to NYBDC's competitive position as a lender"; because the information sought is likely available, albeit at high cost, from other sources, such as lien filings under the UCC, commercial search services and through documents available from county clerks indicating the identities of mortgagor's on NYBDC loans secured by mortgages; and because the assets of the Common Retirement Fund are "substantially 'public money', and the public has a right to know how it's and who's using it". You also pointed out that you are seeking records indicating only those who received funds from the Retirement Fund, rather than all who received loans from NYBDC.

In this regard, I offer the following comments.

First, the NYBDC is described in Article V-A of the Banking Law, sections 210 to 220. Based upon a review of those provisions, the NYBDC is, in my opinion, a private rather than a governmental entity. The fact that its activities may be funded in great measure through public sources of funding is likely irrelevant to issues involving the State Comptroller's duty to disclose under the Freedom of Information Law.

Second, as indicated earlier, the basis for denial offered in the correspondence is section 87(2)(d), which generally authorizes agencies to withhold trade secrets or other records when disclosure would cause substantial injury to the competitive position of "the subject enterprise". That enterprise in this instance is the NYBDC, for the records access officer wrote that disclosure of the information sought "would cause substantial injury to the competitive position of NYBDC as a lender". The Banking Law, however, suggests that NYBDC does not carry out its duties in a manner that envisions competing with other banking institutions. Section 218 states that "such corporation shall not be deemed to be a banking organization". In section 212, which describes the NYBDC's "purposes, powers and operation", subdivision (1) states in part that, among its purposes, is the authority:

> "to furnish money and credit to approved and deserving applicants, for the promotion, development and conduct of all kinds of business activity in the state, <u>thereby establishing a source of credit not otherwise readily available therefor</u>" (emphasis added).

Similarly, paragraph (b) of subdivision (2) of section 212, which describes NYBDC's power to act as a lender, specifies:

> "that it shall not be the intention hereof to take from banking organizations any such loans or commitments as may be desired by such organizations generally in the ordinary course of their business."

As such, certain contentions made in your letter appear to be accurate, i.e., that NYBDC's customers are generally "business enterprises that cannot qualify for conventional financing", and that "[t]his type of lender has a somewhat captive clientele, and it's doubtful that there's as much real competition among the non-bank economic development lenders as you might find among home mortgage lenders."

Based upon the foregoing, the functions of NYBDC, according to the Banking Law, envision that entity carrying out its duties as a lender in cases which there is little or no competition from other lenders. While there is paucity of decisional law involving section 87(2)(d), it has been advised that the nature of the records and the degree of competition within an industry or area of commerce in which a commercial entity functions are some of the factors relevant to the assertion of that provision. Under the circumstances, particularly in view of the provisions of the Banking Law cited earlier, it does not appear that disclosure would cause substantial injury to NYBDC's competitive position, for that entity likely is not involved in substantial competition.

Lastly, 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.).

If, as you suggest, the information sought can be obtained from other sources, whether public or commercial, it would not be "secret". Therefore, if that contention is accurate, section 87(2)(d) of the Freedom of Information Law would not, in my opinion, justify a denial.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert R. Hinckley, Records Access Officer
Paul V. Morgan, Records Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6537

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

March 21, 1991

Mr. Robert Camarano
83-A-2246
Wende Correctional Facility
Box 187
Alden, NY 14004-1187

Dear Mr. Camarano:

You have requested advice concerning your unsuccessful efforts to obtain a response to a complaint pertaining to an attorney that you filed with the "Departmental Disciplinary Committee" of the Appellate Division, First Department.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law 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 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 or 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 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.

Under the circumstances, this office has no jurisdiction in the matter, and it is suggested that you exercise patience.

I hope that the foregoing enhances your understanding of the law and the process to which you referred.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6538

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

March 22, 1991

Mr. Bruce B. Hare
[redacted]

Dear Mr. Hare:

I have received your letter of March 18 in which you requested a copy of "regulations concerning the Employers responsibility under the New Freedom of Information Law".

Enclosed are copies of the Freedom of Information Law and the regulations promulgated pursuant to the Law by the Committee on Open Government. The regulations pertain to the procedural implementation of the Freedom of Information Law.

Since you referred to the responsibility of "employers", for purposes of clarity, it is emphasized that the Freedom of Information Law is applicable to agency records. Section 86(3) of the Law defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local government. It does not apply to records maintained by private firms or private "employers".

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6539

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

March 22, 1991

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 March 6 in which you raised questions concerning the Freedom of Information Law.

According to your letter, you wrote to the Ticonderoga Town Board to appeal a denial of access to records. Under separate cover, this office received a copy of your appeal and related materials. As of the date of your letter to this office, you had received not response to the appeal.

In this regard, section 89(4)(a) of the Freedom of Information Law pertains to the right to appeal and states that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Although reference to the right to appeal is made on the Town's request form, I do not believe that you would be required to complete that form in order to appeal, for nothing in the Law refers to any particular form to be used for the purpose of appealing a denial. Since the initial denial was rendered on February 2 and your letter of appeal is dated February 11, the appeal appears to be proper.

You also questioned whether a person other than the Town's records access officer may respond to a request. The regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) indicate that the records access officer has the duty of coordinating an agency's response to requests. Therefore, I believe that an official, when appropriate, may respond to a request on behalf of the records access officer.

Lastly, with respect to a "refusal" to comply with the Freedom of Information Law, section 89(4)(b) of the Law states that a person denied access to records may, after having exhausted his or her administrative remedies, seek judicial review of the denial by means of a proceeding initiated 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

cc: Town Board
Paula A. Buckman, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6590

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

March 22, 1991

Ms. F.J. Thompson
[redacted]

Dear Ms. Thompson:

I have received a series of letters from you dated March 3, with attachments. In each instance, you referred to appeals to agencies made under the Freedom of Information Law that had not been answered, and you asked whether copies of your appeals were forwarded by the agencies to this office.

Since your appeals were made on February 11, a search of our February appeals files was conducted, and none of those to which you referred could be located.

With respect to the agencies' failure to respond to the appeals and to forward the appropriate documentation to this office, 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 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."

I hope that I have been of some assistance.

Sincerely,

Robert J. F

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1903
FOIL-AO-6541

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

March 22, 1991

Mr. Patrick E. Poleto
[redacted]

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

Dear Mr. Poleto:

I have received your letter of March 4 and the correspondence attached to it.

According to the materials, following your request for minutes of "workshop meetings" held by the Brunswick Town Board, you were informed by the Town Clerk that "recorded minutes are not taken at workshops". You have requested information concerning "requirements of taking minutes by the town clerk at town board meetings".

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 the Town Clerk.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joan Rasmussen, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6592

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

March 22, 1991

Mr. Terence J. Murphy
88-A-2495
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. Murphy:

I have received your letter of March 6, in which you sought an advisory opinion concerning a request made under the Freedom of Information Law.

Although you did not include a copy of your request, you wrote that you submitted a request to the Great Meadow Correctional Facility for a "redacted version of the 'Supplemental Change Notice'", which "describes the movement of incoming inmates". You specified that you requested records "without the identifying information of individual inmates - no NYSID (New York State Identification), DIN (Department of Corrections Identi- fication Number), or Name data", and that you are seeking the data in the remaining columns of the records, which you characterized as "Ethnic, Received From, House and Work Location". Nevertheless, in response to the request, you were told your name did not appear on any of the change sheets and that "[t]o release such documents would constitute an unwarranted invasion of personal privacy of the inmates listed on those forms...".

In addition to seeking an opinion concerning the denial, you requested sample materials concerning the initiation of a judicial proceeding to compel release of 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, as you are likely aware, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions of records the disclosure of which would result in "an unwarranted invasion of personal privacy". However, section 89(2)(c) of the Law states that, unless a different ground for denial applies, disclosure does not constitute an unwarranted invasion of personal privacy "when identifying details are deleted" [section 89(2)(c)(i)]. While I am not familiar with the forms in question, it would appears that, following the deletion of identifying details, the remainder of such records would be available.

Third, the letter of denial suggests that your request, as you described it, was misinterpreted, for there is no reference to your specification that identifying details be deleted. As such, it is suggested that you discuss the matter with the records access officer at the facility.

Lastly, this office does not maintain the kinds of "sample papers or forms" to which you alluded. Those materials would likely be available at your facility library.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: M. Murphy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6543

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

March 26, 1991

Ms. Debra L. Buckman
[redacted]

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

Dear Ms. Buckman:

I have received your letter of March 5 in which you asked whether "the actual notes produced by the Court Stenographer are accessible under 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."

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

The preceding comments are not intended to suggest that court records are not available, for other statutes (e.g., Judiciary Law, section 255) often provide substantial rights of access to those 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.6544

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

March 26, 1991

Mr. Darryl E. Fisher
88-T-1700
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. Fisher:

I have received your letter of March 5 in which you requested assistance.

In brief, you indicated that you have directed requests to the New York City Police Department, but that you have received no reply.

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, 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 provi-

> ded 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

For your information, the person designated to determine appeals at the Department is Susan R. Rosenberg, Assistant Commissioner for Civil Matters.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Louis J. Copasso, Records Access Officer
Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO- 120
FOIL-AO- 6545

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

March 26, 1991

Mr. John T. O'Shaughnessy
[redacted]

The staff of the Committee on Open 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'Shaughnessy

I have received your letter of March 5, as well as the materials attached to it.

According to your letter, you were canvassed by the State Police for employment as a trooper. After having undergone all aspects of their testing, you were denied employment due to a "failure to fulfill all of their requirements". Since you were given no reason for not being hired, you requested copies of records "pertaining to what requirements [you] did not fulfill". Although your request was made under the Personal Privacy Protection Law, the State Police denied your request under the Freedom of Information Law on the ground that the records sought are intra-agency materials and could be withheld on that basis.

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

First, the Freedom of Information Law and the Personal Privacy Protection Law represent two separate vehicles under which members of the public may seek access to state agency records. The Freedom of Information Law grants access to records to the public generally. 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, one of the grounds for denial in the Freedom of Information Law pertains to intra-agency materials. Section 87(2)(g) of the Law permits an agency to withhold records that:

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

Without knowledge of their contents, it is possible that certain aspects of the records sought could be withheld under section 87(2)(g) of the Freedom of Information Law. However, other aspects of the records, such as factual information or a final determination, would apparently be available. As such, even if the Freedom of Information Law were the only statute applicable as a basis for seeking records, the denial by the Division of State Police might have been unduly broad.

Third, separate from the Freedom of Information Law is the Personal Privacy Protection Law. That statute generally confers rights of access to a "data subject", a natural person about whom information has been collected by a state agency [see Personal Privacy Protection Law, section 92(3)], to records pertaining to him or her. Section 95(1) of the Personal Privacy Protection Law states in part that, upon request for records by a data subject for records pertaining to him or her, a state agency must disclose such records, unless access is "not required to be provided pursuant to subdivision five, six or seven" of that section.

Subdivision five enables an agency to withhold information "compiled for law enforcement purposes" when disclosure 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, records generated or prepared in conjunction with an application for employment could not be characterized as having been "compiled for law enforcement purposes". If such records could not be so characterized, I do not believe that the conditions described in subparagraphs (i) through (iv) of section 95(5)(a) would apply.

Subdivision six of section 95 provides a series of exceptions to rights of access. None, in my opinion, would be pertinent under the circumstances.

Subdivision seven of section 95 states that rights of access granted by the Personal Privacy Protection Law do not apply to public safety agency records. Section 92(8) of the Personal Privacy Protection Law defines the phrase "public safety agency record" to mean:

> "a record of the commission of correction, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of parole, the crime victims board, the division of probation or the division of state police or of any agency or component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to 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."

While the Division of State Police is a public safety agency, I do not believe that the information sought, which deals with your application for employment, "pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order...". Further, the fact that records may consist of "intra-agency materials" for purposes of the Freedom of Information Law does not diminish rights of a data subject under section 95 of that statute.

In short, if there is no basis for withholding the records under the Personal Privacy Protection Law, I believe that they must be made available to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis A. DeFrancesco, Chief Inspector
Gary C. Dunne, Lieutenant Colonel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6546

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

March 26, 1991

Ms. Lorraine Ambrosio
Lindenhurst Tax-Pac Unit
[redacted]

The staff of the Committee 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. Ambrosio:

As you are aware, I have received your letter of March 4 and the correspondence attached to it.

Your inquiry concerns your unsuccessful efforts to obtain records under the Freedom of Information Law concerning the "CLASP Program", which is "funded with New York State Grant monies". The program is run by a member of the Lindenhurst Board of Education. You informed me by phone that "CLASP" stands for the "Children's Leisure After School Program", that it is essentially a program for "latch key" children, and that its funding is not derived from School District appropriations. Based upon our conversation, CLASP appears to be a not-for-profit organization that uses school grounds but which is largely independent of the District.

In this regard, as explained to you during our conversation, the Freedom of Information Law generally pertains to records maintained by agencies of state and local government. 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."

If indeed CLASP is not a governmental entity but rather is a private organization, I do not believe that it would constitute an "agency" subject to the Freedom of Information Law, despite its receipt of public moneys. If my analysis is accurate, the Freedom of Information Law would not be applicable as a basis for seeking records from CLASP.

I hope that I 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-0547

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

March 26, 1991

Mr. Mark J. Phillips
[redacted]

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

Dear Mr. Phillips:

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

In conjunction with a series of facts presented in the materials, you raised the following question: "After it has been forwarded by a State agency to a municipality, is a drafter Order on Consent available for public viewing under the NYS FOI 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.

Relevant under the circumstances 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.

In my view, a draft consent order transmitted between a state agency and a municipality would constitute inter-agency material. Further, since a draft would not be reflective of a final agency determination, it appears that such a record could justifiably be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-121
FOIL-AO-6548

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

March 27, 1991

Mr. M.F. Denich
[redacted]

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

Dear Mr. Denich:

Your letters addressed to the Attorney General and the Solicitor General have been forwarded to the Committee on Open Government. The Committee is authorized to provide advice concerning New York's Freedom of Information and Personal Privacy Protection Laws.

You asked "what type of information about a person is regarded as 'public information'?"

By way of background, the statutes within the Committee's advisory jurisdiction pertain to records maintained by governmental entities in New York. Separate from those provisions are the federal Freedom of Information and Privacy Acts, which apply to records maintained by federal agencies.

For a variety of reasons, your question cannot be easily answered. The structure of the general statute concerning access to government records, the Freedom of Information Law, is based on a presumption of access. In brief, it states that all records are available, with certain exceptions. Therefore, the Law does not enumerate the records that are public; rather, it provides a series of grounds for denial of access to records.

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 result in "an unwarranted invasion of personal privacy". While subjective judgments must often be made when issues of privacy arise, section 89(2)(b)

provides a series of examples of unwarranted invasions of personal privacy. Despite the absence of specificity in the Law, it is clear in my view that an agency may withhold records reflective of the intimate details of peoples' lives.

Further, the Personal Privacy Protection Law, which pertains to state agencies (but not local governments) imposes restrictions upon the disclosure of personal information to the public and to other entities of government. When that statute is construed in conjunction with the Freedom of Information Law, a state agency may often be prohibited from releasing records when disclosure would result in an unwarranted invasion of personal privacy.

Lastly, there are numerous other statutes that require the confidentiality of personally identifiable records.

Enclosed are copies of the Freedom of Information Law, the Personal Privacy Protection Law and explanatory brochures concerning those statutes. I point out that page 9 of "You Should Know" lists a number of subject areas in which personal information is confidential.

If you have questions about particular records, please feel free to contact me. 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- 1905
FOIL-AO- 05549

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

March 28, 1991

Mr. Philip E. Zegarelli
Vice President
Manufacturers Hanover Trust Company
270 Park Avenue
New York, NY 10017

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

Dear Mr. Zegarelli:

I have received your letter of March 13, as well as copies of letters that you addressed to Vincent Iaconis, President of the Pocantico Hills Central School District. You have requested my comments concerning issues raised in those letters.

As you are aware, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. While certain issues raised in the materials relate to those statutes, others do not. Consequently, my remarks will be restricted to those areas that fall within the scope of the Committee's advisory jurisdiction.

According to one of the letters, although you attended a meeting of the Board of Education on March 4, "no mention was made nor announcement made that the entire school board had decided to attend the upcoming Pocantico Hills PTA meeting of Tuesday, 5 March 1991". You added that the President and other members of the Board "clearly spoke as officers and members of the school board" at the gathering with the PTA, and you contend that the Board engaged in a "moral, ethical and legal breech of the Open Meetings Law...".

In this regard, the Open Meetings Law applies to meetings of public bodies, and it is emphasized that the courts have interpreted the term "meeting" expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to vote or take actions, and regardless of the manner in

which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Court affirmed a decision rendered by the Appellate which dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also referred specifically to what might be described as preliminary gatherings, stating that:

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'" (id. at 416).

In addition, in its consideration of the characterization of meetings as "informal," the court found that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in

> ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id. at 415).

Based upon the judicial interpretation of the Open Meetings Law, a gathering of a quorum of a public body, held for the purpose of conducting public business, constitutes a "meeting" that falls within the requirements of the Open Meetings Law.

In the context of your correspondence, if the Board convened for the purpose of conducting public business collectively, as a body, I believe that its gathering was a "meeting," irrespective of whether the Board met on its own initiative or at the request of others, such as the PTA.

It is noted, too, that in a recent decision, it was that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the council was asked to attend by a person who was not a member of the city council [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the gathering in question might have been held at the request of the PTA, I believe that it was a meeting, assuming that a quorum of the Board was present for the purpose of conducting public business, which appears to have been so.

The other issue relates to the propriety of mailings by the District and the contents of those publications. It appears that, in response to questions raised by you and others, the Board sought an opinion on the matter from its attorney, David Shaw. Although Mr. Shaw's opinion was disclosed, you requested a copy of the Board's "initiating request" to him, for it is your view "that Mr. Shaw was not provided with a summary of the relevant points [you] have consistently outlined to the School Board in order to enable Mr. Shaw to render a 'good faith' and unbiased opinion". You also wrote that "[w]ithout a copy of the outgoing or initiating request [you] cannot tell what the basis of Mr. Shaw's opinion is related to".

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

From my perspective, two of the grounds for denial may be relevant to rights of access to the record in question.

The initial ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is section 4503 of the Civil Practice Law and Rules, which concerns communications made pursuant to an attorney-client relationship and confers confidentiality with respect to those communications under certain circumstances.

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 the record involves a request for legal advice from the Board's attorney, I believe that it 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 it has been stressed that the attorneyclient 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; 131 AD 2d 806 (1988)].

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..."

If the memorandum from the Board to Mr. Shaw does not consist of any of the categories of information described in subparagraphs (i) through (iv) of section 87(2)(g), it appears that it could be withheld.

Lastly, I point out that the Freedom of Information Law is permissive; although an agency may withhold records under appropriate circumstances, it may choose to disclose [see Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)]. Therefore, the Board could opt to waive the attorney-client privilege or determine to disclose intra-agency materials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Vincent Iaconis, Presidnet, Board of Education
Dr. Robert Morrison, Superintendent
David Shaw, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6550

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

March 28, 1991

Ms. Kandi Stevens
[redacted]

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

Dear Mr. Stevens:

I have received your recent letter, which reached this office on March 14.

You have requested "answers" to the following questions:

> "1) If a Dog Control Officers (DCO) Complaints file (complaints called in - maybe not a seizure) or a daily log book (probably purchased with tax dollars) is public information? And if so can the documents be altered to blank out complainants name?
>
> 2) If a ticket issued by a DCO for a violation of law is public information?
>
> 3) When you request copies of original documents if you can be given copies of carbon copies - ex third carbon copy not legible. And if reason for denial can be non-legible copies submitted by DCO to records access officer?
>
> 4) Where are all records used for DCO suppose to be stored? The DCO's home? The records access officers office? Is the records access officer supposed to hold copies of the documents at her office or can all copies be stored at DCO's home?"

In addition, you attached a copy of a form used to request records, and you asked whether it is proper, and whether an agency can deny a request "if you refuse to sign this form."

In this regard, I offer the following comments.

First, 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.

Second, when a complaint is made to an agency, 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.

A ticket indicating a violation would in my view be available. Unlike a complaint, which represents an allegation, a record of violation represents a finding that a person has failed to comply with law.

Third, when records are available under the Freedom of Information Law, the public has the right to inspect those records. Therefore, if an original, legible record is accessible, I believe that you would have the right to view that record, rather than an illegible carbon copy.

Fourth, I know of no provision of law that specifies where records of a dog control officer must be kept. Nevertheless, the regulations promulgated by the Committee on Open Government pursuant to the Freedom of Information Law (21 NYCRR Part 1401) detail the duties of an agency's records access officer.

Relevant to your inquiry is section 1401.2 of the regulations, which 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..."

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, even though the records access officer may not have physical possession of requested records, that person, in my opinion, has the responsibility to obtain those records for the purpose of making them available or ensuring that agency personnel make the records available.

Lastly, the form attached to your letter appears to be out of date in many respects, for it appears to be based upon the Freedom of Information Law as originally enacted in 1974. That statute was repealed and replaced by the current version of the Freedom of Information Law, which became effective in 1978.

Moreover, the Freedom of Information Law, section 89(3), and the regulations promulgated by the Committee, section 1401.5, require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Although, 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)], neither the Law nor the regulations refer to or authorize 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 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.

I hope that I 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-6551

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

March 28, 1991

Richard T. Castallo, Ed.D.
Associate Professor
State University College at Cortland
P.O. Box 2000
Cortland, NY 13045

The staff of the Committee on 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. Castallo:

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

According to your letter:

> "The professors' union at SUNY Cortland puts out a multipage publication each year in which they list the names and salaries of each employee of the College. They give the employee's name, rank (professor, associate professor, etc.), salary for the previous year and salary for the present year.
>
> "This is done without any approval by the people named in the publication."

You have asked whether "this practice is legitimate".

In this regard, I offer the following comments.

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

Second, with certain exceptions, the Freedom of Information Law is does not require an agency 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 information in question is included among the records required to be kept pursuant to "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, a payroll record that identifies all College officers or employees by name, public office address, title and salary must be prepared by an agency to comply with the Freedom of Information Law. Further, I believe that the payroll record must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6552

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

April 2, 1991

Ms. F.J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received a series of correspondence to you concerning a request for records of New York City Police Pension Fund. In brief, you have questioned the responses to the requests by Sergeant Louis J. Capasso, the Records Access Officer for the New York City Police Department.

Based upon a review of the materials, it appears that the Pension Fund operates within the Police Department and that Sergeant Capasso serves as the records access officer concerning requests for records of the Pension Fund, as well as the Department generally. If my assumption is accurate, the Pension Fund does not have a records access officer or an appeals officer; rather those functions are carried our by persons so designated at the Department. Further, it appears that Sergeant Capasso's responses were provided in conjunction with his duty, as records access officer, to "coordinate" the agency's response to requests [see 21 NYCRR section 1401.2(a)].

With regard to the time within which agencies must response 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 decision rendered by the Appellate Division, First Department, 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, 157 AD 2d 486 (1990)]. 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 be 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, based upon Sergeant Capasso's letter to you of March 12, access has been granted to the records sought insofar as they exist. As such, his response appears to have been proper.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Sergeant Louis J. Capasso, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6553

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

April 2, 1991

Ms. F.J. Thompson
[redacted]

The staff of the Committee 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. Thompson:

I have received a series of correspondence from you concerning requests for records of the Savings Bank Life Insurance Fund. In brief, the issue is whether that entity is subject to the Freedom of Information Law. Theodore Manno, Vice President of the Fund, has contended that the Freedom of Information Law is inapplicable to its records.

In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law is applicable to agencies, 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."

Second, the initial sentence of section 270 of the Banking Law states that:

> "There shall be in the banking department a body corporate to be known as the savings bank life insurance fund with the powers specifically provided in this article and with such other general corporate powers as are necessary or appropriate to the conduct of its business and the conduct of the business of the life insurance departments of the savings and insurance banks."

However, section 270 also states that the Fund:

> "shall not be subject to the provisions of the state finance law constituting chapter fifty-six of the consolidated laws nor shall the moneys of such body corporate be public funds, moneys of the state or under state control or subject to audit by the state comptroller."

Further, having discussed the matter with an attorney for the Banking Department, I was informed that the Department does not physically maintain records of the Fund, and that the Fund operates in a manner independent of the Department.

Third, in what might have been a similar situation, an entity that in some respects appeared to have been a part of a state agency was found to fall beyond the scope of the Freedom of Information Law. Consolidated Edison Co. v. Insurance Department [532 NYS 2d 186 (1988)] involved the status of the "Liquidation Bureau" under the Freedom of Information Law. Although it was found that "the official letterhead of the Liquidation Bureau reads State of New York, Insurance Department, Liquidation Bureau and bears the seal of the State of New York" (id. at 188), in view of its functions and its separateness from the operations of the State Insurance Department, the Liquidation Bureau was found not to be an "agency" for purposes of the Freedom of Information Law. I have enclosed a copy of that decision for your review.

In my opinion, due to the introductory language of section 270 of the Banking Law, the status of the Fund under the Freedom of Information Law is unclear and could be resolved with certainty only by a court. However, based upon

the remaining provisions in the Banking Law pertaining to the Fund and the holding in the decision cited above, I would conjecture that it is not an "agency" subject to the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Theodore Manno

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6559

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

April 2, 1991

Mr. Francisco Rodriquez
86-A-3821
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. Rodriquez:

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

You have asked that I "look into" a situation in which you requested materials from the Clerk of the Middletown City Court under the New York Freedom of Information Law and the federal Freedom of Information and Privacy Acts. Although your request was made on February 14, as of the date of your letter to this office, you had not yet received a response.

In this regard, I offer the following comments.

First, the federal Freedom of Information and Privacy Acts pertain to records maintained by federal agencies. As such, those statutes do not apply to records of a state or municipal court.

Second, the New York 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.

The preceding comments are not intended to suggest that court records are not available, for other statutes (e.g., Judiciary Law, section 255) often provide substantial rights of access to those records. It is suggested that you resubmit your request to the court clerk under provisions of an applicable statute, 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

OML-AO- 1909
FOIL-AO- 6555

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

April 3, 1991

Mr. Howard W. Ostrander
[redacted]

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

Dear Mr. Ostrander:

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

In brief, according to your letter, there has been controversy in the Town of Guilford concerning the number of justices there should be and whether there is a need to have a court clerk. In conjunction with those issues, a request was made under the Freedom of Information Law for "records of cases processed, recessed by docket number for year 1989 and 1990 to date, showing cases processed" within and outside the Town. Further, you specified that "Request is for total No. of cases only. Also by which judge". The request was initially denied, and you appealed. Although the appeal "has never been approved or denied", the town attorney advised you and the town clerk that "court dockets should be available". Nevertheless, you wrote that "Justice Vosburgh has denied any access to the dockets in his possession even after members of the town board had requested he do so...".

You added that in:

> "February 1991, a meeting of the town board was held without any notice to public to audit books of the Justice Vosburgh, at which Mr. Vosburgh and his wife were present and a discussion of the court activities took place. It is our opinion at this meeting, the town board agreed to appoint the wife of Justice Vosburgh to the position of Court Clerk to serve both justices even though paragraph 100.3 of Title 22 Judiciary

> states that a judge shall also refrain from recommending a relative for appointment or employment to another judge serving in the same court. Also, that prior approval of the chief administrator of the courts was not obtained.
>
> "At the February regular town meeting a motion was made, seconded and passed without any discussion by board members or our being allowed to present our concerns."

You have asked that this office "investigate this matter".

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. This office has neither the staff nor the resources to conduct an investigation, nor it is empowered to compel an agency to comply with law. Nevertheless, I offer the following comments and suggestions.

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

Second, the foregoing is not intended to suggest that court records are not public. On the contrary, as you are aware, various other statutes often grant substantial rights of access to those records. For instance, section 255 of the Judiciary Law generally requires court clerks to make available records in their possession; section 255-b of the Judiciary Law requires that "A docket-book, kept by a clerk of a court, must be kept

open during the business hours fixed by law, for search and examination by any person". Further, section 2019-a of the Uniform Justice Court Act specifies 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...".

Under the circumstances, it is suggested that you contact either the Office of Court Administration, who has general oversight of the court system, or the Commission on Judicial Conduct. The Office of Court Administration is located at the Empire State Plaza, Agency Building 4, Albany, NY 12223. The Commission on Judicial Conduct is located at 801 Second Avenue, New York, NY 10017.

Third, with respect to the unannounced meeting, I direct your attention to the Open Meetings Law. That statute pertains to meetings of public bodies, and it is noted that the courts have interpreted the term "meeting" expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Court affirmed a decision rendered by the Appellate Division which dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

With regard to notice, section 104 of the Open Meetings Law 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."

While subdivision (3) of section 104 indicates that a public body need not pay to publish a legal notice prior to meetings, notice nonetheless must be given to the news media and posted prior to all meetings. In the case of a meeting scheduled at least a week in advance, I believe that the intent of section 104(1) is to ensure that the news media possess a notice of such a meeting a minimum of seventy-two hours prior to the meeting. Mailing a notice seventy-two hours before the meeting would in my view subvert the intent of the notice requirement, for the notice may not be received with adequate time to publicize a meeting. In short, if notice is mailed, I believe that mailing should occur far enough in advance that it could reasonably be expected to be delivered at least seventy-two hours before the meeting.

Finally, 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. In addition, section 105(1) of the Law prescribes a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, the cited provision states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, an executive session is not separate and distinct from an open meeting, but rather is a part of an open meeting from which the public may be excluded. In addition, it is clear that a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6556

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

April 3, 1991

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 letter of March 15 in which you requested an advisory opinion concerning the Freedom of Information Law.

The question involves your "right to make copies of accessed records on [your] own portable xerox machine". You added that you have requested and have been able to inspect a record within five business days, and "[w]ith that record in your hand, [you] want to make a copy with [your] own machine."

In this regard, 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 Law (Cooke v. city of Albany, Supreme Court, Albany County, October, 1974).

As a general matter, when a person seeks to inspect records accessible under the Freedom of Information Law, no fee may be imposed by an agency. If an applicant requests that an agency photocopy a record pursuant to section 89(3) of the Law, an

agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches. Specifically, section 87(1)(b)(iii) 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 by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

Based upon the language quoted above, there is no precise direction in the Law concerning the assessment of fees when a person seeks to use his or her own photocopy machine. While it does not appear that any fee could be charged in such a circumstance, it might be contended that the "actual cost" to the agency involves the use of electricity. If that is so, and if an agency can establish the cost of electricity, an applicant might be required to pay a minimal fee for use of electricity.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ann Leonard, Clerk
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6557

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

April 3, 1991

Mr. Bernard J. Blum
President
Rockaway Bay Sierra Club Task Force
[redacted]

The staff of the Committee on Open 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 March 15 and the materials attached to it. You have requested an "evaluation" of a statement made by Michael Kharfen concerning the Freedom of Information Law. Mr. Kharfen serves as director of the Community Assistance Unit of the Office of the Mayor of New York City.

In a response to a letter relating to the election of officers by a community board, Mr. Kharfen wrote that:

> "The Corporation Counsel's Office has advised us that if the final action in the election of an officer by Community Board 14 was an approval by acclamation of one candidate, then the Board would be able to create a record noting a vote in favor of that candidate by each member present at the time of the motion, in compliance with FOIL."

In this regard, as you are aware, 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 community board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

In the context of a vote taken by the Board to elect an officer, it appears that a series of ballots may be taken until a particular member receives an affirmative vote of the number needed to elect. If that is so, it does not appear that preliminary votes, i.e., those votes that do not result in the election of an officer, must be recorded, for they are not "final". However, when a vote results in the election of an officer, that vote would, in my opinion, be required to be recorded and indicate how each member voted. Therefore, if a final vote was accomplished by "acclamation", resulting in the election of a certain person, I would agree with Mr. Kharfen's statement that the Board should prepare a record indicating a vote in favor of the person by each member who voted.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Kharfen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6558

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

April 3, 1991

Mr. Tim 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 March 6 in which you raised a question relating to the Freedom of Information Law.

According to your letter, you wrote twice to the Norwich City Clerk and requested copies of work permits issued to a particular person. Having received no response, you telephoned the clerk, who informed you that permits were not required for the type of work the individual is doing. Consequently, you asked the clerk to "confirm in writing what [you] had discussed and he agreed to do so". To date, you have not received any such confirmation, and you asked whether you are "entitled to this information in writing in order to properly document [your] file and whether it would be available under the Freedom of Information Law".

In this regard, in a situation in which an agency does not maintain a requested record, section 89(3) of the Freedom of Information Law provides that, on request, the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". Therefore, I believe that the clerk is required to provide a written certification consistent with the provision quoted in the preceding sentence.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jody Zavresky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6559

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

April 4, 1991

Mr. Raphael Perez
89-A-0579 U-H-10-44
Clinton Correctional Facility
Box 367B
Dannemora, NY 12929

Dear Mr. Perez:

I have received your letter of March 18, which relates to an opinion prepared on your behalf concerning the status of a legal aid society under the Freedom of Information Law.

Having reviewed that opinion, I do not believe that I can offer additional advice regarding the issue. Although you have offered a series of contentions on constitutional grounds, I am not an expert with respect to constitutional law, and those contentions, in my view, are largely unrelated to the coverage of the Freedom of Information Law.

Attached to your letter is a copy of a request for records of the New York County Supreme Court under the federal Freedom of Information and Privacy Acts. In this regard, the federal Freedom of Information and Privacy Acts pertain to records maintained by federal agencies. As such, those statutes do not apply to records of a state or municipal court.

Similarly, the New York 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.

The preceding comments are not intended to suggest that court records are not available, for other statutes (e.g., Judiciary Law, section 255) often provide substantial rights of access to those records. It is suggested that you resubmit your request to the court clerk under provisions of an applicable statute, 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-6560

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

April 4, 1991

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, unless otherwise indicated.

Dear Mr. Corbin:

I have received your letter of March 20 as well as the your note of March 22 relating to that letter.

Your inquiry concerns certain conferences or hearings conducted by the Division of Housing and Community Renewal (DHCR), and whether "DHCR, upon request [is] obligated to provide a copy of a tape of a conference or hearing for the cost of the blank tape". Further, if a person is permitted to listen to a tape, you asked whether "he or she [may] record it on their own equipment".

In this regard, I offer the following comments.

First, having discussed the matter with officials at DHCR, I believe that there are distinctions between hearings and conferences. As you are aware, the procedures and rules of practice concerning hearings are described in detail in DHCR's regulations (9 NYCRR Part 2051). It is my understanding that conferences are significantly less formal than hearings. Further, I believe that hearings are generally transcribed and/or tape recorded, and they are open to the public; it appears that conferences are rarely recorded, and there is no statement in the regulations indicating that they are conducted in public.

Second, the Freedom of Information Law generally pertains to existing records, and section 89(3) states in part that an agency is not required to create or prepare a record in response to a request. While DHCR regulations require the preparation of a "complete record" including a transcript of hearings, no analogous provision appears to exist with respect to conferences.

Third, 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."

Therefore, if tape recordings of hearings or conferences exist, I believe that they constitute "record" subject to rights of access.

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, a tape recording of a public hearing 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]. In the case of a tape recording of a conference that is not open to the general public, if a person present at a conference requests a tape recording of the conference, I do not believe that any ground for denial could be asserted to withhold the tape from such a person. If a tape is requested by others, there may be privacy considerations, and it is possible that such a tape could be withheld in whole or in part.

Lastly, when a record is accessible under the Freedom of Information Law, section 87(2) specifies that it is available for "inspection and copying". "Inspection" of a tape recording would, in my opinion, involve enabling a person to listen to it. Similarly, I believe that a person could copy a tape recording by using his or her equipment to reproduce the content of a tape. Further, section 89(3) of the Law obliges agencies to make copies of accessible records upon payment of the appropriate fee. 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 tape recordings. 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); see Zaleski, supra]. Therefore, the actual cost of copying a tape recording would ordinarily be the cost of a blank tape.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6561

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

April 4, 1991

Mr. John H. Warner
Town Taxpayers Association
P.O. Box 1242
Newburgh, NY 12550

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

Dear Mr. Warner:

I have received your letter of March 18 and the materials attached to it.

Your inquiry concerns a denial of access to real property records by the Orange County Real Property Tax Service Agency. The denial was issued despite an opinion prepared on your behalf in which it was advised that the records should be disclosed. You have inquired as to your "possible courses of action".

In this regard, when a request for records is denied under the Freedom of Information Law, the person denied access may appeal in accordance with section 89(4)(a) of the Law. That provision states in relevant part that:

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

I hope that I 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-6562

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

April 4, 1991

Mr. Richard K. Schroeder
[redacted]

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

Dear Mr. Schroeder:

I have received your note, which appears on a copy of a letter that you addressed to the Assessor of the Town of Amherst.

In brief, you indicated to the Assessor that his office does not offer adequate hours to enable individuals to review assessment records. You wrote that recently, when you reached the Town Hall at 3:50 p.m., a clerk was "locking the doors, even though [you were] told the records would be available until at least 5 p.m. that day". Soon thereafter, you took a half day off from work to inspect assessment records. Although you arrived at 2 p.m., "again the clerk was in process of locking the doors...". It is your view that the Town is unnecessarily restricting access to records and you asked for assistance in influencing the Town "to be more open".

In this regard, I offer the following comments.

First, by way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations governing the procedural aspects of the Freedom of Information Law (21 NYCRR Part 1401). In turn, section 87(1) requires that each agency adopt regulations consistent with the Law and the Committee's regulations.

Relevant to your inquiry is section 1401.2 of the Committee's regulations, which 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..."

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, even though the records access officer may not have physical possession of requested records, that person, in my opinion, has the responsibility to obtain those records for the purpose of making them available or ensuring that agency personnel make the records available.

Second, section 1401.4(a) of the regulations states that:

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

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: Dan Ward, Supervisor
Harry E. Williams, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6563

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

April 5, 1991

Mr. Jon Ek
77-A-0724
Sullivan Correctional Facility
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. Ek:

I have received your letter of March 17 in which you sought advice concerning rights of access to records of the New York County District Attorney. The records in question apparently relate to co-defendants.

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. 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 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, 151 AD 2d 677, 679 (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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6564

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

April 5, 1991

Mr. Francis Read
89-C-1510
Wende Correctional Facility
P.O. Box 1187
Alden, NY 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. Read:

I have received your letter of March 22 in which you requested assistance. In brief, you wrote that your requests to the Office of the District Attorney of Onondaga County under the Freedom of Information Law have not been answered.

In this regard, I offer the following comments.

First, 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)].

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 unaware of the nature or content of the records sought, I cannot offer specific guidance concerning the extent to which the records must be disclosed.

In an effort to enhance compliance, a copy of this letter will be forwarded to the Office of the District Attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO- 122
FOIL-AO- 6565

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

April 5, 1991

Mr. Elwyn E. Vaughan
[redacted]

The staff of the Committee 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. Vaughan:

I have received your letter of March 20 in which you sought an advisory opinion under the Freedom of Information Law and the Personal Privacy Protection Law concerning rights of access to records maintained by Chemung County. You also requested records of this office concerning the matter.

In this regard, I offer the following comments.

First, the only records maintained by this office concerning your request are materials that you have sent to this office; no records have been forwarded by any Chemung County agency.

As I interpret your comments, it appears that you appealed a partial denial of a request. To learn more of the matter, I contacted Mark Fleisher, the County's coordinator of records and information. He indicated that the County considered your letter prepared following its response as a complaint rather than an appeal. He reiterated that the records sought would in great measure be made available to you upon payment of the appropriate fee, and that you could contact the County Attorney after reviewing those records if you are dissatisfied.

Second, having reviewed my earlier letter to you, there is little that I can add concerning rights of access to records under the Freedom of Information Law. I have neither the authority nor the expertise to offer advice concerning the Criminal Procedure Law or your constitutional rights, and those issues would appear to be separate from considerations of rights under

the Freedom of Information Law. I agree with your general contention that your status as a defendant or litigant does not affect your rights as a member of the public when seeking records under the Freedom of Information Law.

Lastly, you requested an advisory opinion concerning your rights under the Personal Privacy Protection Law relative to the records sought. In my view, the Personal Privacy Protection Law is inapplicable. Unlike the Freedom of Information Law, which applies to records of state and local government, the Personal Privacy Protection Law pertains only to state agencies. 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 or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

As such, the Personal Privacy Protection Law excludes "any unit of local government" from its coverage.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Fleisher, Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1910
FOIL-AO-6566

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

April 5, 1991

Ms. Mary C. Hayes
[redacted]

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

Dear Ms. Hayes:

I have received your letter of March 25 in which you requested a clarification of the Open Meetings Law.

In your capacity as a newly designated member of the Village of Northville Planning Board, you asked whether a "work session" is subject to the requirements of the Open Meetings Law and, if so, whether minutes of those gatherings must be prepared.

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 a public body 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.

I hope that I 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-6567

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

April 9, 1991

Mr. Dennis Watson
85-A-1591 L-h-5-6
Clinton Correctional Facility
Box 367B
Dannemora, NY 12929

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

Dear Mr. Watson:

I have received your letter of March 25 in which you sought assistance concerning your unsuccessful efforts in gaining access to records of the Greene County District Attorney and your attorney.

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 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 entities of state and local government. As such, I believe that records maintained by an office of a district attorney fall within the scope of the Freedom of Information Law; records of a private attorney, however, would fall beyond the requirements of that statute.

Second, when applicable, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 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, 151 AD 2d 677, 679 (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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: District Attorney, Greene County
Anthony C. Bucca

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6568

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

April 9, 1991

Mr. Bruce B. Hare
[redacted]

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

Dear Mr. Hare:

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

According to the materials attached to your letter, on February 10 you requested "the Names, Public Office Address, Titles and Annual Salary of all Management/Confidential Personnel who are or have been in the employ of the Olympic Regional Development Authority for the years 1988, 1989 and 1990". Although the receipt of your request was acknowledged on February 15, on March 6, you were informed that you must provide the Authority "with the purpose for which the requested information will be utilized".

In this regard, I offer the following comments.

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

Second, with certain exceptions, the Freedom of Information Law is does not require an agency 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 information in question is likely included among the records required to be kept pursuant to "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, a payroll record that identifies all Authority officers or employees by name, public office address, title and salary must be prepared by an agency to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, I believe that the information sought must be disclosed.

Third, in general, the reasons for which a request is made or an applicant's potential use of records are 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, section 89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, 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).

Nevertheless, 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 to any party to records."

As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since the payroll information in question was found to be available prior to the enactment of the Freedom of Information Law, I believe that it must be disclosed, irrespective of the intended use of the records. As such, I do not believe that the Authority may require that you indicate the purpose for which you requested 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Carl Mastrianni
Stanislaw L. Kornecki

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6569

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

April 9, 1991

Mr. Sam Edmondson
90-A-9397
P.O. Box 149
Attica, NY 14011

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

Dear Mr. Edmondson:

I have received your letter of March 22. In brief, you wrote that, as of that date, you had not received responses to your requests directed to the Rikers Island House of Detention for Men for copies of an "index" and your medical records.

In this regard, I offer the following comments.

First, the Rikers Island House of Detention is part of the New York City Department of Correction. I an unaware of whether there is a records access officer at Rikers Island. Assuming there is none, it is suggested that you renew your requests and direct them to the Department's designated records access officer. The records access officer has the duty of coordinating the agency's responses to requests for records. The Department's records access officer is Ms. Ruby Ryles, and her address is Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

Second, insofar as your request involved an "index", it is assumed that you were referring to what is generally characterized as a "subject matter list". If my assumption is accurate, I point out that section 87(3)(c) of the Freedom of Information Law requires that each agency shall maintain:

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

In my view, an agency's subject matter list is not required to identify each and every record of an agency, nor is a subject matter list required to refer to records pertaining to a specific individual. However, it is required to include reference, by category, to all records maintained by an agency, whether or not the records are available to the public. Further, in my opinion, the purpose of the subject matter list is to enable the public to know of the categories of records maintained by an agency. With that kind of knowledge, requests for records can be made by means of a category of records appearing in the list. As stated in regulations promulgated by the Committee on Open Government, which have the force of law: "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [see 21 NYCRR Section 1401.6(b)].

Lastly, the Freedom of Information Law pertains to agency records, including those maintained by the Department of Correction 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 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.

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

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

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

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

> Access to Patient Information Coordinator
> New York Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> Empire State Plaza
> Albany, New York 12237

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6570

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

April 9, 1991

Ms. Marilyn J. Slaatten
County Attorney
Westchester County Department of Law
Room 600
Michaelian Office Building
148 Martine Avenue
White Plains, NY 10601

Dear Ms. Slaatten:

I appreciate having received a copy of your determination of April 3 following an appeal by Robert Shaheer.

A portion of the determination refers to a request for a "subject matter list", and you indicated that the meaning of that phrase was unclear.

For purposes of clarification, the term "subject matter list" is generally used to describe the record required to be maintained by section 87(3)(c) of the Freedom of Information Law. That provision states that:

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

In my view, an agency's subject matter list is not required to identify each and every record of an agency. However, it is required to include reference, by category, to all records maintained by an agency, whether or not the records are available to the public. Further, in my opinion, the purpose of the subject matter list is to enable the public to know of the categories of records maintained by an agency. With that kind of knowledge, requests for records can be made by means of a category of records appearing in the list. Further, the regulations promulgated by the Committee on Open Government refer to that record and state in part that: "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [see 21 NYCRR Section 1401.6(b)].

I hope that the I have been of some assistance. If you would like to discuss the matter, 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-1913
FOIL-AO-6571

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

April 9, 1991

Mr. Michael Kharfen
Director
New York City Office of the Mayor
Community Assistance Unit
51 Chambers Street
New York, New York 10007

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

Dear Mr. Kharfen:

I have received your letter of March 29 in which you requested a "clarification concerning the requirement that New York City Community Boards conduct their elections of officers by open ballot."

Specifically, you referred to a statement in a decision rendered by the Appellate Division, Fourth Department, in which the Court held that: "When action is taken by a formal vote at open or executive sessions, the Freedom of Information Law and Open Meetings Law both require open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)]. Your question relates to "the definition of 'open voting', and if it requires that people attending meetings of public bodies must see how its members vote, or if it is sufficient to simply see them vote" (emphasis yours). As such, you asked whether "the use of signed paper ballots in the election of Community Board officers during an open meeting would meet the definition".

In this regard, I do not believe that the issue has been specifically addressed judicially. It might be contended, based upon the legislative declaration appearing at the beginning of the Open Meetings Law, that the public has the right to "observe" the manner in which members of public bodies vote at open meetings. The first sentence of the declaration states that:

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

While the ability to "observe the performance of public officials" might be construed to confer the right to "see how members of public bodies vote, it is clear in my view that situations arise in which the public has no right to see or watch how members of public bodies cast their votes. As you are aware, section 105(1) of the Open Meetings Law permits a public body to vote during an executive session properly held, except that "no action by formal vote shall be taken to appropriate public moneys". Further, section 106(2) of the Law pertains to minutes of executive sessions and refers to "action that is taken by formal vote" during executive sessions. Although section 87(3)(a) of the Freedom of Information Law read in conjunction with the Open Meetings Law requires that a record be prepared indicating how each member cast his or her vote, a vote taken in executive session occurs behind closed doors. Therefore, the public has the right to know how members of public bodies voted, but there would be no right to watch the members while they cast their votes.

Based upon the foregoing, it is my view that the use of "signed paper ballots" used to vote would be permissible.

I hope that I 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-6572

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

April 9, 1991

Mr. Joseph J. Cerbone
[redacted]

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

Dear Mr. Cerbone:

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

Your inquiry concerns rights of access to records maintained by the Village/Town of Mount Kisco. By way of background, APF Carting, Inc. initiated a lawsuit some time ago against the Town/Village. The lawsuit was dropped when APF and the municipality reached a settlement, the terms of which are described in a news article that you enclosed. In 1990, you sought to "review the Village files so that [you could] see for [your]self if the affidavits...which are in [your] possession are exact copies". The request was denied on October 12, 1990 by Daniel T. Vindigni, Assistant Village Manager. On March 14 of this year, you requested the same documents from Mary Alice Bennett, Assistant Village Manager, who is identified in a news article as the Village's records access officer. Ms. Bennett responded on March 21, referring you to your earlier request and stating that "[t]he one month time limit to appeal that decision has expired."

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

First, there is no indication that your recent request constituted an appeal. Further, there is nothing in the Freedom of Information Law that precludes an applicant whose initial request has been denied from seeking the records again [see e.g., Matter of Mitchell, Supreme Court, Nassau County, NYLJ, March 9, 1979].

Second, if I accurately understand the matter, the records sought consist of papers exchanged by or in possession of the parties in a lawsuit that was subsequently settled. If that is so, the two grounds for denial offered by the Village were, in my opinion, inappropriately asserted.

The first basis for the denial is that the records are subject to the attorney-client privilege. The initial ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is section 4503 of the Civil Practice Law and Rules, which concerns communications made pursuant to an attorney-client relationship and confers confidentiality with respect to those communications under certain circumstances.

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)].

From my perspective, once a document prepared for litigation has been disclosed to a person other than the client, such as the opposing party, the record could not be characterized as privileged.

The other basis for denial offered in response to your initial request was based on a contention that the records constitute "intra-agency material". Here I direct your attention to section 86(3) of the Freedom of Information Law, which 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, an opponent in a lawsuit, a commercial enterprise, is not an "agency". As such, a record prepared for the purpose of being submitted to an adversary in a lawsuit would not consist of intra-agency material.

In sum, neither of the grounds for denial to which the Village alluded would, in my opinion, have been applicable. On the contrary, under the circumstances, as I understand them, it appears that the records sought should be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mary Alice Bennett, Assistant Village Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6573

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

April 9, 1991

Mr. Theodore Belli
88-A-7772
Fishkill Correctional Facility
Beacon, NY 12508-0901

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

Dear Mr. Belli:

I have received your letters of March 1 and March 23, as well the materials attached to them. The correspondence deals with requests for records of a district attorney, the Department of Social Services, medical records maintained by a physician, and records concerning a student attending public schools.

Before dealing with issues concerning rights of access to records, several points should be noted. It is noted initially that you referred to the federal Freedom of Information Act (5 USC 552). That statute pertains to records maintained by federal agencies and is inapplicable with respect to the records in question. The New York Freedom of Information Law is applicable to agency records in this state, 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."

Further, your requests were generally made to the heads of agencies maintaining the records sought. Here I point out that requests under the Freedom of Information Law should 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 for records. Also, the Committee on Open Government

is authorized to advise with respect to the Freedom of Information Law. This office is not empowered to compel an agency to grant or deny access to records.

With regard to rights of access to the records sought, 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.

With respect to your request to the Queens County District Attorney, 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 sub-paragraphs (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.

I point out that in a 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, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

Second, medical records maintained by a private physician are not, in my opinion, subject to the Freedom of Information Law, for they are not records of an agency. However, section 18 of the Public Health Law generally grants rights of access to medical records maintained by hospitals or physicians to the subjects of the records. To obtain additional information concerning access to medical records, you may write to:

> Access to Patient Information Coordinator
> NYS Department of Health
> Division of Public Health Protection
> Corning Tower - Room 2517
> Empire State Plaza
> Albany, NY 12237

Third, with regard to records relating to public assistance maintained by the Department of Social Services, I point out that 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". Further, 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].)"

Fourth, 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.

Fifth, 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 under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes those rights."

Based on the foregoing, in the case of divorce or separation, a school district must, in my view, provide access to both natural parents, custodial and non-custodial, unless there is a legally binding document that specifically removes a parent's rights under the Buckley Amendment. I believe that a legally binding document would include a court order or other legal paper that prohibits access to educational records, or removes the parent's rights to have knowledge about his or her child's education. I point out that it has been held judicially that a non-custodial parent enjoys rights conferred by 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).

Lastly, 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)].

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-6574

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

April 11, 1991

Mr. Robert W. Greene
Assistant Managing Editor
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. Greene:

As you are aware, I have received your letter in which you requested an opinion concerning the propriety of a denial of access to records by the New York City Department of Investigation (DOI). The records sought were received or prepared in conjunction with an investigation of Mayor Dinkins' Inner City Stock Transfer.

By way of background, a review of the materials attached to your letter, including the final report of the matter by DOI's Special Deputy Commissioner, indicates that DOI initiated its investigation of the matter in October of 1989. Concurrently, a federal grand jury investigation was being conducted in the Eastern District of New York. The federal investigation was completed without the filing of any criminal charges. Further, although the Special Deputy Commissioner found that no further action would be required by DOI, the matter was referred to the Internal Revenue Service "for evaluation as to whether a civil disposition is appropriate".

According to the letter of appeal that followed the initial denial of the request, the records sought include:

> "1) transcripts of interviews and depositions of Mayor Dinkins and of all other witnesses questioned by the DOI Office of the Special Deputy Commissioner; 2) all correspondence between the mayor, his attorney, and the DOI Special Deputy; 3) the letter from the Office of the U.S. Attorney for the Eastern District of New

> York, which summarizes the results of its investigations of the Mayor's stock transfer, including back-up documents; 4) all federal grand jury testimony turned over to the DOI Special Deputy Commissioner; 5) the Secret Service analysis of the October 30, 1985 'Dear Dad' letter written by David Dinkins, Jr.; and finally, 6) an index of documents, interviews and evidence collected as part of the Special Deputy Commissioner's investigation."

The request was denied in full by John J. Kennedy, Assistant Commissioner and Records Access Officer. The denial was affirmed by Steven M. Gold, General Counsel and Records Access Appeals Officer. It is noted that Mr. Gold specified in his determination that the items identified as 3 and 4 in the appeal, which respectively involve a letter from the Office of the U.S. Attorney for the Eastern District of New York summarizing the results of its investigation and federal grand jury testimony made available to DOI, are no longer in the possession of DOI. As such, the denial relates to the remaining aspects of Newsday's request and appeal.

The affirmation of the denial by Mr. Gold cited several provisions of the Freedom of Information Law. He alluded first to the referral by the Special Deputy Commissioner to the Internal Revenue Service concerning a civil tax matter. He wrote that "[i]n light of this pending tax matter, which may well involve records compiled for law enforcement purposes during the Special Deputy Commissioner's criminal investigation", section 87(2)(e)(i) and (ii) constituted valid grounds for denial. He added that "the extent of the investigation by the Internal Revenue Service and its future direction are not known". Second, Mr. Gold cited DOI's "strong interest in protecting the confidentiality of the records of its criminal investigations in order to encourage the most candid and complete cooperation of witnesses, who have an expectation of privacy when they provide information to this Department". As such, he denied access to "private hearing transcripts and memoranda of interviews with witnesses", citing sections 87(2)(e)(iii) and 87(2)(b) of the Freedom of Information Law. Mr. Gold relied, to the extent applicable, upon "Public Officers Law [section] 87(2)(g)(iii) [which] exempts from disclosure records which are 'inter-agency or intra-agency materials which are not final agency policy or determinations'". He added that the report, which has been publicly disclosed, is DOI's "final agency policy or determination".

Mr. Gold also relied upon section 87(2)(b) concerning unwarranted invasions of personal privacy, not only as that provision relates to witnesses in this investigation, but with respect to future witnesses in other investigations. Lastly, with respect to item 5 of the appeal, which relates to a handwriting analysis by the Secret Service of a letter, section 87(2)(e)(iv) was cited.

Although each of the grounds for denial offered by Mr. Gold is relevant to a determination of rights of access to the records sought, for the following reasons, I believe that the denial is unnecessarily broad and inconsistent with the specific requirements of 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. 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 contain both accessible and deniable information. Moreover, 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. Although portions of records might be deniable, the remainder of the records should be disclosed after appropriate deletions are made.

Second, I stress that courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than a decade ago:

> "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 <u>in camera</u> 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)].

In view of Mr. Gold's statements in his affirmation of the denial, various aspects of the records sought do not, in my view, "fall squarely within the ambit" of the exceptions.

Mr. Gold relied initially upon subparagraphs (i) and (ii) of section 87(2)(e). Those provisions state 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..."

As indicated earlier, the U.S. Attorney, following an investigation by a federal grand jury, stated that no federal criminal charges would be forthcoming, and the Special Deputy Commissioner recommended that the Internal Revenue Service review the matter "for whatever civil disposition it deems appropriate". Mr. Gold referred to "this pending tax matter" without knowledge of whether the Internal Revenue Service is considering or will consider the matter, and he specified that the extent of any investigation by that agency is unknown. As such, reliance upon section 87(2)(e)(i) and (ii) appears to be based upon conjecture; there is no factual basis for asserting that disclosure would, at this juncture, interfere with an investigation or deprive a person of a "fair trial or impartial adjudication".

The second provision upon which Mr. Gold relied is section 87(2)(e)(iii), which provides that an agency may withhold records compiled for law enforcement purposes when disclosure would:

> "identify a confidential source or disclose confidential information relating to a criminal investigation..."

That provision was cited in conjunction with section 87(2)(b), which enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Mr. Gold relied upon those provisions, for a denial of access would encourage the cooperation of witnesses, "who have an expectation of privacy when they provide information" to DOI and to carry out DOI's "policy...to deny access to private hearing transcripts and memoranda of interviews with witnesses".

Section 87(2)(e)(iii) refers to the authority to withhold certain information as it relates to a "criminal investigation". It is noted that not every investigation carried out by DOI could be characterized as "criminal", for the powers and duties of the DOI and its commissioner are broad. As stated in section 803(b) of the New York City Charter:

> "The commissioner is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

Based upon the foregoing, some investigations may be criminal; others would presumably involve a variety of issues, none of which would pertain to criminal matters. A recent decision suggests that records of certain investigations by DOI are not criminal and might not have been compiled for law enforcement purposes. While I am unfamiliar with the nature of the records at issue, Stone v. Department of Investigation (First Department, Appellate Division, NYLJ, April 4, 1991) involved a request for an "investigatory file" held by DOI. Although the court upheld the denial following an in camera review of the file, the exceptions cited by the court to justify the denial were sections 87(2)(g) and 89(2)(b), which deal respectively with inter-agency and intra-agency materials and unwarranted invasions of personal privacy; there was no reference to section 87(2)(e). Again, not every investigation by DOI is apparently criminal, and not every transcript or memorandum of an interview with a witness relates to a criminal investigation. Therefore, if indeed DOI views all of its records of interviews as exempt under section 87(2)(e)(iii), that policy would, in my opinion, be inconsistent with the Freedom of Information Law as it relates to DOI's duties.

The report of the Special Deputy Commissioner suggests that the investigation in this instance was multi-faceted. I am unaware of the manner in which the investigation was conducted. Some aspects of the inquiry in my view clearly involved criminal investigation (i.e., the "indentation analysis" conducted by the U.S. Secret Service); others might not be characterized as criminal (i.e., the "Cable Votes"). Whether the various prongs of the investigation were carried out separately, or whether records concerning certain aspects of the records are distinct and segregable is unknown to me. However, those considerations may be relevant in determining the scope and applicability of section 87(2)(e)(iii) as a basis for denial.

Additionally, despite the claim that witnesses have an expectation of privacy, Mr. Gold's contention is weakened, if not eliminated, in this case in my opinion because the report of the Special Deputy Commissioner is replete with names and information concerning the circumstances under which people served as witnesses. Further, there is no indication that those persons were given promises of confidentiality. In a case involving records maintained by the New York City Police Department relating to a sexual assault, it was held that:

> "NYPD has failed to meet its burden to establish that the material sought is exempt from disclosure. While NYPD has invoked a number of exemptions

> which might justify its failure to supply the requested information, it has failed to specify with particularity the basis for its refusal...
>
> "As to the concern for the privacy of the witnesses to the assault, NYPD has not alleged that anyone was promised confidentiality in exchange for his cooperation in the investigation so as to qualify as a 'confidential source' within the meaning of the statute (Public Officers Law [section] 87[2][e][iii]" [Cornell University v. City of New York Police Department, 153 AD 2d 515, 517 (1989); motion for leave to appeal denied, 72 NY 2d 707 (1990)].

Moreover, there may have been interviews with witnesses who are not identified in the report. In those circumstances, if appropriate, names or other identifying details could be deleted, and the remainder of the documentation could be disclosed without compromising personal privacy.

Many of those who served as witnesses were public employees. While the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", that standard is flexible and often may involve subjective interpretations. Nevertheless, there are numerous decisions that pertain to the privacy of public employees. In brief, the courts have held that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980]. It appears that many of the interviews involved public employees who provided information that clearly pertained to the performance of their official duties.

Therefore, the extent to which DOI may justify withholding records on the grounds that disclosure would constitute an unwarranted invasion of personal privacy, identify a confidential source, or involve confidential information is questionable. As suggested earlier, certain identifying details or, where appropriate, other aspects of the records sought could be deleted, while the remainder of the records could be disclosed.

The remaining provision in section 87(2)(e) upon which Mr. Gold relied is subparagraph (iv), which enables an agency to withhold records compiled for law enforcement purposes which if disclosed would "reveal criminal investigative techniques or procedures, except routine techniques or procedures". That provision was cited as the basis for withholding scientific tests performed by the Secret Service in its indentation analysis of the "Dear Dad" letter. The report of the Special Deputy Commissioner discloses the results of the tests, which include analyses of indentations or impressions on paper, the ink that was used, and the age of the paper.

The leading case involving the assertion and scope of section 87(2)(e)(iv) is a decision rendered by the Court of Appeals that was cited earlier, Fink v. Lefkowitz. In a discussion of the issue, the Court held that:

> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel" [Fink, supra, at 572].

While the tests used might be unusual in the context of DOI's duties, it is unlikely in my view that disclosure could enable potential lawbreakers to act in a manner that would enable them to "evade detection".

Lastly, Mr. Gold also cited section 87(2)(g) and wrote that that provision exempts from disclosure records which are "inter-agency or intra-agency materials which are not final agency policy or determinations". That description of section 87(2)(g) is incomplete, for there may be aspects of inter-agency or intra-agency materials that must be disclosed, even though they do not consist of final agency policies or determinations.

Specifically, 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, unless a different ground for denial could 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.

Further, the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, 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)].

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

In sum, while I cannot provide specific guidance concerning the extent to which the records sought may have been withheld with justification, it appears that significant portions of the records sought should be disclosed and that DOI's blanket denial of Newsday's request was overbroad.

In an effort to enhance compliance and to obviate the need to engage in litigation, copies of this opinion will be forwarded to DOI 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: Steven M. Gold, General Counsel
John F. Kennedy, Assistant Commissioner
Nancy E. Richman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1915
FOIL-AO- 6525

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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April 11, 1991

Mr. Matthew Lee
Director and Editor
Inner City Press/Homesteaders
P.O. Box 416
Hub Station
Bronx, NY 10455

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

Dear Mr. Lee:

I have received your letter of March 28 addressed to the Committee on Open Government. As indicated above, the staff of the Committee is authorized to advise on its behalf.

In conjunction with the materials attached to your letter, you asked that certain agencies be advised of their responsibilities under the Freedom of Information Law.

The first issue appears to involve a failure on the part of agencies to respond to requests in a timely manner. In this regard, 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)].

A second issue involves minutes of meetings of public bodies. With regard to minutes, section 106 of the Open Meetings Law 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, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. While a public body may choose to prepare detailed or verbatim minutes, the Law does not require that they be so expansive. 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.

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.

The third issue involves contracts awarded by an agency and related materials, as well as other unspecified records. In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. As such, the nature of records and the effects of their disclosure are the factors used in determining rights of access. In my view, several of the grounds for denial may be relevant to such determinations.

With respect to contracts and related records, of greatest significance is section 87(2)(c), which enables an agency to withhold records that:

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

After a contract has been signed, disclosure would not impair the process by which it is reviewed or awarded. As such, contracts, as well as proposals must, in my view, generally be made available if those agreements have been consummated [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (1980)].

Also relevant may be 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 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.

Lastly, although I am unaware of the nature of the records in question, you referred in your request to "squatters" and others. In this regard, 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".

As you requested, copies of this opinion will be forwarded to the agencies in receipt of your requests.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: District Manager, Community Board #3
Appeals Officer, Community Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6576

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

April 11, 1991

Ms. Abbey Block Cash
[redacted]

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

Dear Ms. Cash:

I have received your letter of March 25 in which you requested an advisory opinion.

According to your letter, at a recent meeting of the Board of Education of the Ichabod Crane Central School District, a motion was made to ratify the contracts of several administrators employed by the District. When a resident in attendance inquired "about the specific conditions included in the contracts", the Superintendent and various board members said that "they were not permitted (i.e., they were prevented by law) to disclose the contents of the negotiated package before board approval had been concluded". You added that none of the employees who were the subjects of the contracts are part of any collective bargaining unit.

You have asked: "What law, if any, prohibits the disclosure of the terms of an administrative contract (when collective bargaining is not an issue) before they have been voted on during a public session", and whether Board members were "permitted to give out such information upon request at a board meeting". You also indicated that, following the meeting, the Superintendent distributed a news release that included information "only about percentage pay increases"; other conditions of the agreements were not disclosed.

In this regard, I offer the following contents.

First, unless a statute, an act of the State Legislature or Congress, prohibits an agency from disclosing records, nothing in the Freedom of Information Law would preclude the agency from disclosing, even when it has the authority to withhold records. Specifically, the introductory language of section 87(2) of the

Freedom of Information Law states in relevant part that: "Each agency shall...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof" that fall within the grounds for denial that follow (emphasis added). Further, the Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemptions provision contains permissible rather than mandatory agency's discretion to disclose such records...if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562-567 (1986)].

Under the circumstances that you described, I do not believe that District officials were prohibited from disclosing the terms of the proposed agreements, for there is no statute of which I am aware that would prevent those officials from disclosing.

The Superintendent apparently anticipated ratification of the agreements, for he distributed information about them following the meeting. As such, the confirmation of the contracts appears to have been pro forma. If that was so, it might be contended that the records in question would have been available under the Freedom of Information Law. The provision most relevant to the contracting process is section 87(2)(c), which enables an agency to withhold records when disclosure would "impair present or imminent contract awards or collective bargaining negotiations". In this instance, it appears that the negotiation process had ended, that the parties had reached tentative agreements, and that the only step to be taken was the pro forma act of ratifying the contracts. If that was so, disclosure at the meeting would not have impaired or in any way affected the process by which the agreements were reached.

Second, I believe that contracts between administrators and the District or the Board are accessible in their entirety under the Freedom of Information 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". Nevertheless, 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, supra; Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, supra]. Further, in one of the decisions cited above, 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, supra, 565-566).

From my perspective, administrators' contracts, like collective bargaining agreements between public employers and public employee unions, must be disclosed, for they are clearly relevant to the duties, terms and conditions of the employment of public employees.

As you requested, copies of this opinion will be sent to the persons 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:jm

cc: Ann Marie DePasquale
Patricia H. Digrigoli
Mark Hatfield
Celeste Hill
Rosalie Johnson
Donald Larson
Annette Musiker
Colleen Sterner
Mr. Giammattei
Daralene Brennan
Jerome F. Callahan
James Reese

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6577

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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April 11, 1991

Mr. Armando Guzman, Jr.
89-A-0085
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Guzman:

I have received your letter of March 29 in which you requested an advisory opinion concerning the Freedom of Information Law.

You have asked whether you may obtain from the New York City Police Department records acknowledging that a particular individual served as "an auxiliary police officer during a specific period and was in fact discharged from law enforcement as a result of drug abuse".

In this regard, I offer the following comments.

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

Second, while I believe that records indicating that an individual served as an auxiliary police officer during a certain time period, the Department, in my view, would not be obliged to disclose that the individual's service was terminated due to drug abuse. Such a disclosure in my opinion would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, sections 87(2) and 89(2)(b)].

Further, although the following remarks may be tangential to your inquiry, I point out that federal law provides that records identifiable to an individual maintained in conjunction with drug abuse programs are confidential. Specifically, 21 U.S.C. section 1175(a) states that:

> "Records of the identity, diagnosis, prognosis or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstance expressly authorized under subsection (b) of this section."

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-6578

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

April 11, 1991

Mr. Robert F. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your letter of March 27, as well as the materials attached to it. You have sought an advisory opinion concerning your requests directed to the Fairview Fire Department.

The first request involves:

> "1) Any correspondence (dated January 1, 1991 or later) to or from the New York State Employees Retirement System or the New York State Policeman's and Firemen's Retirement System which relates to the surname Reninger or a variant spelling thereof.
>
> 2) Any written data distributed (after January 1, 1991 by the Fire District Secretary, Fire District Treasurer, Deputy Fire District Treasurer or any other employee or agent of the Fairview Fire District or Fairview Fire Department) to the Board of Fire Commissioners which relates to a former Fire District employee whose surname is Reninger or a variant spelling thereof."

In the second request, you sought copies of certain "payroll registers", a retirement system adjustment form pertaining to you, and a report of corrected wages pertaining to you submitted by the District to the Internal Revenue Service. The records in question were prepared in 1985 and 1986.

In this regard, I offer the following comments.

First, an initial issue in my view, based upon a conversation with a representative of the Fire District, is whether the records sought can be located. I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. In construing that provision, 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 "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 requests, I was informed by the District official that some of the records sought are stored in boxes in various locations. Some of the boxes are marked to describe their contents; others are not. In my view, to the

extent that the records can be located by means of the District's recordkeeping system, the Department would be obliged to retrieve the records. On the other hand, if the only method of locating the records involves a search of papers that are stored unsystematically, I do not believe that agency officials would be required to search through the boxes in an effort to locate the records.

Second, insofar as the records can be located and retrieved, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 nature of the communications between the Department and the retirement systems to which you referred. Of possible relevance 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.

Assuming that the records consist of information required to be disclosed under subparagraphs (i) through (iv) of section 87(2)(g), such as factual information, and that the records pertain to you, I believe that they would be available under the Freedom of Information Law.

As you requested, enclosed is a copy of the Committee's 1990 annual report.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Thalia Wade, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6579

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

April 12, 1991

Mr. Daniel Lynch
82-A-6183
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

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

Dear Mr. Lynch:

I have received your letter of March 31 in which you requested an advisory opinion.

According to your letter, you requested copies of your clinical records from the [redacted] under the Freedom of Information Law. In response, you were informed that the Freedom of Information Law does not apply to those records, and that the applicable provision concerning your rights of access is section 33.16 of the Mental Hygiene Law. You have asked whether in such a case, officials at the Center may "ignore" the Freedom of Information Law.

In this regard, I offer the following comments.

The initial ground for denial 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 is section 33.13 of the Mental Hygiene Law. In brief, that provision exempts from public disclosure clinical records maintained by mental health facilities. Consequently, the Freedom of Information Law does not apply to those records.

As you may be aware, section 33.16 of the Mental Hygiene Law grants rights of access, with certain exceptions, to mental health records to the subjects of those records. I believe that section 33.16 is the only statute that confers rights of access to clinical records to the subjects of those records.

You have requested copies of certain advisory opinions concerning mental hygiene records. Although copies of those opinion have been enclosed, it is noted that many were prepared prior to the effective date of section 33.16, which was January 1, 1987.

Lastly, you requested copies of the regulations that the Senate and the Assembly follow under the Freedom of Information Law. This office does not maintain those records, and it is suggested that you seek them directly from the Senate and the Assembly.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6580

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

April 12, 1991

Ms. Karen Cochrane Brown
Assistant Counsel
NYS Teachers' Retirement System
10 Corporate Woods
Albany, NY 12211-2395

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

Dear Ms. Brown:

I have received your letter of April 3, in which you requested an advisory opinion confirming advice that has been offered in telephone conversations in which we have engaged.

According to your letter, it has been advised that the disclosure of records indicating the amounts of retirees' pensions is "permissible", for the "pension formula is contained in statute", salary information is public, and, "[t]herefore, theoretically, anyone could compute the amount of any public employee's pension".

In confirming the advice offered orally, I offer the following comments.

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

Second, one among the few instances in the Freedom of Information Law that requires agencies to maintain particular records relates to 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..."

As such, a payroll record that identifies all agency officers or employees by name, public office address, title and salary must be prepared and maintained by an agency to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, this Committee has advised and the courts have upheld the general principle 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Similarly, it has been held that records indicating the year in which public employees were hired and the "step" upon which employees were hired are available under the Freedom of Information Law (Steinmetz, supra).

In short, records reflective of public employees' wages are and have long been public. Moreover, a review of payroll records pertaining to public employees coupled with the statutory pension formula would in my view enable the public to ascertain the amounts of retirees' pensions. Consequently, it is my view that records reflective of retirees' pensions must be disclosed.

Lastly, even if there was no easy method of computing retirees' pensions, records indicating pensions would nonetheless in my view be public. Since those records indicate payments or benefits paid by a governmental entity to individuals solely due to their status and employment as public employees, I do not believe that it could effectively be contended that disclosure would constitute an unwarranted invasion of personal privacy, particularly in view of the examples of such invasions of privacy described in section 89(2)(b) of the Freedom of Information Law. Rather, as suggested earlier, it is my view that disclosure would result in a permissible invasion of retirees' privacy and that records indicating the amounts of former public employees' pensions must be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6581

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

April 12, 1991

Mr. David Zaire
83-A-2242
P.O. Box 2000
Pine City, NY 14871

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

Dear Mr. Zaire:

I have received your letter of March 25 in which you requested assistance.

According to your letter, you have been denied access to records by the New York City Police Department indicating the "full name and shield number" of a particular police officer "on the basis of technicalities which [you] find to be inapplicable".

In this regard, as you suggested in your letter, section 87(3)(b) of the Freedom of Information Law requires agencies to prepare payroll records that identify employees by name, public office address, title and salary. As such, I believe that the name of a particular police officer is a matter of public record. Further, the officer's shield number would in my view be available, for none of the grounds for denial enumerated in section 87(2) of the Freedom of Information Law would apparently be applicable.

I believe that I have located the response to your appeal concerning the matter. In that response, Assistant Commissioner Susan Rosenberg wrote that your appeal was untimely for it was made more than a year after the records access officer's initial denial of your request. In my view, her response was not reflective of a "technicality"; rather, it was based upon section 89(4)(a) of the Freedom of Information Law, which specifies that "any person denied access to a record may within thirty days appeal...". Further, notwithstanding the untimeliness of your appeal, Ms. Rosenberg offered you assistance by suggesting that you could direct your request for the information in question by writing to the officer's assigned command, for which she provided an address.

Under the circumstances, it is recommended that you seek the information from the officer's assigned command as suggested by Ms. Rosenberg, or that you seek the records by means of a new request.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO.6582

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

April 12, 1991

Mr. Darnell Jones
89-A-8334
Clinton Correctional Facility
Box 367B
Dannemora, NY 12929

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

Dear Mr. Jones:

I have received your letter of March 22, which reached this office on April 4. You have requested assistance in obtaining motion papers from a court.

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."

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

The preceding comments are not intended to suggest that court records are not available, for other statutes (e.g., Judiciary Law, section 255) often provide substantial rights of access to those records. It is suggested that you resubmit your request to the court clerk under provisions of an applicable statute, rather than the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6583

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

April 12, 1991

Mr. Frank DeChirico
89-T-4185
Auburn Correctional Facility
135 State Street
P.O. Box 618
Auburn, NY 13021

Dear Mr. DeChirico:

I have received your letter of April 1 in which you requested assistance.

According to your letter, you requested records from the Office of the Kings County District Attorney in July of 1990. Although the receipt of the request was acknowledged by Nicholas Sisto, you have not receive a response granting or denying the request.

In this regard, I have contacted the Office of the District Attorney on your behalf and was informed that due to changes in personnel, including Mr. Sisto's departure from that agency, that some requests have been mislaid. To ensure a prompt response, it was suggested that you resubmit your request to:

Ms. Allison Gill
Chief of Paralegal Services
Office of Kings County District Attorney
210 Joralemon Street
Brooklyn, NY 11201

For future reference, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6584

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

April 12, 1991

Mr. Rafael Robles
88-A-8275 L-H-5-5
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:

I have received your letter of April 1 in which you requested assistance concerning the Freedom of Information Law.

The first issue involves a request directed to the Office of the Kings County District Attorney in which you were informed that that office does not maintain possession of the records sought. Those records include: "Diagram of basement, E.M.S. Report, Photos of weapon [and] Photos of deceased". You were not given any information concerning which agency might maintain the records.

In this regard, under the circumstances, if the Office of the District Attorney does not possess the records, it is suggested that you request them from the law enforcement agency that prepared the records. If that agency is the New York City Police Department, a request that reasonably describes the records may be directed to Sgt. Louis J. Capasso, Records Access Officer, 1 Police Plaza, New York, NY 10038.

The second issue involves a denial of access to photos of a deceased by the Office the Chief Medical Examiner of New York City. The basis for the denial was section 87(2)(a), which enables agencies to withhold records that are specifically exempted from disclosure by statute. The statute cited in the denial is section 557(g) of the New York City Charter. If that provision was enacted by the State Legislature, I believe that it would constitute a statute that exempts the records in question from disclosure.

The remaining area of inquiry concerns the capacity to obtain criminal history records pertaining to others from the Division of Criminal Justice Services (DCJS). In this regard, 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. If a criminal history record was submitted into evidence during a public criminal proceeding, I believe that it would be available from the court in which the proceeding was conducted.

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

OML-AO 1916
FOIL-AO-6585

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

April 12, 1991

Ms. Martha L. Weale
[redacted]

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

Dear Ms. Weale:

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

According to your letter, on March 15, you requested minutes of a meeting of the Village of Addison Board of Trustees held on February 11. However, the clerk refused to honor your request. You added that the minutes of the meeting were amended to correct an error in a figure and approved at a meeting held on April 1.

You have asked that I prepare an opinion "on the fact that February 11th minutes which had to contain data regarding Proposition #1 relative to purchase of a pumper fire truck for a ballot for the March 19th election were not approved by the Village Board 'til April 1, 1991".

In this regard, your letter does not contain sufficient information to comment with respect to the specific matter quoted above, other than that minutes were apparently not approved until some six weeks after a meeting. Nevertheless, I offer the following remarks concerning minutes, their contents and requirements relating to their disclosure.

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 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. The Open Meetings Law is silent with respect to the approval of minutes, and the language of section 106(3) is clear, in that minutes must be made available "within two weeks of the date of such meeting".

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, reviewing the issue from a different vantage point, the Freedom of Information 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)]. Further, minutes often reflect final agency determinations, which are available under section 87(2)(g)(iii), irrespective of whether minutes are "approved". 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.

As you requested, copies of this opinion will be forwarded to the parties identified in your letter, and to the Village Clerk.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Editor, The Addison Post
Larry Wilson, The Star Gazette
Editor, The Leader
Peter Weale
Dan Sheridan, Editor, Steuben Courier/Advocate
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6585a

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

April 17, 1991

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 April 3 and appreciate your thanks.

In conjunction with a news article attached to your letter, you have requested an advisory opinion concerning rights of access to what you characterized as a "contingency budget" prepared by the Superintendent of the Hauppauge School District. The article refers to the plan as a proposal and indicates that the Superintendent "has not yet told the board which specific cuts are contained in his contingency budget".

Having reviewed an earlier opinion prepared at your request on December 20, 1990, concerning rights of access to the Board's "budget book", I believe that rights of access to a proposed contingency budget would be determined on the basis of the same analysis. In short, insofar as the documentation consists of "statistical or factual tabulations or data" as described in that opinion, I believe that it would be available, except to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations" pursuant to section 87(2)(c) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Conrad Knott, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6586

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

April 17, 1991

Mr. Walter A. Andrews
Ms. Katherine S. Andrews
[redacted]

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

Dear Mr. and Ms. Andrews:

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

In brief, having requested records under the Freedom of Information Law from the Cortland City School District, you were informed by the District's records access officer that:

> "As per Board Policy...there are fees attached to the process of accessing records. There is a $.20 per page copying fee for any materials. There is also a fee for the actual costs for research and compilation of any records requested" (emphasis supplied by the records access officer).

You have questioned the propriety of the Board's policy concerning the assessment of fees.

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)]. Moreover, 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 or the actual cost of reproducing other records (i.e., those that cannot be photocopied), 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 reproducting other records 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, and it has been con- firmed judicially that a fee of more than twenty-five cents per photocopy may be assessed only pursuant to authority conferred by a statute [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, research or administrative fees, unless such fees are prescribed by statute (21 NYCRR 1401.8).

In short, I believe that the policy adopted by the Board is inconsistent with the Freedom of Information Law and the regulations promulgated thereunder. Insofar as the policy authorizes the assessment of a fee other than a maximum fee of twenty-five cents per photocopy, it is, in my opinion, invalid.

As you requested, in an effort to enhance compliance, copies of this opinion will be sent to District officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Harvey Kaufman, Superintendent
Kathleen Tavarone, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6587

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

April 18, 1991

Ms. Helen Wharton Lynch
[redacted]

Dear Ms. Lynch:

I have received your letter of April 9 in which you requested medical records pertaining to a person who died in 1979.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office does not maintain custody or control over records, and a request should be made directly to the hospital that maintains the records sought.

Further, the Freedom of Information Law does not deal directly with access to medical records. Rather, section 18 of the Public Health Law pertains to access to those records by the subjects of the records or other qualified persons. In brief, that statute generally grants access to medical records to those persons.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may call (518) 474-1383 or write to:

Access to Patient Information Coordinator
New York Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6588

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

April 19, 1991

Ms. Lucia Gardner
[redacted]

Dear Ms. Gardner:

I have received your letter of April 15, which reached this office today. You have requested from the Committee on Open Government "the audio tape or tapes of the 911 calls that took place between 4PM and 5:15PM on September 19, 1984 from 78 Webster Avenue, Brooklyn, NY 11230."

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain records generally, and it has no power to compel an agency to grant or deny access to records. As such, I cannot provide the records that you requested, because this agency does not possess them. Nevertheless, I offer the following comments and suggestions.

First, a request for records under the Freedom of Information Law should be made 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. Under the circumstances, if the records in question exist, they would be maintained by the New York City Police Department. The Department's records access officer is Sgt. Louis J. Capasso, whose office is located at 1 Police Plaza, Room 110C, New York, NY 10038.

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. Since the calls in question were made more than six years ago, it is possible that the tapes have been erased or destroyed. If that is so, the records sought would not exist and the Freedom of Information Law would be inapplicable.

Third, 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.

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-6589

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

April 23, 1991

Mr. Leonard D. Fischer
84-B-1060
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. Fischer:

I have received your letter of April 2.

Your initial area of inquiry pertains to the propriety of a denial of a request for files concerning yourself maintained by a county probation department.

It is assumed that some of the material would include a pre-sentence report or reports. In this regard, 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 of federal statute..." Relevant under the circumstances, is section 390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically

> required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of section 390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in section 390.50 of the Criminal Procedure Law. Further, Matter of Thomas, 131 AD 2d 488 (1987), in my view confirms that a pre-sentence report may be made available only by a court or pursuant to an order of the court.

With respect to other records, I have contacted the Division of Probation and Correctional Alternatives. Counsel to the Division advised that, pursuant to the provisions of section 243 of the Executive Law and 9 NYCRR 348.4(k), case records are available only as authorized by law or court order.

Your second area of inquiry involves whether there is an agency responsible for enforcing the Freedom of Information Law. Although the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, no agency is empowered to enforce the Law. I point out, however, that a person denied access to records 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 ex-

> plain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

Further, if a denial is affirmed on appeal, a proceeding may be initiated to seek judicial review of the denial pursuant to 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-6590

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

April 24, 1991

Ms. F.J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received a number of your letters dated April 3.

In most of those letters, you asked whether this office has received copies of appeals and related documentation. Having reviewed our appeals files for the appropriate period, I do not believe that any of the materials in question have been forwarded to this office. As suggested in previous correspondence, several of your appeals were addressed to units of larger agencies and, therefore, may not have their own appeals officers.

The other letter refers to a request for records of the Deferred Compensation Board. In response to the request, you were informed that the fee for copies would be fifty cents per page. 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)]. Moreover, 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 or the actual cost of reproducing other records (i.e., those that cannot be photocopied), 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 reproducting other records 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, and 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 [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, research or administrative fees, unless such fees are prescribed by statute (21 NYCRR 1401.8).

In short, unless a statute authorizes the Board to charge fifty cents per photocopy, I believe that it may assess a fee of no more than twenty-five cents per photocopy.

As you requested, copies of this response will be forwarded to officials at the Deferred Compensation Board.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Christine M. Belden
Karen D. Earing

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6591

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

April 24, 1991

Ms. Debby Bock
[redacted]

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

Dear Ms. Bock:

I have received your letter of April 2.

Your initial area of inquiry involves your recourse when agencies refuse to respond to requests for records.

In this regard, 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)].

In your second question, you asked which law book contains the Freedom of Information Law. That statute is found in Public Officers Law, section 84-90. Further, the Committee on Open Government has promulgated general regulations concerning the procedural implementation of the Freedom of Information Law (21 NYCRR Part 1401). Enclosed for your review are copies of the Freedom of Information Law and the Committee's regulations.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1920
FOIL-AO- 6592

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

April 24, 1991

Ms. Marie A. Coville
Town Clerk
Town of Schroeppel
Box 9B - RD #1
Route 57A
Phoenix, NY 13135

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

Dear Ms. Coville:

I have received your letter of April 8 in which you raised a series of questions in your capacity as Town Clerk of the Town of Schroeppel.

The first concerns an executive session held by the Town Board on April 4. You wrote that, on the next day, the acting supervisor told you that the Board "had decided to give [your] full time deputy a certain duty...". However, the Board apparently took no minutes reflective of its action, and you asked how you "handle this as no minutes are ever kept".

Before responding to your specific question, it is my opinion that the discussion of the matter in question likely should not have been held during an executive session. In my view, the only ground for entry into executive session of possible relevance would have been section 105(1)(f). That provision 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..."

Insofar as the Board discussed policy relating to the duties of a person or persons serving as deputy clerk, I do not believe that there would have been a basis for conducting an executive session. On the other hand, to the extent that the discussion focused on a "particular person" and whether that person was qualified to perform certain duties, I believe that the executive session was properly held.

With respect to your question, in my opinion, minutes reflective of the Board's decision should have been prepared, and that as clerk, you have the duty to prepare them. As you are aware, section 30(1) of the Town Law specifies that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting...". In my opinion, section 30 of the Town Clerk is intended to require the presence of the clerk to take minutes in situations in which motions and resolutions are made and in which votes are taken.

To give effect to both the Open Meetings Law and section 30 of the Town Law, which imposes certain responsibilities upon a town clerk, it is suggested that there may be three options available when a matter is discussed and voted upon in executive session. First, the Town Board could permit you to attend an executive session in its entirety. Second, the Town Board could deliberate during an executive session without your presence. However, prior to any vote, you could be called into the executive session for the purpose of taking minutes in conjunction with the duties imposed by the Town Law. And third, the Town Board could deliberate toward a decision during an executive session, but return to an open meeting for the purpose of taking action.

Further, the Open Meetings Law includes requirements concerning minutes and the time within which they must be prepared and made available. 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."

Under the circumstances, assuming that there is an accurate rendition of the Board's action, it is suggested that you prepare minutes indicating the nature of the action taken, the date, and the vote of each member.

Your second question involves "the current rule on tape recorders" and how long tape recordings of meetings must be kept.

In this regard, 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."

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

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.

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].

Finally, 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.

Third, you asked whether you must keep a list of those numbers of the public who request records or require them to complete a form when requesting records. There is no requirement that any such list be prepared. Further, although an agency may require that members of the public request records in writing, the regulations promulgated by the Committee on Open Government state that records may be made available pursuant to an oral request. In short, there is no specific requirement that a list or other record be prepared to identify those who made requests under the Freedom of Information Law.

Your final question involves the number of "deputy supervisors" there may be. In this regard, since the issue does not involve the Freedom of Information Law or the Open Meetings Law, I have neither the expertise nor the authority to provide advice.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6593

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

April 24, 1991

Ms. F.J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of April 8. You have asked that I inform Sgt. Louis Capasso, Records Access Officer for the New York City Police Department, that an agency must "provide access to records during all regular business hours."

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.

A copy of this opinion will be forwarded to Sgt. Capasso.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis J. Capasso, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6594

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

April 26, 1991

Mr. Hector Dionisio
90-A-5916
Watertown Correctional Facility
P.O. Box 168
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. Dionisio:

I have received your letter of April 8. As in the case of previous correspondence, you wrote that your requests for records of the New York City Police Department have not been answered.

Having reviewed my letter to you of February 1, there is little that I can add to it. However, it is reiterated that you may apparently appeal on the ground that your request has been constructively denied. The provisions concerning the right to appeal are found in section 89(4)(a) of the Freedom of Information Law, which states in part that:

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

The person designated by the Department to determine appeals is Susan R. Rosenberg, Assistant Commissioner.

You asked "what good" an Article 78 would do. In brief, while I am unfamiliar with the records sought, a court could compel the agency to locate the records or perhaps review records in camera to determine the extent to which they must be disclosed under the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6595

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

April 26, 1991

Mr. Matthew Lee
Director and Editor
Inner City Press Community
on the Move
P.O. Box 416
Hub Station
Bronx, NY 10455

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

Dear Mr. Lee:

I have received your letter of April 8 addressed to Lieutenant Governor Stan Lundine, who serves as a member of the Committee on Open Government. As indicated above, the staff of the Committee is authorized to render advice on behalf of its members.

According to your letter, [redacted] and two officials of the New York City Department of Housing Preservation and Development (HPD) have said that "meetings and planning preceded each of these...evictions and relocations". Nevertheless, in a discussion with HPD's records access officer, Mr. Alfred Schmidt informed you that the head of the agency's relocation operations "said he had no records". It if your belief that that person maintains records concerning the matter in question. Further, you wrote that you seek to gain access to records indicating "who planned [the eviction], how it was carried out."

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 records in response to a request. Therefore, if the records sought do not exist, HPD would not be required to prepare records on your behalf containing the information sought.

Second, section 89(3) also states that when an agency indicates that it does not maintain or cannot locate a requested record, the person seeking the record may request that the agency "certify that it does not have possession of such record or that such record cannot be found after diligent search".

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

In my view, two of the grounds for denial are likely relevant with respect to rights of access to any such record.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". The records sought might contain personal information regarding tenants and others that could be withheld under section 87(2)(b), unless those persons consent to disclosure.

The other provision of significance pertains to communications prepared by HPD staff. 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. As

such, the specific contents of intra-agency materials are the factors used in determining the extent to which those records must be disclosed or may be withheld. If the records in question exist, portions might consist of factual information, instructions to staff that affect the public or final agency determinations that would be accessible, unless a different ground for denial (i.e., section 87(2)(b)] may be asserted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alfred Schmidt, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6596

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

April 26, 1991

Mr. Alfred W. Goff
[redacted]

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

Dear Mr. Goff:

Your letter of March 18 addressed to the "Commissioner of Operation" at the Department of State has been forwarded to this office. Please note that there is no "Commissioner of Operation" or bureau with that name, and that your letter reached this office nearly a month after it was mailed. The Committee on Open Government is authorized to advise with respect to the Freedom of Information Law.

According to your letter and the correspondence attached to it, you wrote to the Westchester County Attorney on February 27 and requested records relating to litigation in which you were involved and which has ended. The records sought include materials maintained by three county agencies, and you expressed particular interest in obtaining an "investigative report" prepared by two named police officers. It appears that none of the records have been disclosed.

In this regard, I offer the following comments.

First, by way of background, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, require that each agency designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests. I believe that in Westchester County, a records access officer has been designated at each County agency. Therefore, if you are interested in obtaining records from the Parks Department, for example, a request should be made to the records access officer at that agency.

Second, with regard to rights of access to the records sought, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more 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.

I point out that in a 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, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

Lastly, since some of the records sought involve those maintained by the County Attorney, I direct your attention to the first ground for denial, section 87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute". Here I point out that attorney work product and material prepared for litigation are generally exempted from

disclosure pursuant to section 3101 of the Civil Practice Law and Rules. However, I do not believe that those exemptions would apply with respect to records that have been disclosed to an adversary (i.e., yourself), or that are part of public records maintained by a court.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marilyn J. Slaaten, County Attorney
John Dillon, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6597

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

April 29, 1991

Mr. Jose Rivera
87-B-2209
P.O. Box 618
Auburn, NY 13021

Dear Mr. Rivera:

I have received your letter of April 24 in which you requested the educational background, "certification position" and the name of the employer of a particular individual.

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. This office does not maintain records generally, and we do not have the records in which you are interested.

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."

Therefore, if the information sought is not maintained by a governmental entity, the Freedom of Information Law would not apply.

If the information sought is maintained by an agency subject to the Freedom of Information Law, a request should be made to the records access officer at the agency that possesses the information. The records access officer has the duty of coordinating an agency's response to requests.

Further, I believe that an agency would be required to disclose a public employee's name and title. Rights of access to a public employee's educational background would be contingent upon the nature of the position held, and perhaps the provisions of statutes other than the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6598

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

April 30, 1991

Mr. Charles Lejcek
[redacted]

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

Dear Mr. Lejcek:

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

Your question involves the extent to which the Town of North Elba is required to provide information concerning the Lake Placid Commerce and Visitors Bureau under the Freedom of Information Law. The latter entity is also known and incorporated under the Not-for-Profit Corporation Law as the Lake Placid Chamber of Commerce, Inc. The issue apparently has arisen in conjunction with the terms of a contractual agreement between the Town and the Chamber of Commerce in which the Chamber has been engaged as an "independent contractor" and has agreed to provide certain services for the Town.

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."

While the Town is clearly an "agency", the Chamber in my view is not, for it is not a governmental entity. Based upon a review of its by-laws, the Chamber is a private entity separate and independent from government. Further, various terms of the contractual agreement between the Town and the Chamber specify their separation. For example, paragraph 3 indicates that: "All staff and personnel hired or employed by Chamber shall be employees of the Chamber and not of Government"; paragraph 5 states that the parties act "as independent contractors and this Agreement is not intended to create, nor shall it be construed as creating a joint venture or partnership." In short, I do not believe that the Chamber is required to disclose records pursuant to the Freedom of Information Law.

Second, however, any records maintained by the Town pertaining to or in conjunction with the agreement with the Chamber would be subject to rights of access 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.

Several aspects of the agreement indicate that certain records must come into the possession of the Town. Paragraph 8 refers to "Exhibit 'A'", a proposed budget concerning the rendition of services to be rendered under the contract. That paragraph also states that:

> "It is agreed by Chamber and Government that modification of said projected budget amounts and transfer and utilization of funds from one activity or serve to another exceeding the amount of ten percent (10%) of said projected amount during the term of this Agreement shall require the prior written approval of Government as hereinafter provided, such approval shall not be unreasonably withheld."

In my view, the proposed budget and any communications between the Town and the Chamber relating to the modification of the budget maintained by the Town would be public, for none of the grounds for denial would apply.

Further, paragraphs 9 and 10 of the agreement state in relevant part that:

> "Chamber further agrees to provide Government with a copy of any and all audits secured by Chamber during the term of this Agreement. Government

shall have the right to audit all of the records of Chamber relating to expenditures of funds provided by this Agreement at any time upon reasonable advance notice to Chamber. Chamber agrees to secure and maintain documentation substantiating expenditures of the funds provided herein to the satisfaction and consistent with the auditing practices and procedures utilized by Government during the term of this Agreement. All such documentation shall be made available to Government or its designated representative at any time during the term of this Agreement.

"10. Chamber agrees to provide monthly written expenditure reports to Government and a monthly oral performance report to Government during each month of this Agreement, said reports to be submitted to Government at its monthly regular 'work session' date. Said oral report will be in the nature of a narrative of program progress to date and an outline of program objectives for the future.

"In addition, Chamber agrees to submit an annual written report to Government no later than November 15th, 1990, setting forth a narrative statement of Chamber's evaluation of its performance of its duties for Government pursuant to this Agreement, said report to include a reasonable estimate of the financial impact of Chambers performance and the benefits derived by the Town of North Elba and its citizens. Selected copies of all documentation, advertisements and literature evidencing the work product of the Chamber shall be submitted."

Again, I believe that any records maintained by the Town concerning matters referenced above would be subject to the Freedom of Information Law. Moreover, none of the grounds for denial would appear to be applicable regarding those records. Consequently, any such records would in my opinion be available from 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:jm

cc: Town Board, Town of Elba
Lake Placid Chamber of Commerce, Inc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6599

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

April 30, 1991

Mr. Anthony Logallo
90-B-1210
Box 2000
Pine City, NY 14871

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

Dear Mr. Logallo:

I have received your letter of April 12 in which you questioned how you may obtain copies of "court papers", particularly those relating to your trial.

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."

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

The preceding comments are not intended to suggest that court records are not available, for other statutes (e.g., Judiciary Law, section 255) often provide substantial rights of access to those records. It is suggested that you direct requests to the clerk of the court or courts that would maintain the records in which you are interested.

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-6600

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

April 30, 1991

Mr. James E. 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. Landers:

I have received your letter of April 11 and the materials attached to it.

In brief, following the ice storm in the Rochester area in March, you sought to inspect the Town of Gates' emergency plan. You reviewed the records on April 8 and thereafter requested copies, which were made available. You wrote, however, that the plan that you were shown "was not a completed disaster plan", but rather was "a guideline published by Monroe County and distributed to the towns in August, 1990". You added that "[t]his guideline has not been completed (or even started) by the town" and that "[i]t was a plan for the Town of Brighton with the word 'Brighton' covered by 'white out' and the word 'Gates' typed in".

You asked what recourse you have if you "believe that the town put these documents in place" after receiving your request. You also asked whether the Committee on Open Government will investigate if the Town provides what you characterized as "bogus documents".

In this regard, I offer the following comments.

First, the Committee on Open Government has neither the staff nor the authority to conduct an investigation.

Second, I am unfamiliar with the requirements, if any, concerning the preparation of an emergency plan. Further, often when municipalities seek to carry out analogous functions, they ascertain whether others have carried out similar functions.

Perhaps in this instance, the plan developed by a different municipality was considered as a model and adopted by the Town of Gates. It is possible that, rather than rewriting the plan, "Gates" was substituted for "Brighton".

Third, as I understand the situation, you requested a record and the Town complied by enabling you to review the record and obtain copies. Assuming that the record disclosed is reflective of the record that you requested, it appears that the Town complied with the Freedom of Information Law.

Lastly, with respect to your allegation that the record is bogus, all that I can suggest is that you attempt to ascertain the means and date of the adoption of the plan.

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 - 6601

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

April 30, 1991

Ms. Barbara J. Capton
[redacted]

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

Dear Ms. Capton:

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

According to your letter, the City of Niagara Falls is attempting to acquire certain properties "on the premise of urban blight". Although it is your view that you have a right to know "what they have appraised [your] house value at", the Director of the City's Urban Renewal Agency denied your request on the ground that the appraisal "constitutes information developed in anticipation of possible litigation". You also wrote that questions concerning "U.D.A.G. grant qualifications, Project #'s, findings from the housing survey are never answered."

In this regard, I offer the following comments.

First, based upon a review of your correspondence, your requests were made under the federal Freedom of Information Act. That statute is applicable to records maintained by federal agencies; it would not apply to a municipal agency. The statute that is applicable is the New York Freedom of Information Law, which generally pertains to records maintained by entities of state and local government in New York.

Second, the title of the Freedom of Information Law may be somewhat misleading, for it deals with access 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. As such, if information sought does not exist in the form of a record, an agency would not be obliged to prepare a new record containing the information sought on your behalf.

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 disagree with the basis for denial offered by the Agency. In short, unless a record is prepared solely for litigation, and not for multiple purposes, which appears to be so in this instance, it would not be exempted from disclosure as material prepared for litigation [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)]. Under the circumstances, I believe that a decision rendered by the Court of Appeals, the state's highest court, is most relevant to the issue. Specifically, Murray v. Troy Urban Renewal Agency, Inc. [56 NY 2d 888 (1982)] dealt with appraisals prepared by an "independent appraiser as to the resale and reuse value of certain buildings owned by the agency" (id. at 889). The Court held that the denial of the appraiser's reports prior to the consummation of the transactions was proper, citing section 87(2)(c) of the Freedom of Information Law. That provision permits an agency to withhold records when disclosure would "impair present or imminent contract awards...". The Court pointed out, however, that "A number of the buildings have since been sold, and it is obvious that the statutory exception to disclosure no longer applies to the appraiser's reports on those buildings (id. at 890). In view of the decision rendered in Murray and based upon the facts as I understand them, the appraisal could, at this juncture, likely be withheld.

In addition to section 87(2)(c), section 87(2)(g) of the Freedom of Information Law may also be relevant. That provision pertains to inter-agency and intra-agency materials. If the appraisal was prepared by Agency officials, it could be characterized as "intra-agency material". Similarly, the Court of Appeals has found that records prepared by consultants for an agency are also considered to be intra-agency materials [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1986)]. In brief, to the extent that inter-agency or intra-agency materials consist of advice, opinion or recommendation, for example, I believe that they may be withheld. As such, an opinion regarding the value of property expressed by an appraiser could likely be withheld under section 87(2)(g) of the Freedom of Information Law.

Lastly, when a request for records is made, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond. 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: William Clark

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6602

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

April 30, 1991

Mr. Duncan T. Osborne
OutWeek
159 West 25th Street
7th Floor
New York, NY 10001

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

Dear Mr. Osborne:

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

By way of background, attached to your letter is a request dated February 15 directed to the New York City Police Department in which you sought:

> "all documents, including, but not limited to, reports, memoranda, letters, computer printouts, files, photographs, video tapes, or other written or electronic media, which describe, explain, or relate to records held by the New York City Police Department on the AIDS Coalition to Unleash Power, also known as ACT UP."

You added that the request "is for all documents held by the NYPD at police headquarters, any borough command, any precinct office, or any other office of the NYPD."

The request was denied by the Department's records access officer "on the basis that it fails to identify specific documents for a particular occurrence or incident", and he indicated that a request for "any and all documents" is "too broad" and does not comply with the Freedom of Information Law. You

appealed, "claiming [you] knew of no such exemption" and "that if the N.Y.P.D. maintained a list of records in their possession as F.O.I.L. requires responding to [your] request would be an easy matter."

You also wrote that, having met with Department representatives, you were told that "the department keeps only records pertaining to police guidelines, regulations, and reports, organized by subject matter, in their F.O.I.L. database". You have asked whether "this system complies" with the Freedom of Information Law.

In this regard, I offer the following comments.

First, 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 and identify 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, I must admit to being unfamiliar with the Department's record-keeping system. If, for example, headquarters, bureaus and precincts maintain records filed under "ACT UP" or in some manner that would permit staff to retrieve records pertaining to that organization, I believe that the request would have reasonably described the records. However, if the records requested are not maintained in a manner that enables staff to locate and retrieve them and if the records "could not be identified by retracing a path already trodden", the request would not likely have met the requirement that it reasonably describe the records sought.

Second, among the few instances in the Freedom of Information Law in which agencies must prepare a record relates to the "subject matter list". Specifically, section 87(3)(c) of the Freedom of Information Law requires that each agency shall maintain:

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

In my view, an agency's subject matter list is not required to identify each and every record of an agency. However, it is required to include reference, by category, to all records maintained by an agency, whether or not the records are available to the public. Further, in my opinion, the purpose of the subject matter list is to enable the public to know of the categories of records maintained by an agency. With that kind of knowledge, requests for record can be made by means of a category of records appearing in the list. As stated in regulations promulgated by the Committee on Open Government, which have the force of law: "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [see attached regulations, 21 NYCRR Section 1401.6(b)].

If the "F.O.I.L. database" is intended to represent the Department's subject matter list, I believe that it would be inadequate and incomplete. I point out that the Freedom of Information Law is silent with respect to the means by which records are kept or filed. As such, even when a request is specific, the ability to locate records, as suggested earlier, may be dependent upon the manner in which records are filed and the agency's ability to locate records in conjunction with its identification and retrieval system.

Under the circumstances, it is suggested that you attempt to obtain information regarding the Department's filing systems and the methods it uses to locate and retrieve records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis J. Capasso, Records Access Officer
Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6603

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

May 2, 1991

Mr. Jules B. St. Germain
[redacted]

The staff of the Committee 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. St. Germain:

I have received your letter of April 11 in which you requested an advisory opinion.

Specifically, you asked whether a member of the public seeking records under the Freedom of Information Law has the right:

> "1. To disassemble a file by removing staples holding it together or otherwise removing pages that are held together by binding, looseleaf holdings or other means.
>
> 2. To make a copy of a record with his or her own equipment by using wiring from without the building to the interior if in the opinion of the Access Officer the condition resulting constitutes a threat to public safety or the preservation of the record and/or a violation of any law or regulation relating to fire prevention.
>
> 3. To be required to make the inspection and/or a copy on a specified date between certain business hours."

In this regard, I offer the following comments.

With respect to the first question, as you are aware, section 87(2) of the Freedom of Information Law states that any person may inspect and copy accessible records. Whether a person may disassemble a file by removing staples, for instance, would in my opinion involve the discretionary authority of the custodian of the records. According to section 4-402 of the Village Law, the clerk "shall...have custody..." of village records. 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 statute cited above, I believe that Village officers are obliged "to retain and have custody" and "adequately protect" records. As such, it would appear that the custodian of the records would have the authority to enable a person to "disassemble" a file or to preclude that person from so doing.

With regard to the second question, the issue apparently arose when an applicant sought to use his own photocopy machine to reproduct village records, but was prohibited from doing so. I prepared an opinion at the request of the applicant, copies of which were sent to Village officials, advising that he could use his machine, with the possible qualification that he might be required to pay a fee for the use of electricity. In terms of your specific inquiry, it is questionable in my view whether the records access officer has the expertise to determine whether the use of the equipment in the circumstances described would indeed constitute a threat to public safety. If, however, there is a law or regulation concerning fire safety that deals with the matter and which prohibits the use of the equipment under those circumstances, the Village could likely preclude an applicant from using the equipment in the manner specified.

Lastly, with respect to requiring an applicant to inspect or copy records on a specified date between certain business hours, I believe that the issue should be determined on the basis of reasonableness in conjunction with the regulations promulgated pursuant to the Freedom of Information Law [section 89(1)(b)(iii)] by the Committee on Open Government (21 NYCRR Part 1401). Section 1401.4(a) of the regulations states that:

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

Assuming that the Village has regular business hours, that a request has been granted and that records have been retrieved and are ready to be inspected and copied, I believe that the records should be made available during regular business hours.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Emil Murtha

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1922
FOIL-AO-6604

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

May 3, 1991

Mr. Tony Bullock
Supervisor
Town of East Hampton
159 Pantigo Road
East Hampton, NY 11937

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

Dear Mr. Bullock:

I have received your letter of April 16 in which you raised a question concerning the Open Meetings Law. I point in good faith that I have also received correspondence from Helen S. Rattray and Jack Otter of the East Hampton Star relating to your letter and in which they, too, raised questions involving the Open Meetings Law, particularly in conjunction with activities of the East Hampton Town Board. Copies of this opinion and that prepared at the request of the Star will be sent to you and the Star.

With respect to the question that you raised, by way of background, you wrote that "[a]s with many town boards throughout the State, most of [y]our practices are the result of traditional ways of doing things handed down for many years". You added that the East Hampton Town Board conducts regularly scheduled, formal meetings during which votes are taken and minutes are prepared by the clerk; work sessions, which are also known as informal meetings or "brown bags", which the clerk generally does not attend or take minutes; and special meetings.

You wrote that the question relates to the Board's work sessions and indicated that:

> "The specific problem at issue here stems from the practice of going into executive session on Tuesday afternoon following the open portion of our work sessions. No minutes of these meetings are taken. No resolutions are adopted.

> The Town Clerk is not present. No roll call is taken. In short, no record really exists of the work sessions at all. They are, however, public, open meetings, held on a regular schedule and attended regularly by the press and noted in the calendar of the official newspaper."

Based on the foregoing, you raised the following question:

> "May the Town Board by voice vote after stating the nature of the items to be discussed, convene an executive session at the conclusion of a regularly scheduled work session?"

In this regard, although the question is brief and straightforward, several issues are involved. In this regard, I offer the following comments.

First, the problem in my view emanates from tradition, which may be longstanding, but which may not be consistent with law. 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 a public body 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. It is also noted that section 30 of the Town Law requires the clerk to "attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting...". Therefore, if there is a possibility that any of the events required to be recorded under section 106 will occur at a work session (including a motion to enter into executive session), I believe that the clerk must be present for the purpose of taking minutes.

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 (again, including a vote on a motion to conduct an executive session), a record, presumably minutes, must be prepared that indicates the manner in which each member cast his or her vote.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Helen S. Rattray
Jack Otter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6605

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

May 6, 1991

Mr. Jeffrey S. d'Auguste
Community School Board District 31
211 Daniel Low Terrace
Staten Island, NY 10301

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

Dear Mr. d'Auguste:

I have received your letter of April 18, as well as the documentation attached to it.

In your capacity as a member of Community School Board 31, you wrote that monitors have been assigned by the New York City Board of Education "to observe the open meetings process" of community school boards in New York City. You added that the observer assigned to the board on which you serve has been tape recording the Board's meetings and "files a report of each meeting". Having written to the Board of Education to request copies of those reports, you indicated that you have "been given only evasive answers as to whether [you] will be receiving the information."

You have requested advice concerning 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 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 division 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

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, only one of the grounds for denial would be relevant to a determination of rights of access to the records in question. Specifically, 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, unless a different ground for denial could 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.

Further, the contents of materials falling within the scope of section 87(2)(g), such as intra-agency records in this instance, represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, 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)].

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

Lastly, while it is possible that portions of the records sought may be withheld, there is no requirement that they must be withheld. 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)]. Therefore, even though the Board likely is authorized to withhold certain aspects of the records, it may choose to disclose them in their entirety.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ruth Bernstein
Fred H. Woodruff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6606

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

May 6, 1991

Mr. Markeith Boyd
90-A-9631
[redacted]

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

Dear Mr. Boyd:

I have received your letter of April 19 in which you requested assistance and advice concerning the use of the Freedom of Information Law.

You raised questions initially concerning "what to do" when requests are ignored, and you asked for a "'SAMPLE' Article 78 Proceeding".

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to 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)].

While this office does not maintain "sample" forms concerning judicial proceedings, it is likely that those materials could be obtained through your facility library.

Your second area of inquiry involves whether the Freedom of Information Law applies to the courts and offices of district attorneys. 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 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, although the courts and court records are not subject to the Freedom of Information Law, it is clear, in my view, that an office of district attorney is an "agency" required to comply with the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6607

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

May 6, 1991

Mr. Richard R. Dangler
[redacted]

Dear Mr. Dangler:

I have received a copy of your letter to John V. Doherty, Superintendent of the Yorktown Central School District, in which you requested that various records be made available to you.

Having reviewed your request, although it appears that some of the information should be disclosed (i.e., rules and procedures concerning admission into the National Honor Society), other aspects of the information are, in my view, confidential.

Although the Freedom of Information Law provides broad rights of access to records, the first ground for denial of access, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is the federal Family Educational Rights and Privacy Act (20 U.S.C. section 1232g), commonly known as the "Buckley Amendment", which governs rights of access to student records.

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" 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.

The regulations promulgated by the U.S. Department of Education pursuant to the Buckley Amendment 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..." (34 C.F.R. section 99.3)

Based upon the foregoing, as a general matter, if documentation is "directly related to a student", and it is shared by school officials with persons other than substitutes for the maker of the record (i.e., substitute teachers), it constitutes an "education record" that must be kept confidential, unless it is requested by a parent of a student who is the subject of a record, or unless the parent of a student consents to disclosure.

As such, I believe that much of the information sought is confidential and beyond the scope of public rights of access.

I hope that the foregoing serves to enhance your understanding of the law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John V. Doherty, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6608

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

May 6, 1991

Mr. Robert F. Reninger
[redacted]

Dear Mr. Reninger:

I have received your letter of April 15 in which you requested that I reconsider an opinion prepared on April 11.

The issue presented in that opinion involved whether a request directed to the Fairview Fire District reasonably described the records sought. In brief, it was advised that if District officials could locate the records by means of their recordkeeping systems, they would be obliged to retrieve them; it was also advised, however, that "if the only method of locating records involves a search of papers that are stored unsystematically", District personnel would not be required to search through a series of boxes in order to locate them.

In your recent letter, you expressed the belief that I was "misled" concerning the "actual status of old documents", for you wrote that "[t]here are perhaps no more than ten boxes of documents dating prior to 1985 and five of those relate to the period prior to 1970", and that several boxes "exclusively contain paid vouchers and are easily identifiable by merely removing the box top". Moreover, you added that the records sought "are contained on 11 x 17 computer paper and are bound in distinctively colored computer printout binders and labeled with a content and date label".

In this regard, as specified in the opinion of April 11, the Court of Appeals has held that to deny a request on the ground that it fails to reasonably describe the records, an agency must demonstrate that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)]. If your contentions are accurate, that there are few boxes that might contain the records, and that the records contained within those boxes are labeled in a manner that permits the location of the records that you requested, it does not appear that the task of

retrieving them would be onerous or require "a search of every file in the possession of the agency" (id., 250). Under the circumstances that you presented, I do not believe that it could be effectively contended that the request failed to reasonably describe the records.

It is emphasized that the earlier opinion was based in part upon information provided by District staff that was accepted in good faith. I accept your representation of the facts in good faith as well, notwithstanding my lack of personal knowledge of the means by which the records are kept.

In an effort to assist you, a copy of this response will be forwarded to the District's records access officer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thalia Wade, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1925
FOIL-AO- 6609

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

May 6, 1991

Mr. Bernard J. Blum
President
Rockaway Bay Sierra Club Task Force
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 April 11, as well as the materials attached to it. Please note that your correspondence did not reach this office until April 22.

You asked that I "evaluate the argument" made by Vincent S. Castellano, Chairman of Community Board No. 14, in a letter to Nicholas Garaufis, Counsel to the Queens Borough President, concerning the requirements imposed by the Freedom of Information Law relative to voting by members of community boards. You also raised a question concerning the adequacy of notice given prior to a "special meeting" of the Community Board.

In this regard, contentions concerning the possibility that members of community boards may elect their offices by secret ballot have been the subject of several opinions, and I do not believe that there is any need to reiterate points offered previously. However, I would like to address some of Mr. Castellano's comments.

In what is characterized as issue 4 in his letter, Mr. Castellano wrote that:

> "The members of Community Board 14 believe that disclosing a vote is 'an unwarranted invasion of personal privacy'. Refer to FOIL section 89.2(b)(iv). It specifically refers to 'personal hardship'."

The provision to which Mr. Castellano alluded represents one among a series of examples of unwarranted invasions of personal privacy and specifically refers to:

> "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..."

From my perspective, the manner in which a member of a public body casts his or her vote in the performance of that person's official duties is clearly relevant to the work of the agency, in this case a community board. Further, in view of the general intent of the Freedom of Information Law to ensure governmental accountability, there is in my opinion hardly a matter more significant to accountability than enabling the public to know how its representatives vote on a given issue, even if the issue relates to the selection of leadership of a governmental entity. In addition, there are numerous judicial decisions that pertain to the privacy of public employees. In brief, the courts have held that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. Moreover, with respect to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of their 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 Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, supra]. Again, I believe that the vote cast by a member of a community board is clearly relevant to the performance of that person's duties.

Mr. Castellano also referred to a number of opinions that authorized secret ballot voting and questioned "the sudden switch in policy". As indicated in earlier correspondence, the "open vote" provision of the Freedom of Information Law has been in effect since that statute was enacted in 1974. Insofar as policies might have authorized community boards to elect officers via secret ballot, those policies were in my view inconsistent with a requirement imposed by a statute. In my opinion, there has been no "sudden switch in policy"; rather, there has been a recent recognition of a requirement of law.

With respect to notice of meetings, section 104 of the Open Meetings Law prescribes notice requirements applicant 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 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.

It is noted that the Open Meetings Law does not require that the notice include reference to an agenda or the topics to be discussed. Further, although the Law requires that notice be provided to the news media, there is no requirement that the news media must publish or publicize notice of a meeting.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Nicholas Garaufis, Counsel to the Borough President
Vincent S. Castellano, President
Michael Kharfen, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6610

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

May 6, 1991

Mr. Joseph Schuster
[redacted]

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

Dear Mr. Schuster:

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

As I understand your comments, which relate to proceedings before the New York City Commission on Human Rights and the New York State Division of Human Rights, they do not generally involve the Freedom of Information Law. In one aspect of your letter, however, it appears that you asked whether, under the Freedom of Information Law, you may obtain records that would include answers to various legal questions. For example, you wrote: "Via Freedom of Information, can you request copies of the laws and definitions, which may prevail, so as to void...give-backs under certain circumstances".

@hile I believe that you may request a copy of a particular statute or regulation, the kind of inquiry described above in my view represents a request that an agency perform legal research. In this regard, I point out that the Freedom of Information Law is a vehicle that enables the public to request existing records. Section 89(3) of the Freedom of Information Law states in part that an agency need not create or prepare a record in response to a request. As such, agency officials are obliged to disclose existing records to the extent required by law; in my opinion, they are not required to answer questions or develop information that would reflect an interpretation of law. If my understanding of your request is accurate, you have not requested records per se; rather you have asked that an agency perform legal research and produce records indicating a certain result.

Enclosed as you requested are provisions of the Public Officers Law concerning ethical conduct by public officers and employees.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Herb Herskowitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6611

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

May 7, 1991

Mr. Dwayne Gosso
88-T-0506
Wende Road
P.O. Box 1187
Alden, NY 14004

Dear Mr. Gosso:

I have received your letters of April 29. One involves a request that certain matters relating to your treatment at a correctional facility be investigated. The other is a request that various records be provided to you by the Committee on Open Government.

In this regard, as I have explained to you in previous correspondence, the major function of this office involves providing advice concerning the Freedom of Information Law. Consequently, the Committee cannot investigate allegations pertaining to your treatment at the facility. In my view, those matters should be raised with appropriate officials at your facility or the Department of Correctional Services. Similarly, 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 records requested because this office does not possess them.

To seek records under the Freedom of Information Law, requests should be directed to the records access officers at the agencies that maintain the records in which you are interested. The records access officer has the duty of coordinating an agency's responses to requests for records.

It is noted, too, that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate and identify the requested 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-1928
FOIL-AO-6612

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

May 8, 1991

Mr. Myron Wander
[redacted]

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

Dear Mr. Wander:

As you are aware, I have received your letter of April 22.

You alluded to a telephone conversation in which we discussed certain issues relating to matters brought before a town board of ethics. You have asked that I "confirm" the following points in conjunction with consideration of "a question of violation" of a town code of ethics:

> "1. The Board of Ethics must prepare written Minutes of its meetings on the possible violation and the Minutes must be made available to the extent required by the Freedom of Information Law.
>
> 2. The Board of Ethics makes its recommendations to the Town Board, and the Town Board then makes the determination as to whether the Code of Ethics was violated.
>
> 3. The Town Board must prepare written Minutes of its meetings on the matter and the Minutes must be made available to the extent required by the Freedom of Information Law.
>
> 4. The Town Board must make its determination public.

> 5. A request can be made to the Town Board for this determination under the Freedom of Information Law and the Town Board must comply with the request within five (5) business days."

First, I believe that municipal boards of ethics generally perform in an advisory capacity. While a board of ethics might deal initially with a complaint or allegation that a code of ethics has been violated, I believe that the board would be authorized to advise or recommend to a governing body, such as a town board. The governing body would then be authorized to render a final determination.

Second, I direct your attention to the Open Meetings Law. That statute 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."

A town board of ethics in my view is subject to the Law, for it is created by a town board, 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 town. Further, the definition makes a specific reference to committees, subcommittees and "similar" bodies.

Although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally by conducted open to the public, section 105(1) of the Law lists eights grounds for entry for entry into executive session.

Relevant 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.

With regard 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, 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 no action is taken, there is no requirement that minutes of an executive session be prepared. It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. For reasons to be discussed in the ensuing commentary, records concerning a proceeding before a board of ethics or a town board might justifiably be withheld under the Freedom of Information Law, depending upon the contents of those 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. Two of the grounds for denial are, in my opinion, relevant to rights of access to the records sought.

A recommendation in the form of minutes of an executive session held by a board of ethics and transmitted to a town board could be characterized as "intra-agency material." Section 87(2)(g) of the Freedom of Information Law pertains to such materials and states that an agency may withhold records that:

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

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

recommendation and the like could in my view be withheld. As such, minutes reflective of a recommendation offered to a town board by a board of ethics could in my view likely be withheld as intra-agency material.

Also relevant is section 87(2)(b), which enables an agency to withhold records 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 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. However, 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)].

Therefore, if a town board renders a final determination to the effect that the code of ethics has been violated or that a public officer or employee has engaged in misconduct, I believe that minutes reflective of that determination, including the name of the officer or employee involved, must be disclosed. However, if it is found that the officer or employee has not violated the

code of ethics or otherwise engaged in misconduct, any such finding could in my view be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, unless the name of the person and his or her involvement in the proceeding had previously been disclosed.

Lastly, assuming that a determination is accessible under the Freedom of Information Law and is contained in minutes of a meeting, as indicated earlier, minutes must be prepared and made available in accordance with the time limitations described in section 106(3) 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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6613

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

May 8, 1991

Mr. Joseph P. Notaro
The Independent Party
11 Doral Drive
North Hills, NY 11030

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

Dear Mr. Notaro:

I have received your letter of April 18, as well as the materials attached to it. You have requested an advisory opinion with respect to "five refusals" to disclose records by the Village of North Hills.

In this regard, in order to learn more of the status of your requests, I have contacted Ms. Nancy G. Calderon, the Village's records access officer. According to Ms. Calderon, the Village has honored three of the five requests. The two remaining requests involve copies of subpoenas served upon the Village by various law enforcement agencies and portions of the Village's real property tax assessment roll that indicate the names and addresses of owners of real property in the Village. In my opinion, the former appears to have been properly denied, while the latter should have been granted.

In this regard, I offer the following comments.

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

With respect to the request for subpoenas, most relevant in my view is 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."

Ms. Calderon informed me that the subpoenas were served in conjunction with an ongoing investigation, many of the details of which are unknown to Village officials. Consequently, I believe that those records could be characterized as having been compiled for law enforcement purposes. Further, if disclosure at this juncture would interfere with an investigation, I believe that the denial would have properly been made pursuant to section 87(2)(e)(i).

The assessment roll, according to the request form that you enclosed, was denied on the basis of section 89(2)(b)(iii) of the Freedom of Information Law. By way of background, section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2)(b) describes a series of unwarranted invasions of personal privacy, including subparagraph (iii), which pertains to:

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

Therefore, if a list of names and addresses is requested for commercial or fund-raising purposes, an agency may, under most circumstances, withhold such a list. In this circumstance, however, based upon the judicial interpretation of the Freedom of Information Law, I believe that the assessment roll must be disclosed, notwithstanding the purpose for which it was requested or its intended use.

In a decision rendered some ten years ago, the issue was whether county assessment rolls were accessible under the Freedom of Information Law in computer tape format. In holding that they are, the court found that assessment rolls are public records and were public before the enactment of the Freedom of Information Law. Specifically, in Szikszay v. Buelow [436 NYS 2d 558 (1981)], it was found that:

> "An assessment roll is a public record (Real Property Tax Law [section] 516 subd. 2; General Municipal Law [section] 51; County Law [section] 208 subd. 4). It must contain the name and mailing or billing address of the owner of the parcel (Real Property Tax Law [sections] 502, 504, 9 NYCRR [section] 190-1(6)(l)). Such records are open to public inspection and copying except as otherwise provided by law (General Municipal Law [section] 51; County Law [section] 208 subd. 4). Even prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law [section] 66, repealed L.1974, c. 578, assessment rolls and related records were treated as public records, open to public inspection and copying (Sanchez v. Papontas, 32 A.D.2d 948, 303 N.Y.S.2d 711, Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 N.Y.S.2d 756; Ops. State Comptroller 1967, p. 596)" (id. at 562, 563).

Further, in discussing the issue of privacy and citing the provision dealing with lists of names and addresses, it was held that:

> "The Freedom of Information Law limits access to records where disclosure would constitute 'an unwarranted invasion of personal privacy' (Public Officers Law [section] 87 subd. 2(b), [section] 89 subd. 2(b)iii). In view of the history of public access to assessment records, and the continued availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.R.L.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted' (cf. Advisory Opns. of Committee on Public Access to Records, June 12, 1979, FOIL-AO-1164). In addition, considering the legislative purpose behind the Freedom of Information Law, it would be anomalous to permit the statute to be used as a shield by government to prevent disclosure. In this regard, Public Officers Law [section] 89 subd. 5

> specifically provides: '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.'" [id. at 563; now section 89(6)].

The court stated further that:

> "...the records in question can be viewed by any person and presumably copies of portions obtained, simply by walking into the appropriate county, city, or town office. It appears that petitioner could obtain the information he seeks if he wanted to spend the time to go through the records manually and copy the necessary information. Therefore, the balancing of interests, otherwise required, between the right of individual privacy on the one hand and the public interest in dissemination of information on the other...need not be undertaken...
>
> "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" (id.).

Based upon the foregoing, I believe that the assessment roll should be disclosed. It is noted that the same conclusion was reached by Supreme Court in Nassau County in an unreported decision [Real Estate Data, Inc. v. County of Nassau, Supreme Court, Nassau County, September 18, 1981].

I point out that 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 records the reasons for further denial, or provide access to the record sought."

The forms attached to your letter indicate that an appeal may be made to the Mayor.

Lastly, although you asked that my response be transmitted via fax machine, responses are generally not communicated in that manner when copies are forwarded to agencies, which is so in this instance. In fairness to all parties, mailing correspondence concurrently tends to enable the parties to receive it at the same time.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Lowell H. Kane, Mayor
Nancy G. Calderon, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6614

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

May 8, 1991

Mr. Paul Warloski
Staff Writer
The Malone Evening Telegram
387 East 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 Mr. Warloski:

I have received various materials from you and the Malone Central School District concerning your requests for records under the Freedom of Information Law, which have been denied in part. You have asked for an advisory opinion concerning the propriety of the denial.

By way of background, in response to an appeal following a denial of access to records contained in the personnel file of a particular teacher, Thomas G. Helmer, Superintendent of Schools, granted access to a number of records, including the teacher's application for employment, records relating to a transfer request, a tenure appointment notice, as well as other documents. However, Mr. Helmer denied access to "resumes, past disciplinary history, demotion and performance ratings as vague and that they do not specifically refer to final determinations, as referenced under the Freedom of Information Act and cases interpreting that." He added that "the denial of this request does not necessarily mean that the District maintains records of this nature for the above individual, but merely that it feels that such records, if maintained, would not be disclosable", and that "these documents, if they did exist, would represent inter-agency materials and may relate to an ongoing investigation and may, therefore, be used for litigation purposes".

In this regard, I offer the following comments.

First, with respect to the contention that the requests were "vague in that they do not specifically refer to final determinations", I point out that the Freedom of Information Law as originally enacted required an applicant to seek "identi-

fiable" 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 and identify 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)]. Therefore, assuming that the records sought can be located, even though the request did not specify particular records, I believe that the request would have met the requirement that it "reasonably describe" the records sought.

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 emphasized that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial. Based upon the language quoted in the preceding sentence, I believe that a single record may be accessible or deniable in whole or in part. Moreover, that language, in my view, imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In my opinion, two of the grounds for denial are relevant to rights of access to the records in question. However, in conjunction with the ensuing analysis, I believe that they would be accessible or deniable, perhaps in part, depending upon their contents.

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 public employees. In brief, the courts have held that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a

permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980].

I point out, too, 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)].

The other ground for denial 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. 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 access to a resume of a public employee, while sections 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 of a person who has been hired, for instance, 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 or educational accomplishments as a condition precedent to serving in an particular position, those aspects of a resume or 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 whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, such as a certification, they should be disclosed, for I believe that disclosure of those aspects of documents 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.

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)]. However, 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. Further, since the District has disclosed the teacher's application, equivalent portions of a resume would in my view be available.

With respect to records reflective of one's "disciplinary history" or demotions, 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 15, 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 request, it is my view that decisions to impose disciplinary action, a demotion or a penalty upon a teacher are

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 Co. v. School District of City of Syracuse, 430 NYS 2d 460 (1989)]. Further, to the extent that charges are dismissed, I believe that they may be withheld. As you may be aware, section 3020-a(4) of the Education Law, which pertains to situations in which tenured persons are the subjects of charges, states in part that, following a hearing: "If 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".

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

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

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

> "the citizen's right to know that public servants are held accountable whey 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 rights to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards

> of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531)
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

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

In short, insofar as the records in question include determinations reflective of disciplinary action or demotions, those records would in my opinion be accessible under the Freedom of Information Law.

A similar analysis is offered concerning access to "performance ratings", which are generally made in conjunction with evaluations of staff. Although I am unfamiliar with the form of any 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 any of the records sought contain information analogous to that described, I believe that some portions 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 a reviewer's 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 an opinion 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.

Third, I do not believe that a response can validly assert that a denial "does not necessarily mean that the District maintains [the] records" that you requested. Section 89(3) of the Freedom of Information Law states in part that, in response to a request for a record, an agency "shall make such record available to the person requesting it, [or] deny such request in writing...". The same provision also states that, upon request, an agency "shall certify that it does not have possession of such record or that such records cannot be found after diligent search". Further, while I am not suggesting that it is applicable, section 89(8) of the Freedom of Information Law provides that "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation". Based upon the provisions cited above, I believe that an agency must admit to the existence of a record, respond to a request, and grant or deny access to it.

Lastly, the possibility that the records sought may be used "for litigation purposes" is, in my view, irrelevant. When records are prepared solely for litigation, I would agree that they would be confidential [see Civil Practice Law and Rules, section 3101(d)]. However, it has been held that when records are prepared for multiple purposes, including possible eventual use in litigation, they are subject to rights conferred by the Freedom of Information Law [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

A copy of this opinion will be forwarded to Superintendent Helmer.

I hope that I have 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 G. Helmer, Superindent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6616

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

May 14, 1991

Mr. Robert Sharpe
[redacted]

Dear Mr. Sharpe:

I have received your letter of May 2, which reached this office on May 13.

Enclosed as requested is "Your Right to Know", a brochure which describes the Freedom of Information Law and contains a sample letter of request.

You asked whether certain entities are subject to the Freedom of Information Law, including the New York County District Attorney's office, the Attorney General's office, the Legal Aid Society and the Enforcement Bureau of the Office of Rent Administration.

In this regard, it is noted 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."

Based upon the foregoing, offices of district attorneys, the Attorney General and Rent Administration are in my view clearly agencies required to comply with the Freedom of Information Law.

It is my understanding that there are a variety of entities within New York that use the name "Legal Aid Society". Some are 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 agencies 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, and that it is not an "agency" subject to 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-6617
PPPL-AO-123

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

May 14, 1991

Ms. Nancy E. Richman
Senior Staff Counsel
Newsday
780 Third Avenue
New York, NY 10017

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

Dear Ms. Richman:

I have received your letter of April 23 in which you requested an advisory opinion on behalf of Newsday reporter David Zinman.

By way of background, according to a news release issued by the New York State Department of Health on December 4, 1990, a study was prepared concerning the quality of cardiac surgery in hospitals in the State. The release indicates that, in the fall of 1989 "...composite data were given to the 28 hospitals certified to perform adult open-heart surgery in New York State", and that "[t]he information derived from these data was intended to stimulate all hospitals to inquire into the cause of their outcomes and to identify ways to improve their performance". It was also stated that, "each of these was also given a computer diskette that allowed it to calculate the risk of death for patients with any combination of clinical conditions found in the study to be significant", as well as "the means to calculate the volume of cases, risk factors and risk-adjusted morality rates for their individual surgeons".

You wrote that Mr. Zinman's request for "surgery statistics regarding the State's 138 cardiac surgeons" was denied "despite the fact that the same physician-specific data that Mr. Zinman is seeking is apparently shared by the State Department of Health with the originating hospitals, who have been encouraged to share the data with the physicians most likely to refer patients to cardiac surgeons". Your assertion concerning the sharing of the data appears to be based upon the same news release to which reference was made earlier, for the release states that:

> "Patients considering cardiac surgery should discuss this new information with their physicians, in particular the cardiologist, who provides most cardiac surgery referrals.
>
> "Patients and referring physicians are expected to use this information to assist them in making decisions on the choice of institutions for cardiac procedures. Patients should be able to obtain from their doctor or hospital:
>
> 1. The performance history of each hospital.
>
> 2. The performance record of individual surgeons.
>
> 3. The risk of mortality for patients based on their individual risk factors.
>
> "Dr. Axelrod indicated that the availability of these new cardiac surgery data is expected to foster development of a new pattern for the use of information in patient decision-making in other areas of medicine as well."

It is noted that the release specified that recipients of the data should consider it carefully, for it states that "[t]he Health Department stressed that patients and physicians should use extreme caution in making judgements based on small numbers of cases" and that "[j]ust one or two cases can cause wide swings in the average of a physician or hospital doing only a small number of cases".

In affirming the denial of Mr. Zinman's initial request, the Department's Records Access Appeals Officer, Peter Slocum, wrote that "disclosure of the physician names in our data could constitute a violation of the Personal Privacy Protection Law...which...requires agencies to protect data or information which would, if made public, constitute an unwarranted invasion of personal privacy". In the denial, Mr. Slocum expressed the Department's belief in the value of the study and wrote that "this agency initiated the project, has given data to the hospitals involved so that they may use it to improve their performance, and urges that the physician-specific data be dis-

cussed by individual patients and cardiologists who may be recommending them for surgery". He added that Department officials "felt that this would allow patients to have access to valuable information without general release, which could constitute the privacy violation I refer to above".

In this regard, I offer the following comments.

Although two statutes are relevant to the disclosure of the physicians identified in the records sought, the Freedom of Information Law and the Personal Privacy Protection Law, the issue in my view focuses on whether disclosure would result in "an unwarranted invasion of personal privacy".

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. Among the grounds for denial 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 under the provisions of subdivision two of section eighty-nine of this article". Section 89(2) states that an agency may delete identifying details to protect against unwarranted invasions of personal privacy when it makes records available, and the Health Department did so in response to Mr. Zinman's request. Further, section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

The Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law,section 92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [section 92(7)]. For purposes of Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [section 92(9)].

With respect to disclosure, section 96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves when a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-none of this chapter."

It is noted, too, that section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Therefore, if a state agency cannot disclose records pursuant to section 96 of the Personal Privacy Protection Law, it is precluded from disclosing under the Freedom of Information Law. Further, the foregoing in my opinion indicates that the relationship between the Freedom of Information Law and the Personal Privacy Protection Law is somewhat circular and, consequently, the sole question in this situation is whether the disclosure of names would result in an unwarranted invasion of personal privacy.

I an aware of no judicial decision rendered under either the Freedom of Information Law or the Personal Privacy Protection Law that deals directly with the issue, and few decisions serve to provide guidance. In your appeal, you cited two decisions in support of disclosure of licensee records. The first, American Broadcasting Companies, Inc. v. Siebert [442 NYS 2d 855 (1981)], involved a request for certain information relating to the principals of check cashing businesses licensed by the State Banking Department. While the court granted access to the business addresses of those entities, it was found that residence addresses of the principals could be withheld. In the other decision, Kwitny v. McGuire [52 NY 2d 968 (1981)], the Court of Appeals held that approved pistol license applications must be disclosed. The basis of that decision was section 400.00(5) of the Penal Law, which specifies that approved applications are public records. Consequently, I believe that it is irrelevant to this situation.

A more recent, unreported decision involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provision concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". Further, 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. 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)."

As such, there is precedent for drawing a distinction between information concerning an individual in his or her business capacity as opposed to information relating to an individual in a "personal" capacity.

Further, although the federal Freedom of Information Act differs in many respects from its New York counterpart, the courts have cited and relied upon federal court decisions involving issues analogous to those arising under the Freedom of Information Law [see e.g., Fink v. Lefkowitz, 47 NY 2d 568, 572 (1979)].

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552 (b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Allicance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles V. EPA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal

> nature. Because of its intimate personal nature, information regard-ign 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 6. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have estab-lished that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the profes-sional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'pro-fessional qualifications'. 'Pro-fessional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such as unethical behavior. While protection of professional repu-tation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. De-partment of Health and Human Services, 649 F.2d 65, 69 (1981)].

The case involving facts most analogous to those presented here, Public Citizen Health Research Group v. Dept. of Health, Education and Welfare [477 F.Supp 595 (1979)], involved records maintained by a "Professional Standards Review Organization" (PSRO) that had been designated by the Department of Health, Education and Welfare (HEW). The plaintiff agreed to the deletion of information identifiable to patients and requested four categories of records, one of which involved physician profiles relating to five physicians. In describing those documents, the court stated that "Profiles are to be developed, on individual practitioners and institutions, to assist PSRO in evaluating the quality and necessity of medical services" (id., 599). Citing HEW regulations, it was noted that profiles consist of "aggregated data in formats which display patterns of health care services over a defined period of time", and that "they do not call for subjective, evaluative comments" (id.). Other records sought included hospital profiles and medical care evaluation studies and reviews "aimed at effecting specific improvements in health care delivery" (id.).

In its discussion of issues relating to privacy, the court stated that:

> "Exemption six contemplates a balancing test between an individual's interest in privacy and the general public's interest in government information. Plaintiff conceded, as it must, that the records sought fall within the 'personnel or medical files' provision of the exemption. The factors to be considered, then, with respect to both patients and physicians, are: (1) will disclosure result in an invasion of privacy and, if so, how seriously?; (2) what public interest factors favor, or oppose, disclosure and what weight should they be accorded?
>
> "Patients have a substantial interest in not being identified to the general public. Protecting the intimate details of an individual's medical file is indeed a central goal of the privacy exemption. As discussed above, however, individual identification is extremely unlikely based on the data sought by Public Citizen, even in conjunction with information already publicly available. Further, a minute risk of incidental identification does not transform disclosure of the requested

documents into an 'unwarranted invasion'...To decide otherwise would, in effect, authorize the withholding of all aggregate data concerning patients, a plainly erroneous conclusion...

"Defendants also claim a privacy interest on behalf of physicians who provide Medicare and Medicaid services. The Court finds that such an interest is implicated under FOIA. Disclosure of physician identities in profiles or MCE studies raises the prospect of misleading publicity, possibly unwarranted professional and public criticism, and damage to professional reputation.

"At the same time, this privacy invasion is not overly intrusive. Congress, in formulating exemption six, expressed particular concern over disclosure of 'highly personal' information about individuals...The revelation that a physician performs a large number of surgical procedures, or has requests for extension in hospital denied regularly, does not possess that 'intimacy' which has protected records of a person's alcoholic consumption or the legitimacy of his children...or of the state of his personal finances...Nor is the professional embarrassment suffered as likely to have consequences of an immediately personal nature as is disclosure of F.B.I. personnel names, which may lead to continuous harassment or threats of reprisal...Unlike F.B.I. agents, physicians do not rely on anonymity or secret communications as virtual conditions of their employment.

"Against these qualified values of patient and physician privacy, plaintiff presents an impressive array of affiants, experienced in the health care field, articulating important public interests that attach to disclosure of the four categories of records. Foremost is the interest in enabling the consuming public to make more fully informed choices among

> individual physicians and hospitals rendering Medicare and Medicaid services. The availability of objective comparative data from PSRO profiles and MCE studies would help patients facing a surgical procedure to evaluate the relative performance of providers; it would also assist physicians from outside the Washington, D.C. area who refer patients within the District. State agencies involved in health planning, institutional licensing, and Medicaid-Medicare evaluation would benefit from access to this information, as would academics conducting research on various health case delivery issues...Moreover, a better-informed public may be an added incentive to monitoring efforts by the PSROs themselves" (id., 603-604).

The court held further that:

> "Disclosure of a physician's identity does nothing to intrude on his confidential relationship with patients, nor does it restrict the exercise of his professional medical judgment. The conceivable adverse effect on overall physician participation does not outweigh a clear public interest in increased knowledge concerning the quality of government-funded medical services. If Congress concludes that such a hypothetically adverse impact necessitates blanket protection against disclosure, it may of course act accordingly. It has not done so.
>
> "The Court concludes that the invasion of personal privacy resulting from disclosure of certain non-patient-identifiable records is not 'clearly unwarranted' in light of the important public interests at stake" (id., 605).

I point out in good faith that the Public Citizen decision was reversed on appeal. However, the reversal was unrelated to the substantive issues relating to privacy. In brief, the reversal was based upon a finding that the entity in possession of the records, a foundation acting under contract with HEW serving as a PSRO, was not an "agency". As such, the records sought were

found to be outside the scope of the federal Freedom of Information Act [668 F.2d 537 (1981)]. Nevertheless, it appears to remain the decision involving matters most similar to those at issue here, and I know of no New York State or federal court decision in which a contrary finding was reached.

The standard in the New York Freedom of Information Law, as in the case of the federal Act, may require a balancing of interests. Whether disclosure would constitute and "unwarranted invasion of personal privacy" is subject to conflicting points of view, and reasonable people often differ with respect to issues concerning personal privacy. In this instance, the information sought, although identifiable to particular physicians, pertains solely to the performance of their duties in a profession licensed by the state. Unlike an individual's social security number or medical records identifiable to patients, which would involve unique and personal details of people's lives, the records in question are not "personal", in my opinion; rather, again, they deal with functions carried out by individuals in their capacities as licensed professionals. Further, in terms of the public interest in the records, the public is increasingly interested and concerned regarding a variety of issues relating to medical treatment, including a hospital's performance, the necessity of surgical procedures and alternatives to surgery, assessment of risks and similar matters. In short, as suggested in the decisions cited above, the exception concerning privacy likely does not extend to the kind of information at issue, which relates to persons acting in their business or professional capacities, and that, in balancing the interests, disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. Further, although the legal issue relates to considerations of privacy, the matter might be viewed as a "consumer protection" issue.

Lastly, although the Department of Health has chosen to deny access to the names of physicians identified in the record sought, as indicated earlier, it has encouraged hospitals and doctors to disclose that information, specifically "the performance of records of individual surgeons", to patients. Consequently, it appears that the Department has anticipated and in fact intends that the information denied be made available to members of the public, albeit through secondary or indirect sources. From my perspective, it is somewhat anomalous to withhold information based upon a claim that disclosure would result in an unwarranted invasion of personal privacy, while concurrently encouraging that the same information be disclosed by others.

In sum, based upon the Department's public statements and the judicial determinations discussed previously, it appears that the records sought, including those portions identifiable to physicians, should be disclosed under the Freedom of Information

Law. If that conclusion is accurate, the Personal Privacy Protection Law would permit disclosure in accordance with section 96(1)(c) of that statute..

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Slocum
David Zinman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6618

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

May 14, 1991

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, unless otherwise indicated.

Dear Mr. Hajovsky:

I have received your letter of April 22 in which you requested an advisory opinion concerning the Freedom of Information Law.

Your inquiry concerns a request for a list of names and mailing addresses of holders of licenses for the operation of newsstands on public streets in New York City. Although the Department of Consumer Affairs agreed to provide a list of the names of license holders and their newsstand addresses, the Department denied the request insofar as it involves the disclosure of mailing addresses, which are assumed to be home addresses of licensees. According to the materials attached to your letter and a conversation with Elaine Werbell, the Department's records access officer, there is an agreement between yourself and the Department, under which you have "priority" with respect to the ability to gain a license at a particular location or locations should such a site become available.

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, 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 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.

Since your request appears to be business related, it appears to have been made for a commercial purpose.

Third, as I understand the matter, the list maintained by the Department contains two addresses. One is the site of a newsstand, the location in which the licensed activity occurs. The other is a mailing address, which, according to Ms. Werbell, is invariably a home address of a licensee. In this regard, it has been consistently advised that when a licensing agency maintains two addresses, business and home, business addresses must be disclosed, for those addresses are not "personal"; rather, they relate to the location in which a licensed activity occurs. It has also been advised, however, that home addresses of licensees may have little to do with one's activities as a licensee. As stated in a decision involving a request for the identities and home addresses of licensees:

> "Respondent argues that revealing the identities of the principals of check cashing licensees would be an invasion of their personal privacy (Sec. 89[2][b][i]). With the possible exception of their home addresses, it would not. After all, the applicants sought, by license, the patronage of the public-at-large. In supplying this information to the agency, the licensees' reasonable expectation probably was that this information would be available to the public" [American Broadcasting Companies, Inc. v. Siebert, 442 NYS 2d 855, 858, (1981)].

Lastly, you contended that since home addresses appear on licenses which are displayed at newsstands, a list of licensees home addresses should be disclosed. Having raised that issue with Ms. Werbell, she expressed uncertainty as to whether the home address continues to be included on licenses displayed at newsstands. Even if that requirement continues, I believe that there is a distinction between viewing a license at one's place of business and obtaining a list of home addresses of all licensees. One's drivers license and driving record, including a licensee's home address, are readily obtainable from the Department of Motor Vehicles. Similarly, one can generally contact a licensing agency to determine whether a person has a valid license. However, a request for names and home addresses of all licensed drivers for commercial purposes could in my view be denied. In a decision rendered by the Court of Appeals, Scott, Sardano and Pomerantz, supra, it was found that an accident report must be disclosed, regardless of the purpose for which a request was made. Nevertheless, a denial of a request for all accident reports in order to develop a mailing list for commercial purposes was upheld by the State's highest court. As such, it appears that, with respect to lists of names and addresses, both the State Legislature and the courts have recognized, in essence, that the whole may be greater than the sum of its parts.

In sum, it is my view that the home addresses of licensees may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Elaine Werbell, Records Access Officer
Richard Schnader, Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6619

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

May 15, 1991

Mr. Daniel A. Jewell
91001403, NCMC
C.S. 1072
Hicksville, NY 11802

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

Dear Mr. Jewell:

I have received your letter of April 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

You have asked whether certain records must be disclosed by the Division of Parole in order that you may prepare for a final parole revocation hearing. The records in question include minutes of your preliminary hearing, copies of documentary evidence to be used against you, your parole file, the Division's Police and Procedure Manual, and "all unpublished memoranda that may bear on revocation hearings in general or [your] case in particular". You asked how you may "proceed after they ignore [your] requests."

In this regard, I offer the following comments.

First, in terms of procedure, section 8000.5(c)(3) of the Division's regulations states that:

> "Requests for access to case records prior to an appearance before the board or an authorized hearing officer, or prior to the timely perfecting of an administrative appeal, shall be made in writing to the:
>
> (i) senior parole officer in charge, or the State correctional facility where the inmate/releasee is confined; or

> (ii) director of the area parole office serving the locale where the releasee is confined in a city or county jail or correctional facility;
>
> at least ten days prior to the scheduled date of a final revocation hearing or the final date to perfect an administrative appeal, and at most one day subsequent to receipt of notice of the scheduled date of any other hearing."

In addition, section 8000.5(c)(5) and (6) provide that:

> "(5) For the purpose of access to case records, the senior parole officer or parole officer in charge at an institution, or the director of an area parole office or such other professional staff person(s) designated by one of the above persons, shall be the records access officer.
>
> (6) Review of those portions of the case record to which access is granted may take place on the day of the hearing or earlier at the:
>
> (i) State institution where the inmate/releasee is confined; or
>
> (ii) area parole office serving the locale of the city or county institution where the inmate/releasee is confined;
>
> pursuant to arrangements made for review on any workday with records access officer or his designee."

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)].

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

Relevant to your inquiry is section 8005.18 of the Division's regulations, which in subdivision (a) requires that:

> "The alleged violator and an attorney who has filed a notice of appearance shall be given written notice of the date, place and time of the hearing as soon as possible, but at least 14 days prior to the scheduled date of the hearing."

Subdivision (c) of that section states that:

> "Such notice shall include a copy of the report of violation of parole and shall identify such other documents and information that are intended to be entered into evidence and such witnesses as may be presented at the final revocation hearing."

As such, the notice provides reference to all relevant information to be used at the hearing.

With respect to your parole file, the Division's policy and procedure manual and other memoranda, I cannot offer specific advice, for I am unfamiliar with their contents. However, the following commentary may be relevant.

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". Insofar as your parole file or memoranda may identify others, there may be privacy considerations.

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 a policy and procedures manual consists of instructions to staff that affect the public or an agency's policy. Therefore, I believe that a manual would be available, unless a different basis for denial could be asserted. Further, the memoranda to which you referred and the contents of your parole file would likely fall within the scope of section 87(2)(g).

Also of potential significance regarding the manual 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 of 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 appears that most relevant is section 87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, 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 the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by those so inclined. Disclosing to unscrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility 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)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed"(id. at 573).

While I am unfamiliar with the records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. 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.

Lastly, the remaining 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 of safety of any person." To the extent that disclosure would endanger the life of safety of law enforcement officers or others, it appears that section 87(2)(f) would be applicable.

In sum, while some aspects of the records sought might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

Lastly, I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, a request should contain sufficient detail to enable agency officials to locate and identify requested records. In my view, a request for "all unpublished memoranda that may bear on revocation hearings in general" is vague and would not reasonably describe the records in question.

Enclosed are copies of portions of the Division's regulations pertaining to final revocation hearings.

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-6620

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

May 15, 1991

Mr. Edward J. Heldman
[redacted]

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

Dear Mr. Heldman:

I have received your letter of April 21 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter:

> "There have been a number of special education impartial hearings conducted pursuant to the state education Commissioner's Regulations 200.5. Specifically such hearings have been conducted as open, public hearings per 200.5(c)(7). At the commencement of such hearings, the parents of the handicapped child has [sic] waived their right of confiden-. tiality.
>
> "Given that such hearings were conducted, at the parents request, as open & public hearings, do I have the right to acquire copies of said hearing transcripts under F.O.I.L.? The school districts involved receive and retain copies of hearing transcripts."

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". In this instance, it appears that one or perhaps two federal statutes may be relevant. One is the Education of the Handicapped Act (20 USC 1412 et seq.); the other is the Family Educational Rights and Privacy Act (20 USC 1232g). Under both statutes, records identifiable to students must be kept confidential, unless parents of students consent to disclosure. Further, the regulations promulgated by the Commissioner of Education give effect to the requirements concerning confidentiality imposed by federal law. Specifically, section 200.5(f), entitled "Confidentiality of personally identifiable data", states in part that:

> "Personally identifiable data, information or records pertaining to a pupil with a handicapping condition shall not be disclosed by any officer or employee of the State Education Department or any school district, or member of a committee on special education, to any person other than the parent of such pupil, except in accordance with the provisions of section 300.571 of title 34 of the Code of Federal Regulations..."

Although the Commissioner's regulations [section 200.5(c)(2)] and federal law [20 USC 1415(d)(3)] require that a written or electronic verbatim record of a hearing must be maintained, both specify that the record is available as of right only to parties to a hearing. Having discussed the issue with representatives of the State Education Department and the U.S. Department of Education, officials of those entities agreed, as I do, that the transcript or electronic record of hearings, insofar as they are identifiable to students, are education records subject to confidentiality requirements imposed by federal law. Further, notwithstanding the fact that the hearings might have been conducted open to the public, those officials agreed that the transcript of the hearing, as well as the ensuing written determination, are confidential, unless the parents of the students provide the appropriate consent to disclose. Stated differently, while hearings must have been open, it was contended that the records prepared in conjunction with or following hearings must be kept confidential absent parental consent to disclose. As stated in the federal regulations (34 CFR 300.571):

"(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this tile."

Part 99 is 34 CFR 99 and represents the regulations promulgated by the U.S. Department of Education under the federal Family Educational Rights and Privacy Act.

In sum, based upon the requirements of federal law, it appears that hearing transcripts identifiable to students cannot be disclosed unless the parents of the students consent to such disclosure.

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-6621

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

May 15, 1991

Ms. Terri Anne Ference
[redacted]

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

Dear Ms. Ference:

I have received your letter of April 25 in which you requested assistance in obtaining records discussed at "budget worksessions" by the Fairport School District Board of Education.

Specifically, you requested "the statistical and factual tabulations of the proposed budget" that were discussed at meetings of the Board. Both the Superintendent and the District's attorney denied access on the ground that the documentation consists of "non-final policy determinations".

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."

Any such, although documents might be characterized as drafts or worksheets, for example, I believe that they constitute "records" as defined by the Freedom of Information Law. Further, it has been held that "work papers," notes and similar materials are "records" subject to rights of access granted by the Freedom of Information Law [see e.g., Polansky v. Regan, 440 NYS 2d 356, 81 AD 2d 102 (1981); Steele v. NYS Department of Health, 464 NYS 2d 925 (1983)].

Second, as a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is also noted that the introductory language of section 87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record may be accessible or deniable in whole or in part. That phrase, in my view, also imposes an obligation upon agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Therefore, even though some aspects of a records 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 area 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. 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, even though statistical or factual tabulations are not reflective of final policy determinations, I believe that they would be independently available under section 87(2)(g)(i), unless a different ground for denial [i.e., section 87(2)(c)] may be asserted.

In a case involving similar records, so-called "budget worksheets" maintained by the State Division of the Budget, it was held that numerical figures, including estimates and projections 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 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 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 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 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, the 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 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 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.

Lastly, you referred to a bill that has been passed by the Assembly and is now before the Senate (S.816). If enacted, the legislation would require, with certain exceptions, that: "A record that is the subject of a discussion conducted by a public body at an open meeting shall be available to the public, prior to or at the meeting during which such record is discussed...". In my view, enactment of the legislation would diminish much of the frustration that you described.

As you requested, 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:jm

cc: Paul R. Doyle, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6622

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

May 16, 1991

Mr. Howard R. Schneider
[redacted]

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

Dear Mr. Schneider:

I have received your letter of April 28, as well as a copy of a request made under the Freedom of Information Law directed to the Superintendent of the Amagansett School District. Although your request was made more than a month ago, you wrote that, as of the date of your letter, you had received no response. As such, you asked for assistance in the matter.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in 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)].

Second, having reviewed your request, it is emphasized that the Freedom of Information Law pertains to existing records. Therefore, unless specific direction is provided to the contrary, an agency need not create or prepare a new record in response to a request. Similarly, while agency officials may respond to questions, the Freedom of Information Law merely requires that they disclose existing records to the extent required by law. In the context of your request, if, for example, there are no records indicating the average number of sick days for particular age groups of children in certain months, District officials would not be obliged to analyze their records for the purpose of computing a figure.

I point out that one of the few instances in which an agency must create a record involves salary information. 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..."

Lastly, with one exception, insofar as the information sought exists in the form of a record or records, I believe that it would be accessible under the Freedom of Information Law. That exception involves the final aspect of your request, in

which you sought the names and addresses of children who do not reside in Amagansett. Relevant to that issue is the federal Family Educational Rights and Privacy Act (20 USC 1232g), which generally prohibits the disclosure of records identifiable to students, unless the parents of the students consent to disclosure. Absent such consent, unless the District has adopted a policy regarding the disclosure of "directory information" pertaining to students, I believe that the District would be precluded from disclosing the names and addresses of students.

In an effort to enhance compliance with the Freedom of Information Law, 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:jm

cc: Harold Carr, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6623

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

May 16, 1991

Mr. Anthony Logallo
90-B-1210
Box 2000
Pine City, NY 14871

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

Dear Mr. Logallo:

I have received your letter of April 25 in which you raised questions concerning access to records.

You wrote that you are attempting to obtain records pertaining to yourself maintained by a variety of entities since you were six years old. The entities include facilities for children and youths, as well as a public high school. The records sought include medical, mental health, education and similar records. Further, you asked whether fees for copies of those records must be waived.

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 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."

Other than the public high school to which you referred, it is unclear whether the other entities are governmental. If they are not, the Freedom of Information Law would not apply.

Second, rights of access to the records in question appear to be governed not by the Freedom of Information Law, but rather by other statutes. Further, while you may enjoy rights of access to records in certain circumstances due to your status as the subject of the records, they are generally confidential with respect to the public.

With regard to records maintained by a children's or youth facility, whether public or private, it appears that the applicable statute 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."

Based on the foregoing, I do not believe that records maintained by entities having duties relating to the classes of children described at the beginning of section 372 of the Social Services Law can be disclosed, unless authorization to disclose is conferred by a court, by the Department of Social Services or, where appropriate, by the Division for Youth.

Medical records are generally available to the subject of those records by seeking them under section 18 of the Public Health Law from the provider of medical services, such as a physician or 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 State Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> Empire State Plaza
> Albany, New York 12237

Similarly, although mental health records are generally confidential under section 33.13 of the Mental Health Law, section 33.16 of the Mental Hygiene Law generally requires that a mental hygiene facility disclose records to the subject of the records.

Lastly, with respect to records maintained by a high school, rights of access to student records are governed by a provision of federal law, the Family Educational Rights and Privacy Act (20 USC 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 institutions, such as school districts. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record", a term that is broadly defined, that identifies a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over, an "eligible student", similarly waives his or her right to confidentiality. Concurrently, parents of students under the age of eighteen or students eighteen years of age or older or who attend institutions of higher education generally have rights of access to education records pertaining to those students. As such, I believe that you would generally have the right to obtain education records pertaining to you that are maintained by a public high school.

Although education records pertaining to you must generally be disclosed, I point out that rights conferred by the Buckley Amendment do not apply to:

> "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..."

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 - 1930
FOIL-AO- 6624

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

May 16, 1991

Mr. Ronald F. Kovacs
[redacted]

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

Dear Mr. Kovacs:

I have received your letter of April 26, as well as the correspondence attached to it. You have questioned the manner in which the West Islip School District has responded to requests made under the Freedom of Information Law, and it is your view that District officials have "routinely...given incorrect and/or incomplete responses in an untimely manner" and have adopted "an approach that continually relies on misinterpretations and questionable sources of delay".

You have requested advice in order to ensure that District officials respond appropriately to requests. You also requested that I "[a]sk the District to provide a complete accounting of their actions relative to these requests and advise them that unacceptable actions will not be tolerated in the future." Although advice will be offered in the ensuing commentary, it is emphasized that the Committee on Open Government and its staff are authorized to advise with respect to the Freedom of Information and Open Meetings Laws. This office cannot compel an agency to account for its actions, nor is it empowered to require that an agency grant or deny access to records or that entities hold open meetings.

The initial item of correspondence attached to your letter, which is dated March 22, involves notices of meetings, and you asked that the District "advise [you] of the specifics of [its] compliance with [the Open Meetings Law], detailing the frequency and locations of past and future postings of committee and subcommittee meetings". In addition, you requested records concerning the time and place of "all presently scheduled committee and subcommittee meetings, i.e., Finance, Public Relations, Middle School, Citizens Advisory, etc."

In response to the request, Ms. Barbara D. Milne, the District's records access officer, indicated that the Finance Committee meets each Wednesday before the Board meetings at 7:30 p.m., that all other committee meetings are scheduled "when necessary", and that the dates and times of those meetings "will be posted in the Library, Post Office and District Office". In a later response, Ms. Milne wrote that certain committees are not subject to the Open Meetings Law.

Since it is your view that the Open Meetings Law is applicable to "all school board appointed committees and subcommittees, I point out that there appears to be a distinction in the applicability of the Law with respect to committees and subcommittees consisting of members of the Board of Education, as opposed to other entities, such as citizens advisory committees.

Recent decisions indicate generally that entities consisting of persons other than members of public bodies 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, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group 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)].

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 a committee consisting of members 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.

When the Open Meetings Law is applicable, notice must be given prior to meetings in accordance with section 104 of the Law. 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..."

It is also noted that if an entity, such as a citizens advisory body, which is not subject to the Open Meetings Law, holds its meetings on school property, section 414 of the Education Law may require that its meetings be held in public. That provision enables a board of education to authorize school property to be used for certain purposes, such as:

> "For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public" [section 414(1)(c)].

With respect to the specifics of your request of March 22, if the district maintains records indicating the times and locations of previous meetings, whether held pursuant to the Open Meetings Law or otherwise, I believe that those records would be available. Such items would consist of factual information accessible under section 87(2)(g)(i) of the Freedom of Information Law. With respect to future meetings, unless there is an existing schedule of the times and locations of those meetings, Ms. Milne's response appears to have been proper. When the dates of those meetings are scheduled, the District's obligation involves providing notice as required by section 104 of the Open Meetings Law.

The second issue involves access to certain bills and the manner in which District officials responded to your requests.

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Therefore, if an agency does not maintain requested records, it can neither grant nor deny access to those records. Further, section 89(3) of the Freedom of Information Law states in part that an agency generally need not create a record in response to a request. As such, insofar as your requests involved information or records that did not exist or were not yet in possession of the District, I do not believe that the Freedom of Information Law would have been applicable or that District officials would have been obliged to create or prepare records on your behalf.

Lastly, with respect to the timeliness of responses to requests, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond. 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 and that the foregoing serves to clarify your understanding of the Freedom of Information and Open Meetings Laws. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Owen Johnson
Dr. William P. Bernhard
Barbara D. Milne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6625

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

May 17, 1991

Mr. Thomas Porcella
88-T-2384
Box 338
Napanoch, NY 12458-0338

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

Dear Mr. Porcella:

I have received your letter of April 30 in which you requested assistance in obtaining medical records pertaining to you from a hospital.

In this regard, I offer the following comments.

First, the Freedom of Information Law, the statute within the Committee's advisory jurisdiction, is applicable to records of an agency, and section 86(3) of the Law defines "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law includes within its scope records of entities of state and local government. The Freedom of Information Law would not apply to records maintained by a private hospital, for example.

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 a hospital or physician. Therefore, it is suggested that you might renew your request, citing section 18 of the Public Health Law.

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

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-6626

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

May 17, 1991

Mr. Josef M. Foster
90-A-1915
Clinton Correctional Facility
Box 367A
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. Foster:

I have received your letter of May 2 concerning a request for records directed to the New York City Police Department. You wrote that the Department "has failed to provide...a response of denial or a future time when they would comply with such request or make denial available...".

In this regard, 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)].

Further, it is noted that a recent division 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

For your information, the person designated to determine appeals for the Police Department is Ms. Susan R. Rosenberg, Assistant Commissioner for Legal Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Sgt. Louis J. Capasso, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6627

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

May 17, 1991

Mr. Paul Barrios
88-A-9472
Washington Correctional Facility
Lock 11 Road
P.O. Box 180
Comstock, NY 12821-0180

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

Dear Mr. Barrios:

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

You have requested assistance concerning a failure by the Office of Court Administration to respond to a request, which involves information reflective of the "specific date" of an attorney's admission to the bar.

In this regard, while I am unaware of the status of your request, I believe that the person who heads the office in possession of the records in question is Mr. Samuel Younger. If you have not yet received a response to your request, it is suggested that you resubmit the request directly to Mr. Younger.

Since you referred in your correspondence to a "specific date" of an attorney's admission, I have been informed by the Office of Court Administration that it does not maintain records that include the exact dates; rather, its records refer to the year of admission. I have been informed, however, that records indicating the exact dates of admission, as well as records concerning attorney discipline, are maintained by the Appellate Division in which an attorney has been admitted.

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 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, if you do not receive a timely response, I believe that the person designated to determine appeals under the Freedom of Information Law at the Office of Court Administration is Michael Colodner, Counsel to the agency.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6628

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

May 17, 1991

Mr. John M. Crotty
Associate Counsel
NYS Public Employment Relations Board
50 Wolf Road
Albany, New York 12205

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

Dear Mr. Crotty:

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

By way of background, the materials indicate that a public hearing was conducted at the Buffalo office of the Public Employment Relations Board (PERB) during which a certified shorthand reporter recorded testimony taken on that date. The testimony was given by Buffalo Police Commissioner Ralph Degenhart. At the conclusion of the day on which the hearing was conducted, the parties advised PERB's administrative law judge (ALJ) that they sought to engage in settlement discussions and in fact later informed the ALJ that the case had been settled. As such, production of a transcript became unnecessary, and in an effort to avoid the cost of transcription, no transcript was prepared.

Following the hearing, a reporter for the Buffalo News requested a transcript of the hearing, and having been contacted by the attorney for the News, the hearing stenographer "advised that he is maintaining a computer disc of his stenotyped notes of the testimony of Commissioner Degenhart taken on February 11, 1991 but that he cannot provide a copy of the notes or make a hard copy transcript without the authorization of PERB". As such, the attorney has contended that the stenographer is in possession of a record produced on behalf of PERB, and that it is an agency record subject to the Freedom of Information Law.

A related issue raised by R. Peter Morrow, III, Acting Corporation Counsel for the City of Buffalo, involves the claim that "[t]he hearing in question concerned personnel records maintained by the City of Buffalo Police Department and used to evaluate performance towards continued employment or promotion". He wrote that the records and testimony related to them were produced pursuant to a subpoena issued by PERB, and he contends that they are "subject to the full protection of Section 50-a" of the Civil Rights Law and, therefore, are exempted from disclosure under section 87(2)(a) of the Freedom of Information Law. He also contended that "the Board is now subject itself to the limitations of section 50-a because it is an agency of the state referred to in subdivision 1 thereof", and that, consequently, "the Board is directly prohibited from releasing such information unless mandated otherwise by lawful court order".

In conjunction with the foregoing, you have requested an advisory opinion with respect to the following issues:

> "1. Whether the hearing reporter's stenographic notes and/or computer disk which stores those notes is subject to the Freedom of Information Law (FOIL);
>
> 2. Whether and under what circumstances PERB is required to prepare a transcript of the hearing or to otherwise reformat the stenographic notes or computer disk; and
>
> 3. Whether and to what extent disclosure of the subject personnel records and any testimony at the hearing related thereto is prohibited by [section] 50-a of the New York Civil Rights Law or exempt from disclosure under any provision of FOIL or other controlling law or regulation."

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."

The Court of Appeals has construed the definition quoted above 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. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986)], and the definition specifically includes computer tapes and discs within its scope. Further, it was held more than a decade ago that "[i]nformation 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); Brownstone Publishers, Inc. v. New York City Department of Buildings, 560 NYS 2d 642, ___ AD 2d ___ (1990)]. Although stenographic notes and/or a computer disc may be in the physical custody of the stenographer, such materials were produced for PERB and, therefore, would in my view constitute agency records. In addition, the statement by the stenographer to the attorney for the News suggests that, while he maintains a computer disc of his stenotyped notes, he considers the material to be in control of PERB. In short, based upon the definition of "record", the purpose for which the notes were prepared and the facts as described in the correspondence, it is my view that the notes of the testimony constitute an agency record subject to rights of access conferred by the Freedom of Information Law, irrespective of its physical form.

Second, as a general matter, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states that an agency need not create a record in response to a request. If the documentation consists of stenographic notes typed in shorthand, it is my understanding that the notes ordinarily cannot be read or transcribed by anyone other than the stenographer. In that circumstance, although the notes may constitute "records", they would likely be of no utility unless they are later transcribed. If the preparation of a transcript under the circumstances would involve a process analogous to typing a transcript from shorthand notes, that process would in my opinion involve creating a new record, a step that is not required to be taken.

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 or extracted 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, be 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 or print out information that would otherwise be available.

While I am not familiar with the technology employed in this instance, the stenographer indicated that the notes are maintained on a computer disc. If the stenographer has the capacity to transfer the information stored on the disc onto paper (i.e., a "printout") by means of a few keystrokes or commands, I believe that there would be an obligation to do so, assuming that the record is available under the Freedom of Information Law.

It is noted that a recent decision cited earlier, Brownstone, supra, dealt with an agency's obligation to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so. As stated by the Appellate Division, First Department:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1][b][iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> "POL [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano

> & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" (id. 642-643).

In this instance, the information requested is not nearly as voluminous as that sought in Brownstone, and the transfer would presumably involve printing out information stored on a disc onto paper.

Another conceivable outcome of printing out the electronically stored notes, if that is feasible, would be a document that is not entirely verbatim, but rather is a combination of testimony with abbreviations or symbols used by a stenographer. In that eventuality, if the record is accessible, I do not believe that PERB or the stenographer would be required by the Freedom of Information Law to "translate" the abbreviations or symbols. Nevertheless, if PERB and the News agreed to do so, the stenographer could be engaged, based upon a fee or contractual agreement under which the News would pay a fee, to prepare a verbatim account of the testimony or to translate what otherwise cannot be read.

The third and final area of inquiry pertains to the effect of section 50-a of the Civil Rights Law upon rights of access to the transcript of testimony. Although your specific question referred to "personnel records and any testimony at the hearing", the request by the News pertains only to the record of testimony. As such, in conjunction with our telephone conversation, it was agreed that my remarks would pertain only to the testimony, and not to exhibits and other records that might have been subpoenaed, introduced as evidence or otherwise produced for the hearing.

Subdivisions (1) and (2) of section 50-a of the Civil Rights Law state in relevant part that:

> "1. All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces of individuals as police officers...shall be considered confidential

> and not subject to inspection or review without the express written consent of such police officer...except as may be mandated by lawful court order.
>
> 2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review."

In my opinion, for several reasons, section 50-a is inapplicable.

First, I do not believe that PERB is subject to the requirements of section 50-a. As stated above, that provision pertains to certain personnel records "under the control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces...". While PERB might be characterized as an "agency or department of the state", I believe that, in the context of subdivision (1) of section 50-a, the term "police" modifies that phrase. PERB is not a "police agency or department of the state", and I do not believe that section 50-a would serve as a bar to its authority to disclose under the Freedom of Information Law.

Second, prior to the hearing, PERB sought to subpoena records apparently subject to section 50-a from the City of Buffalo Police Department. In response, it appears that the procedure described in subdivision (2) of section 50-a was implemented, for you attached a copy of an order issued by an Erie County Supreme Court Judge directing the City to comply with PERB's subpoena. As such, although it did not involve the record sought by the News (the record of testimony by the Police Commissioner), an order to disclose to PERB was issued in accordance with section 50-a.

Third, even if section 50-a does apply, and I do not believe that is so, the testimony occurred during a public proceeding during which the public was or could have been in attendance. In a case involving a request for records compiled by a district attorney in the course of an investigation that culminated in petitioner's conviction, it was held by the Appellate Division, First Department, 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...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)].

In another decision that dealt with different but related matters, the Court of Appeals considered the issue of "whether there is any basis for setting aside the strong public policy in this State of public access to judicial and administrative proceedings" [Herald Co. v. Weisenberg, 59 NY 2d 378, 381 (1983)] and held that "[a]n unemployment insurance hearing is presumed to be open, and may not be closed to the public unless there is demonstrated a compelling reason for closure and only after the affected members of the news media are given an opportunity to be heard" (id., 380). One of the questions before the Court involved the impact of section 537 of the Labor Law, which requires that certain records be kept confidential and states in relevant part that:

> "[i]nformation acquired from employers and employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court, in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law".

The court found that "[s]ection 537 does not require closure of hearings at which claimants present their cases for unemployment benefits", and that "section 537 concerns only disclosure of information acquired through the reporting requirements of article 18, and not closure of hearings..." (id., 382). Since the hearing was erroneously closed, the court found that the petitioner "is entitled to a transcript of the hearing", specifying that "[i]nasmuch as no examination was conducted at the time into the reasons for barring public to specific portions of the testimony, however, the affected parties should be given an opportunity to make such a showing, if they so desire" (id., 384).

In the instant situation, as indicated earlier, the hearing was conducted in public, documentation was apparently reviewed pursuant to section 50-a(2) of the Civil Rights Law, and no effort was made to demonstrate that there was any reason to close the hearing. As such, any claim that certain aspects of the testimony should be confidential appears to have been effectively waived.

In sum, under the circumstances, I believe that the transcript of testimony, subject to the considerations discussed earlier concerning its preparation, is public and should be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: R. Peter Morrow, III
John H. Stenger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6629

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

May 17, 1991

Mrs. Jeanette Cassatt
Progressive Answering Service
1327 Niagara Street
Niagara Falls, NY 14303

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

Dear Ms. Cassatt:

I have received your letter of April 29, as well as the correspondence attached to it.

Your inquiry involves a request for records from the Niagara Falls Urban Renewal Agency. Specifically, citing "the provisions of the Freedom of Information Act, 5 U.S.C. 552, and/or Public Law 93-579: the Privacy Act of 1974", you requested "property appraisals" prepared for the Agency concerning your property, as well as correspondence with federal agencies pertaining to yourself and your business. In his denial of your request, the Agency's director indicated that his office "has not corresponded with any Federal agencies regarding you, your business, or your property on Niagara Street", and that "[a]ppraisal information is not subject to disclosure under FOIA as it constitutes information developed in anticipation of possible litigation".

You have asked whether you are "entitled to this information". In this regard, I offer the following comments.

First, the statutes that you cited, the federal Freedom of Information and Privacy Acts, pertain to records maintained by federal agencies. Therefore, those statutes do not apply to records of a municipal urban renewal agency. However, the New York counterpart of the federal Act, the Freedom of Information Law, is generally applicable to entities of state and local government in New York. Further, it is clear in my view that an urban renewal agency is subject to 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.

I disagree with the basis for denial offered by the Agency. In short, unless a record is prepared solely for litigation, and not for multiple purposes, which appears to be so in this instance, it would not be exempted from disclosure as material prepared for litigation [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)]. Under the circumstances, I believe that a decision rendered by the Court of Appeals, the state's highest court, is most relevant to the issue. Specifically, Murray v. Troy Urban Renewal Agency, Inc. [56 NY 2d 888 (1982)] dealt with appraisals prepared by an "independent appraiser as to the resale and reuse value of certain buildings owned by the agency" (id. at 889). The Court held that the denial of the appraiser's reports prior to the consummation of the transactions was proper, citing section 87(2)(c) of the Freedom of Information Law. That provision permits an agency to withhold records when disclosure would "impair present or imminent contract awards...". The Court pointed out, however, that "A number of the buildings have since been sold, and it is obvious that the statutory exception to disclosure no longer applies to the appraiser's reports on those buildings (id. at 890). In view of the decision rendered in Murray and based upon the facts as I understand them, the appraisal could, at this juncture, likely be withheld.

In addition to section 87(2)(c), section 87(2)(g) of the Freedom of Information Law may also be relevant. That provision pertains to inter-agency and intra-agency materials. If the appraisal was prepared by Agency officials, it could be characterized as "intra-agency material". Similarly, the Court of Appeals has found that records prepared by consultants for an agency are also considered to be intra-agency materials [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1986)]. In brief, to the extent that inter-agency or intra-agency materials consist of advice, opinion or recommendation, for example, I believe that they may be withheld. As such, an opinion regarding the value of property expressed by an appraiser could likely be withheld under section 87(2)(g) of the Freedom of Information Law.

I hope that the foregoing serves to clarify the law and 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: William Clark, Director
Richard J. Hogan, Jr., Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1630

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

May 17, 1991

Mr. Walter A. Andrews
Ms. Katherine S. Andrews
[redacted]

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

Dear Mr. and Ms. Andrews:

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

According to the materials, having apparently resolved an issue concerning fees that may be assessed under the Freedom of Information Law, you were asked by the records access officer of the Cortland City School District to complete the District's application form. The access officer wrote that staff will compile and copy the records sought upon submission of the form.

Since you previously submitted a request in writing, you questioned the requirement that an applicant form be submitted.

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, neither the Law nor the regulations refer to or authorize 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 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.

As you requested, 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:jm

cc: Harvey Kaufman, Superintendent of Schools
Kathleen Tavarone, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6631

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

May 20, 1991

Mr. Richard W. Blakeslee
[redacted]

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

Dear Mr. Blakeslee:

I have received your letter of May 3, as well as the materials attached to it.

According to your letter, on March 15, you submitted six requests to the Town of Brookhaven under the Freedom of Information Law. The receipt of the requests was acknowledged on March 22, and you were informed that you would receive a response within ten business days. However, on April 16 "six days beyond the deadline", you had not received any further response. As such, you wrote to the Chief Deputy Town Attorney, who advised you that "due to the voluminous nature of the request an additional twenty days will be required to gather the material."

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

First, 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)].

Further, it is noted that a recent division 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

Second, having reviewed your requests, two and perhaps three of the six requests appear to be voluminous, and it is questionable whether they "reasonably describe" the records sought as required by section 89(3) of the Freedom of Information Law. For example, one request involves "copies of any and all financial statements, reports, memoranda, balance sheets, etc., prepared by either town employees or outside firms, which reflect in whole or in part, the finances, assets, liabilities, etc., of the Town of Brookhaven". Another concerns "copies of any and all documentation, manuals, memoranda, how so ever denominated, which constitute the rules, regulations, standard operating procedures, administrative guidelines or policies, etc., governing the practices of the Town Brookhaven and its subdivisions."

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, 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.

I am unaware of the means by which the Town maintains its records or the volume of the records sought. However, it is possible, particularly since certain requests are unlimited in terms of time or scope (i.e., the request for financial records would include records that are current, as well as those that may have been prepared years ago; another request involving "documentation...how so ever denominated...governing the practices of the Town..." might include internal staff manuals, state and federal statutes and rules and regulations, etc.), that certain of the requests or perhaps some aspects of them, do not reasonably describe the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Philip H. Sanderman, Chief Deputy Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6632

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

May 20, 1991

Mrs. Edith Grahn
[redacted]

The staff of the Committee 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 Mrs. Grahn:

I have received your letter of May 4 in which you raised a question concerning the Freedom of Information Law.

According to your letter, Shearer v. City of Johnstown Water Department "was settled out of court recently and involved a compromise settlement to Mr. Shearer", who served as a City employee. You wrote that when a representative of the local news media requested "the dollar amount of compromise", the City Attorney, Mr. Robert Subik, indicated that "by mutual agreement of both parties the amount was not to be divulged". In addition, in separate correspondence, I received a portion of the settlement agreement which provides that "[t]his Agreement shall be kept confidential and shall not be disclosed except for purposes of enforcement or in compliance with a court order or government agency investigation".

In conjunction with the foregoing, you asked whether the City Attorney is "within his right to deny a taxpayer access to information regarding disbursement of public monies paid as a settlement".

In this regard, 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 but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

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

Under the circumstances, it is my view that disclosure of the terms of the settlement agreement would result in a permissible rather 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 those of the agency, the City of Johnstown.

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).

In sum, assuming that no court has ordered that the settlement agreement be kept confidential, and there appears to be no such order, I believe that the Freedom of Information Law as judicially interpreted requires that the terms of the settlement agreement in question be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Subik, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0633

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

May 20, 1991

Mr. Dave Williams
The Poughkeepsie Journal
P.O. Box 1231
85 Civic Center Plaza
Poughkeepsie, NY 12602

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

Dear Mr. Williams:

I have received your letter of May 6 in which you requested an advisory opinion concerning the Freedom of Information Law.

Attached to your letter is a copy of a resolution passed by the Poughkeepsie City School District Board of Education to adopt "the findings of fact and credibility determinations of the Hearing Officer, Herbert L. Haber in the hearing on charges against Assistant Superintendent of Schools, Alfred P. Duffy, pursuant to his employment contract...". The resolution further specifies that four of the charges be sustained, that three be dismissed, that "the Board concurs with the conclusion of said hearing officer that good and just cause for the termination of Mr. Duffy's employment contract exists", and that Mr. Duffy's contract would be terminated, "effective immediately".

Your request for the hearing officer's report was denied, apparently on the basis of advice rendered by the District's attorney, Margo L. May. Ms. May wrote that "[u]ntil the applicable period for appeal has elapsed", the record in question should not be disclosed. Further, Ms. May indicated that she had discussed the matter with me and that I concurred.

You have sought an advisory opinion as to the propriety of the denial.

In this regard, I offer the following comments.

First, I believe that two of the grounds for denial, paragraphs (b) and (g) of section 87(2) of the Freedom of Information Law are relevant to the issue. However, under the circumstances, substantial portions of the hearing officer's report must, in my view, be disclosed.

Second, although I do not recall the specifics of our conversation, the District's attorney, Ms. May did contact this office. In a recent conversation, she indicated that our discussion occurred after the hearing officer's report had been drafted, but prior to any determination by the Board. As such, during our discussion, it was generally advised that hearing officers' reports may be withheld, for they are advisory in nature, and a decision maker, such as a board of education, may eventually accept, reject or modify a hearing officer's recommendations. In this instance and at this time, however, since the Board, after receipt and review of the report, adopted the report in its entirety, based upon judicial interpretations of the Freedom of Information Law, I believe that a different conclusion must be reached. Further, that same conclusion would have been reached had the facts as presented in the materials been present at the time of our conversation.

The provision at issue in terms of the District's denial is section 87(2)(g), which 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 that 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."

I would conjecture that the Board as decision-maker deliberated during one or more executive sessions held in private in the process of reaching a determination. Further, there may have been other materials in which members of the Board or staff expressed their opinions in relation to the hearing officer's findings. Those deliberations and or written opinions would have been predecisional and could in my view be kept private. However, those materials or communications are not the subject of the request; rather, the request involves findings that the Board has adopted as its own and which, at this juncture, are reflective of its collective determination.

Moreover, 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 [sic; published as is], 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 equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intraagency views, when deliberation has ceased and the consensus arrived it represents the final decision, disclosure is not only desirable but imperative 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."

In sum, I do not believe that section 87(2)(g) may serve as a basis for withholding, for the document in question represents a final agency determination accessible under section 87(2)(g)(iii). As such, in my opinion, it must be disclosed, except to the extent that a different ground for denial may justifiably be asserted.

The remaining ground for denial of potential relevance is section 87(2)(b), which enables an agency to withhold records 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 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. However, 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 complaints or charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

In this instance, I believe that the report, insofar as it consists of charges and findings that were sustained and adopted by the Board as its determination must be disclosed. However, those portions of the report involving charges that were dismissed could in my view be withheld as an unwarranted invasion of personal privacy, unless those charges have already been made publicly known.

Lastly, I disagree with the denial to the extent that it is based on a contention that the determination may be withheld "[u]ntil the applicable period for appeal has elapsed". As I understand the situation, the hearing officer's report, as adopted by the Board represents the "final agency determination". Any ensuing determination of the matter would be made by a person or entity other than the agency, the Board of Education. If, for example, the means of appealing the determination involves the initiation of a judicial proceeding by the subject of the report, a decision rendered by the court would not be an "agency determination"; rather, it would involve a decision concerning the propriety or reasonableness of the Board's determination. It is my understanding that no administrative remedies continue to exist and that the only remaining avenue for review of the Board's determination would involve the initiation of a lawsuit. Further, by means of analogy, if the position offered by District officials were found to be appropriate, no agency determination or lower court determination would be available until the time for appeal to a higher level entity, such as an appellate court,

had expired. In my opinion, such a conclusion would effectively eliminate rights of access to final agency determinations until the statute of limitations for seeking review of such determinations had expired and would be contrary to both the letter and the spirit 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: Matthew Clarke, Superintendent
Margo May

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6634

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

May 20, 1991

Mr. Tim Rumberger
Reporter
The Daily Gazette
82 North Main Street
Gloversville, NY 12078

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

Dear Mr. Rumberger:

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

The issue involves "the Johnstown Water Board's recent out-of-court settlement with former Water Superintendent Richard Shearer, who was relieved of his position late in 1990 and sued the board, its members and the city for wrongful termination. Under agreement by both parties, the details of the settlement, including the amount paid Shearer in exchange for dropping his suit, have been sealed." Having sought a copy of the settlement, the request was denied "on the grounds that the agreement stipulates it is to be kept confidential unless ordered by a court or government agency".

In this regard, 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 but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

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

Under the circumstances, it is my view that disclosure of the terms of the settlement agreement would result in a permissible rather 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 those of the agency, the City of Johnstown.

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).

In sum, assuming that no court has ordered that the settlement agreement be kept confidential, and there appears to be no such order, I believe that the Freedom of Information Law as judicially interpreted requires that the terms of the settlement agreement in question be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Subik, City Attorney
City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6635

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

May 21, 1991

Mr. Ralph Diaz
82-A-2460
Box 338
Napanoch, NY 12458-0338

Dear Mr. Diaz:

I have received your letter of May 15, in which it appears that you appealed a constructive denial of access to records by the New York City Police Department to the Committee on Open Government.

In brief, as I understand the matter, you directed a request to the New York City Police Department in August of 1990. Although the receipt of the request was acknowledged, the Department apparently has not yet either granted or denied access to the records sought. As such, you appealed to this office.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office can neither compel an agency to grant access to records, nor is it empowered to render a determination in response to an appeal made under the Freedom of Information Law. The provisions concerning the right to appeal are found in section 89(4) of the 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."

For your information, the person designated to determine appeals at the New York City Police Department is Susan R. Rosenberg, Assistant Commissioner.

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-6636

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

May 21, 1991

Ms. June Maxam
The North Country Gazette
Box 408
Chestertown, NY 12817

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

Dear Ms. Maxam:

I have received your letter of May 6, as well as the correspondence attached to it, and I appreciate your kind remarks.

According to your letter, the school lunch program at the North Warren Central School District has long been a matter of controversy and, most recently, issues have arisen concerning the hiring of an individual as school lunch manager. You have attempted unsuccessfully to obtain records indicating the food service experience and credentials of the person hired, who, according to your letter, "has proclaimed that he is a nutritionist". The District business manager wrote that the information sought "is in his personnel file, and therefore, confidential."

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

First, 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.

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 emphasized that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial. Based upon the language quoted in the preceding sentence, I believe that a single record may be accessible or deniable in whole or in part. Moreover, that language, in my view, imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In my opinion, two of the grounds for denial are relevant to rights of access to the records in question. However, in conjunction with the ensuing analysis, I believe that they would be accessible or deniable, perhaps in part, depending upon their contents.

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 public employees. In brief, the courts have held that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980].

I point out, too, 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)].

The other ground for denial 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 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 access to a resume or application of a public employee, while sections 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 of a person who has been hired, for instance, 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 or educational accomplishments as a condition precedent to serving in an particular position, those aspects of a resume or 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 whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of

documents would result in a permissible rather than an unwarranted invasion of personal privacy. Disclosure repre- sents 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.

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)]. However, 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.

Lastly, in a discussion of the intent of the Freedom of Information Law that may be relevant to the matter, the Court of Appeals has held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 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)... 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 of Fink v. Lefkowitz, 47 NY 2d 567, 571..." (Capital Newspapers, supra, 564-566).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the District's business manager.

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: Lyn H. Hill, Business Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6637

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

May 22, 1991

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 and the materials attached to it.

According to your letter, you requested that the Crown Point Central School provide "a copy of an investigative report that was done on [you] by the private investigator firm of John R. Probst, at the request of the School's law firm...". Although the documentation attached to your letter indicates that the School paid for the report, your request was recently denied on the ground that it is not in the physical possession of school officials. An earlier denial was based on a claim that the report is subject to the attorney-client privilege.

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."

The Court of Appeals has construed the definition quoted above 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. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986)]. Further, the definition specifically includes information "produced...for an agency". As such, irrespective of whether school officials have physical possession of the report, I believe that it constitutes a "record" subject to rights of access.

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

In my view, two of the grounds for denial may be relevant to the issue of rights of access.

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.

Although somewhat 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, as well as the report in question, 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.

The other ground for denial of possible relevance, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by statute". One such statute is section 4503 of the Civil Practice Law and Rules, which makes confidential the communications between an attorney and a client, such as school officials in this instance, under certain circumstances.

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 been waived, and that records consist of legal advice provided by counsel to the client, the records would be confidential pursuant to section 4503 of the Civil Practice Law and Rules and, therefore, section 87(2)(a) of the Freedom of Information Law. I point out, however, that a recent decision stressed that the attorney-client privilege should be narrowly applied. Specifically, in Williams & Connolly v. Axelrod, it was held that:

> "To invoke the privilege, the party asserting it must demonstrate that an attorney-client relationship was established and that the information sought to be 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..." [527 NYS 2d 113, 115, 139 AD 2d 806 (1988)].

Also of potential relevance are sections 3101(c) and (d) of the Civil Practice Law and Rules, which make confidential, respectively, attorney work product and material prepared for litigation.

Lastly, you asked whether the School forwarded copies of your appeals and the ensuing determinations thereon as required by section 89(4)(a) of the Freedom of Information Law. A search of our files indicates that no such documentation was forwarded to this office.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dawn Belden
Philip Bonner, Interim Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6638

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

May 23, 1991

Mr. Herminio Vargas
88-A-7372 E-2
Orleans Correctional Facility
35-31 Gaines Basin Road
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. Vargas:

You recent 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 responsible for advising with respect to the Freedom of Information Law, and its staff is authorized to advise on behalf of the members.

According to your letter and the correspondence attached to it, on March 19, you sent a request to the Bronx County District Attorney in which you sought copies of all records in his possession pertaining to you under the Freedom of Information Act, 5 USC section 522. As of the date of your letter to this office, you had not yet received a response.

In this regard, I offer the following comments.

First, the provision under which you requested the records is the federal Freedom of Information Act, which applies only to records maintained by federal agencies. The statute pertaining to rights of access to records of entities of state and local government in New York is the New York Freedom of Information Law.

Second, section 89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. In your request for records pertaining to you, you provided your name, address, date of birth and social security number. It is questionable in my opinion whether those details are sufficient to meet the requirement that a request must reasonably describe the records.

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, 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. It is suggested that additional details, such as dates of arrest or indictment numbers, if applicable, descriptions of events and similar information might better enable agency officials to locate records in which you are interested.

Lastly, 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)].

For your information, the person designated to determine appeals by the Bronx County District Attorney is Anthony J. Girese.

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-6639

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

May 23, 1991

Mr. Michael G. Kessler
Michael G. Kessler & Associates, Ltd.
3 Whitcomb Avenue
Mount Sinai, NY 11766

The staff of the Committee 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. Kessler:

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

Your inquiry relates in part to a request directed to the Village of Old Westbury in which you sought:

> "1- Vendor listing (name and address) and amounts paid in 1990.
>
> 2- Employee W-2 forms issued in 1990.
>
> 3- 1099 forms issued in 1990.
>
> 4- Any documents including but not limited to the calculation sheets to support $100,000.00 expenditure reported as "LOCAL PENSION" in the annual report of the Village for the period ended May 31, 1991."

In response to the request, you were informed that no vendor listing is maintained by the Village, that neither W-2 forms nor 1099 forms may be reviewed due to restrictions imposed by section 6103 of the Internal Revenue Code, and that the report that will contain the information sought in item 4 of your request has not been prepared, for it will cover a period ending May 31. Further, the Village Clerk-Treasurer asked that you disclose the purpose of your request, for it involves, in part, a list of names and addresses.

You have asked whether, in my view, the records sought are accessible under the Freedom of Information Law and how you "might get the Village to give [you] a timely response since it is apparent that stalling tactics are being used to prevent [you] access to records".

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, unless specific direction is provided to the contrary, an agency need not create or prepare a record in response to a request. Therefore, if, for example, the Village does not maintain a "vendor listing", it would not be required to prepare a list on your behalf. It is suggested, however, that while the Village might not maintain a "list", other records containing the information sought likely do exist and would be available upon submission of an appropriate request.

Second, although tangential to your inquiry, I point out that one of the few situations in which a record must be prepared and maintained 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, a payroll record that identifies all Village officers or employees by name, public office address, title and salary must be prepared by an agency to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, I believe that records reflective of wages paid to public officers and employees sought must be disclosed.

Third, in general, the reasons for which a request is made or an applicant's potential use of records are 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, section 89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, 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).

Nevertheless, 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 to any party to records."

As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since payroll information in question was found to be available prior to the enactment of the

Freedom of Information Law, I believe that it must be disclosed, irrespective of the intended use of the records. As such, I do not believe that the Village may require that you indicate the purpose for which you requested payroll records.

Both the Village Clerk-Treasurer and the Mayor have contended that W-2 and 1099 forms are specifically exempted from disclosure by statute, citing 26 USC 6103 (the Internal Revenue Code) and section 6797(e) of the Tax Law. In my opinion, those statutes are not applicable in this instance. In an effort to obtain expert advice on the matter, I contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by the Internal Revenue Service; those statutes do not pertain to records kept by an individual taxpayer [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)], nor are they applicable to records maintained by an employer, such as the Village. In short, the attorney for the Internal Revenue Service said that the statutes in question require confidentiality only with respect to records that it receives from the taxpayer.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 and 1099 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed.

Lastly, 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)].

Further, it is noted that a recent division 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Village officials.

I hope that I have been of 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. Gilbert M. Columbo, Mayor
Rosemarie Buscarello, Clerk-Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6640

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

May 23, 1991

Mr. Daniel Lynch
82-A-6183
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

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

Dear Mr. Lynch:

I have received your letter of May 5.

By way of background, while being transported from one correctional facility to another, you and other inmates were permitted to use a restroom at a Department of Transportation facility at exit 33 of the Thruway. In brief, you wrote that you have been accused of an attempt to escape during that stop. As such, you are seeking to obtain the address of the local barracks of the New York State Police near exit 33, as well as records indicating whether "a call was really made to the trooper barracks", whether a particular police officer was on vacation at that time, and whether he "received a radio distress signal for help" from the Department of Correctional Services, and any record in which the alleged except might have been "logged".

You also requested certain advisory opinions rendered by this office and the regulations "that the state trooper barracks has to follow pertaining to the Freedom of Information Law".

In this regard, I offer the following comments.

First, this office does not maintain the addresses of State Police barracks or its regulations promulgated under the Freedom of Information Law. It is suggested that you request those records from the records access officer for the Division of State Police, Lieutenant Colonel Gary Dunne. Enclosed, however, are copies of the advisory opinions that you identified.

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 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.

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 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 police officer 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)."

Based upon the foregoing, records indicating dates of vacation used by an officer would in my view be public.

With respect to the remaining issues, I believe that they are considered in the enclosed opinions, particularly number 4415. As such, it appears to be unnecessary to reiterate commentary contained in them. If you feel that they do not deal effectively with the issues in which you are interested, you may seek additional advice.

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-6641

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

May 23, 1991

Mr. James Mitchell
77-B-684
P.O. Box 700
Wallkill, NY 12509

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

Dear Mr. Mitchell:

I have received your letter of May 1, which reached this office on May 8.

According to your letter and the materials attached to it, having requested certain records from the Office of the Kings County District Attorney, you were informed that, due to their age, any such records would have been stored at the Municipal Archives in Queens. Further, although the records had been kept there, they were apparently removed in 1986 and were not returned. You added that you were informed that searches in other places where the records might have been kept did not result in their location.

You have requested suggestions concerning the matter. In this regard, I offer the following comments.

As you indicated in the correspondence, when an agency denies a request for records, the reason or reasons for the denial must be stated in writing. In this instance, however, representatives of the District Attorney have not determined to withhold the records sought; rather, they have been unable to locate them.

In a situation in which an agency maintains or believes that it maintains a record but cannot locate it, a person requesting the record may seek a certification to that effect. Specifically, section 89(3) of the Freedom of Information Law states in relevant part that, in such a case, 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".

If appropriate, it is suggested that you request a certification as described in section 89(3).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Nancy Talcott, Assistant District Attorney
Margaret E. Mainusch, Assistant District Attorney and Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6642

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

May 28, 1991

Mr. Joseph Schuster
[redacted]

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

Dear Mr. Schuster:

I have received your letter of May 11 in which you raised a series of questions.

First, you wrote that you inquired without success concerning "any required 'give-backs' relating to any claimant who has received any injury awards for on-the-job, and may subsequently prevail at a trial with the N.Y. State Division of Human Rights over Discrimination claims". You asked whether, under the Freedom of Information Law, you may seek records "of such 'give backs' circumstances which occurred following trials where claimants under the above circumstances prevailed".

In my view, the issue involves the means by which any such records are filed and whether they can be located. Section 89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. 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, 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. If the records sought are not filed in a manner that enables agency officials to locate or retrieve them, I do not believe that a request would, under the circumstances, reasonably describe the records.

Your remaining area of inquiry involves possible "irregularities or misconduct, or unlawfulness, by employees of the New York State Division of Human Rights", and your belief that the Secretary of State has the obligation to "intervene" in such matters. In this regard, the Committee on Open Government has no jurisdiction with respect to that issue and, to the best of my knowledge, the Secretary of State has neither an obligation to intervene nor any legal role in the kind of situation that you described.

If you believe that employees of the Division of Human Rights have engaged in misconduct, it is suggested that you contact the office of the State Inspector General (1-800-367-4448).

Lastly, with respect to your final question concerning a failure to respond on the part of Lawrence Kunin, Counsel to the Division of Human Rights, I must admit that I cannot determine what the issue is.

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-6643

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

May 28, 1991

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 several items of correspondence from you. With the exception of one area of inquiry, the correspondence pertains to requests for records directed to the Office of Court Administration.

Having discussed the matter with Mr. John Eiseman, he considers your requests to have been honored. With respect to the issue of the number of pages made available to you, the materials were double-checked and Mr. Eiseman indicated that 19 pages were sent to you. If there is any question concerning that issue, he suggested that you speak directly with Ms. Roberts. He also told me that you were informed that "roster cards" pertaining to employees that are the subjects of your requests are available to you through the Director of Personnel.

The remaining issue involves your ability to invoke the Freedom of Information Law to obtain court records. 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."

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Eiseman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6644

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

May 28, 1991

Mr. Raphael Perez
89-A-0579 U-H-10-44
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. Perez:

I have received your letter of May 10 in which you requested assistance in obtaining records from the Cuban mission in New York City.

In this regard, the statute within the Committee's advisory jurisdiction, the New York Freedom of Information Law, is applicable to agency records. 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, the Freedom of Information Law pertains to records of entities of state and local government in New York; it would not apply to records maintained by a foreign government, such as those in possession of the Cuban mission.

In short, I believe that the issue involves a matter outside of the coverage of the Freedom of Information Law.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

CLERICAL ERROR

NO FOIL-AO #6445

CLERICAL ERROR

NO FOIL-AO #6445

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6646

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

May 28, 1991

Ms. F.J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of May 8 concerning an alleged violation of the Freedom of Information Law.

According to your letter, having visited the offices of the New York City Employees' Retirement System, you asked the records access officer for a copy of that agency's rules and regulations promulgated under the Freedom of Information Law. In response to the request, you were informed that you "had to buy, for $11.00+, a copy of the agency's rules and regulations", and that you could not "purchase or get a copy of his agency's F.O.I.L. regulations separately".

You asked that I advise the records access officer on the matter, specifying that "an agency's F.O.I.L. rules and regulations are available, for free" and that you are not required to purchase the entirety of the agency's rules and regulations.

In this regard, I offer the following comments.

First, I believe that a request for a portion of a record, as in this case, one area of an agency's rules and regulations, must be honored. In a variety of contexts, records requested by the public represent portions of larger documents. In this instance, assuming that the agency's regulations promulgated under the Freedom of Information Law can be reproduced in a manner segregable from the remainder of its regulations, I believe that agency officials must do so.

Second, there is nothing in the Freedom of Information Law that requires an agency to make copies of regulations adopted pursuant to that statute for free. Although many agencies do so, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy.

As you requested, a copy of this response will be forwarded to the records access officer of the New York City Employees' Retirement System.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard D. Greaves, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6647

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

May 28, 1991

Mr. Anthony Wilson
85-A-5565 SHO-4
P.O. Box 480
Scotch Settlement Road
Gouverneur, NY 13642-0370

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

Dear Mr. Wilson:

I have received your letter of May 4 in which you raised a question under the Freedom of Information Law.

You have asked whether it is "legal for the Superintendent or watch commander to conceal the name of an officer which was involved in an incident concerning food tampering". You added that other officials involved have been named, but that "this specific officer was eyewitnessed committing the food tampering act".

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, although I am unfamiliar with the facts relating to the incident, it appears that three of the grounds for denial may be relevant to the issue.

First, section 87(2)(a) of the Freedom of Information Law pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is section 50-a of the Civil Rights Law, which states in part that:

> "1. All personnel records, used to evaluate performance toward continued employment or promotion, under the

> control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces of individuals as police officers...or a department of correction of individuals employed as correction officers...shall be considered confidential and not subject to inspection or review without the express written consent of such police officer or correction officer except as may be mandated by lawful court order."

If the record in question is a "personnel record" pertaining to a correction officer, section 50-a of the Civil Rights Law might serve as a basis for denial.

Second, of potential significance is section 87(2)(b), which enables an agency to withhold records 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 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. However, when alle-

gations 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 complaints or charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

And third, 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 the record was compiled for law enforcement purposes, the record might, if disclosed, interfere with an investigation or deprive a person of an impartial adjudication, for example.

Lastly, when a record is denied under the Freedom of Information Law, the person denied access may appeal pursuant to section 89(4)(a). That provision states in relevant part that:

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

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

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-6648

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

May 28, 1991

Mr. Ronald M. Hill
88-A-9157
Attica Correctional Facility
Attica, NY 14011-0149

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

Dear Mr. Hill:

I have received your recent letter in which you requested information concerning your ability to obtain copies of certain records.

The first involves a probation report prepared following your conviction; the second concerns "the status of [your] classification, which is still max". In this regard, I offer the following comments.

It is assumed that the probation report is the same document as is also known as a pre-sentence report. Although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, section 87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state of federal statute..." Relevant under the circumstances, is section 390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be

> made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of section 390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in section 390.50 of the Criminal Procedure Law. Further, Matter of Thomas, 131 AD 2d 488 (1987), in my view confirms that a pre-sentence report may be made available only by a court or pursuant to an order of the court.

With respect to the record of your classification, I direct your attention 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 double negative. While inter-agency 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 a record indicating your classification status represents a final agency determination, I believe that it would be available. However, if it is advisory or an opinion, it could likely 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-6649

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

May 28, 1991

Mr. John Perez
[redacted]

The staff of the Committee on Open 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 letter of May 10 and the materials attached to it.

You referred to a request for records directed to the records access officer for the Village of Ballston Spa that was denied on April 12. On May 1, you "wrote a letter requesting an appeal of her decision", and inquired as to the procedure for appealing the denial. Despite several attempts to learn of the manner in which you could appeal, your efforts were apparently unsuccessful. As such, you asked that I inform you and Village officials whether:

> "1-The Records Access Officer has the legal obligation, under FOIL, of providing [you] with the appeal process, and;
> 2-Does the information requested by [you], under the FOIL, have to be provided to [you] by the Records Access Officer."

The records sought include "weekly work schedules as posted at the Village Police Dept from July 1988 to April 8, 1991", the "Police Dept. payroll schedule from Jan 1990 to April 8, 1991", and a certain letter written by the former mayor to a sergeant at the Police Department. You specified that your request for payroll information involved "how many hours each officer and dispatcher worked on a weekly basis".

In response to the request, the first two items sought were denied pursuant to section 87(2)(b) and (g) of the Freedom of Information Law. In the case of the third item, you were informed that "there is no record of the letter to which you refer".

In this regard, I offer the following comments.

First, 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 Village Board of Trustees and those procedures must include reference to the right to appeal. 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 Village of Ballston Spa, is the Board of Trustees, and I believe that the is required 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."

With respect to denials 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 records the reasons for further denial, or provide access to the record sought."

Further, section 1401.7 of the regulations referenced earlier state 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."

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch 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 the proceeding that the 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" [74 NY 2d 907, 909 (1989)].

In sum, the records access officer has the duty individually or in that person's role of coordinating the response to a request of informing a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

Second, with respect to rights of access to the records sought, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more 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, 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, work schedules and payroll 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, and the number of hours they 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 police officer 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)."

Although somewhat tangential to your inquiry, I point out that one of the few situations in which a record must be prepared and maintained 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, a payroll record that identifies all Village officers or employees by name, public office address, title and salary must be prepared by an agency to comply with the Freedom of Information Law.

Additionally, as stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Based upon the foregoing, I believe that the records sought in items 1 and 2 of your request should be disclosed.

With respect to the third item, if the record in question does not exist, the Freedom of Information Law would not be applicable. If the record does exist but agency officials cannot locate it, you may seek a certification to that effect pursuant to section 89(3) of the Freedom of Information Law. That provision states in part that an agency, on request, "shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

Lastly, while I am not suggesting that it is pertinent to the matter, I point out 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."

In an effort to enhance compliance with and understanding of 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: Board of Trustees
Patricia A. Bowers, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6650

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

May 28, 1991

Ms. Maureen Crocker
[redacted]

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

Dear Ms. Crocker:

I have received your letter of May 14 in which you requested assistance in obtaining a copy of a memorandum from the New Paltz School District.

According to your letter, in early March, your son came home from school and told you that his gym teacher had thrown a hockey stick at him during gym class. The stick hit your son in the ankle. Having met with the principal of the middle school to discuss the matter, you were told by the principal that he would investigate the incident. The principal called the next day and indicated that the teacher did not deny that the incident occurred. You then informed the principal that unless some action was taken, you would file assault charges. The principal notified you soon thereafter that he wrote a memorandum on the subject to the teacher and in fact read the memorandum over the phone to you. Nevertheless, when you requested a copy, he informed you that he had been directed not to provide a copy of the memorandum.

In this regard, I offer the following comments.

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

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

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

Based upon the foregoing, I believe that the memorandum in question clearly constitutes an agency record.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. The introductory language of section 87(2) states that an accessible record must be made available for inspection and copying, and section 89(3) requires an agency to "provide a copy of such record" upon payment of the requisite fee. An agency can generally charge no more than twenty-five cents per photocopy. In this instance, since the content of the memorandum was disclosed to you, I believe that a copy must be made available.

Third, if the memorandum contains personally identifiable information concerning your son, I believe that, as a parent, you enjoy rights of access to that record under a federal statute, the Family Educational Rights and Privacy Act ("FERPA), 20 USC 1232g).

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 record sought constitutes an "education record". The regulations promulgated by the U.S. Department of Education pursuant to FERPA state in relevant part that:

> "'Education record' [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, supervi-

> sory, 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 have in the past discussed the requirements and interpretation of that statute with representatives of the FERPA office at the U.S. Department of Education.

Based upon the statement of facts that you provided, I believe that the documentation in question, if it is "directly related to a student", is an "educational record" that should be disclosed to the parent of the student.

A relevant factor involves the assumption that the preparation of the memorandum was precipitated by the incident. If the document 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. When that is so, rights of access would be determined solely on the basis of the Freedom of Information Law. However, if the memorandum was prepared as a result of the incident and if it relates directly to the student, I have been 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 could be asserted to withhold the record.

Further, while FERPA does not confer a right to have copies of education records, when such records are available, I believe that rights of access conferred by that statute in conjunction with rights conferred by the Freedom of Information Law require that a school district prepare copies of accessible education records.

In an effort to enhance compliance with and understanding of the law, copy of this opinion will be forwarded to the principal.

I hope that I have 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. Glick, Principal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6651

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

May 29, 1991

Mr. Alan Siegel
[redacted]

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

Dear Mr. Siegel:

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

You have complained that you appealed a denial of access to Counsel to the Department of Correctional Services on April 10, but that, as of the date of your letter to this office, the appeal had not yet been determined.

In this regard, I offer the following comments.

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 records 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 correspondence will be forwarded to Counsel to the Department of Correctional Services. It is also noted that I received a copy of a determination of your appeal, which was forwarded to the Committee in accordance with section 89(4)(a), and which is dated May 7.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6652

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

May 29, 1991

Mr. Alan F. Eysen
Newsday
235 Pinelawn Road
Melville, NY 11747

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

Dear Mr. Eysen:

I have received your letter of May 14 in which you requested an advisory opinion concerning the Freedom of Information Law.

You have questioned "Newsday's right to the names and qualifications portions of applications filled out by those who gained competitive civil service positions in the Town of Hempstead". You indicated that Town officials informed you that the records in question are not available to the public and "only an employee's supervisor could see the application form and even he or she would need the permission of the employee".

In this regard, I offer the following comments.

First, 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.

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 emphasized that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial. Based upon the language quoted in the preceding sentence, I believe that a single record may be accessible or deniable in whole or in part. Moreover, that language, in my view, imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In my opinion, three of the grounds for denial may be relevant to rights of access to the records in question. As suggested earlier and in conjunction with the ensuing analysis, I believe that they would be accessible or deniable, perhaps in part, depending upon their contents.

The initial ground for denial, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". The provision upon which Town officials might have relied is section 71.1 of the State Civil Service Department's Rules and Regulations, which states in part that: "[a] candidate's application may be exhibited, upon request, to the appointing officer to whom his name is certified, or to his representative...". While that provision might be interpreted to permit disclosure only to the appointing officer or that person's delegate, I do not believe that an agency's regulations can diminish rights conferred by a statute, such as the Freedom of Information Law. 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, I do not believe that a regulation can be considered as a statute that exempts records from disclosure or that the Town can rely upon regulations as a basis for withholding the records sought.

A second 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". While that standard is flexible and often may result in subjective interpretations, there are numerous decisions that pertain to the privacy of public employees. In brief, the courts have held that public employees enjoy a lesser

degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980].

I point out, too, 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)].

The remaining ground for denial 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 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. Presumably an application would consist of factual information that would be available, except to the extent that different basis for denial [i.e., section 87(2)(b) concerning privacy) may be cited.

With respect to access to a resume or application of a public employee, while sections 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 of a person who has been hired, for instance, 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 or educational accomplishments as a condition precedent to serving in an particular position, those aspects of a resume or 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 whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents 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.

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)]. However, 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.

Lastly, in a discussion of the intent of the Freedom of Information Law that may be relevant to the matter, the Court of Appeals has held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 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)... 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 of Fink v. Lefkowitz, 47 NY 2d 567, 571..." (Capital Newspapers, supra, 564-566).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Town officials identified in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Sammon, Jr., Personnel Officer
Sidney Rosenthal, Civil Service Director
Anthony Santino, Public Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6653

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

May 29, 1991

Mr. Michael James Boothe
85-A-1212 A-4-3
Southport Correctional Facility
Box 2000
Pine City, NY 14871

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

Dear Mr. Boothe:

I have received your letter of May 13 in which you requested assistance in gaining access to records of the Division of Parole.

The records in question include a "pre-sentence investigation report" and a "parole authority warrant disposition related to the parole charge".

With respect to the pre-sentence report, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, section 87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state of federal statute..." Relevant under the circumstances, is section 390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or

> private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of section 390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in section 390.50 of the Criminal Procedure Law. Further, Matter of Thomas, 131 AD 2d 488 (1987), in my view confirms that a pre-sentence report may be made available only by a court or pursuant to an order of the court.

I am unfamiliar with the nature or content of the other record in which you are interested. However, it is noted as as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 terms of procedure, I direct your attention to the regulations promulgated by the Division of Parole concerning parole revocation hearings. Section 8000.5(c)(3) of the Division's regulations states that:

> "Requests for access to case records prior to an appearance before the board or an authorized hearing officer, or prior to the timely perfecting of an administrative appeal, shall be made in writing to the:
>
> (i) senior parole officer in charge, or the State correctional facility where the inmate/releasee is confined; or

> (ii) director of the area parole office serving the locale where the releasee is confined in a city or county jail or correctional facility;
>
> at least ten days prior to the scheduled date of a final revocation hearing or the final date to perfect an administrative appeal, and at most one day subsequent to receipt of notice of the scheduled date of any other hearing."

In addition, section 8000.5(c)(5) and (6) provide that:

> "(5) For the purpose of access to case records, the senior parole officer or parole officer in charge at an institution, or the director of an area parole office or such other professional staff person(s) designated by one of the above persons, shall be the records access officer.
>
> (6) Review of those portions of the case record to which access is granted may take place on the day of the hearing or earlier at the:
>
> (i) State institution where the inmate/releasee is confined; or
>
> (ii) area parole office serving the locale of the city or county institution where the inmate/releasee is confined;
>
> pursuant to arrangements made for review on any workday with records access officer or his designee."

Of possible relevance to your inquiry is section 8005.18 of the Division's regulations, which deals with final revocation hearings and which in subdivision (a) requires that:

> "The alleged violator and an attorney who has filed a notice of appearance shall be given written notice of the date, place and time of the hearing as soon as possible, but at least 14 days prior to the scheduled date of the hearing."

Subdivision (c) of that section states that:

> "Such notice shall include a copy of the report of violation of parole and shall identify such other documents and information that are intended to be entered into evidence and such witnesses as may be presented at the final revocation hearing."

As such, the notice provides reference to all relevant information to be used at the hearing.

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

OML-AO-1936
FOIL-AO-6654

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

May 29, 1991

Ms. Victoria V. Lawson
[redacted]

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

Dear Ms. Lawson:

I have received your package of materials which focuses upon the activities and budget of the Greenburgh 7 Central School District. Your note appears on a letter addressed to the Commissioner of Education in which you asked that the State Education Department prepare a report concerning various complaints by residents relating to the District.

In this regard, as you are aware, the jurisdiction of the Committee on Open Government is limited and involves advising with respect to the Freedom of Information and Open Meetings Laws. Many of the issues raised in the materials pertain to compliance with the Education Law and the State's real property tax structure. While the Freedom of Information Law and Open Meetings Law may in some instances relate to those matters, compliance with those statutes is tangential to the subjects of your complaints.

You appear to be particularly interested in relationships between school district administrations and teachers' unions and the process by which collective bargaining agreements are negotiated. Although one of your goals apparently involves opening up the negotiating process, I point out that section 105(1)(e) of the Open Meetings Law permits public bodies to enter into executive sessions to conduct or discuss collective bargaining negotiations. Similarly, section 87(2)(c) of the Freedom of Information Law enables agencies to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations". As such, much of the information in which you are interested may, under existing law, be shielded from the public.

Since you referred to meetings held in a second floor room that is "not accessible", it is noted that 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.

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

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6655

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

May 29, 1991

Mr. Dana J. Peryea
[redacted]

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

Dear Mr. Peryea:

I have received your recent note, which reached this office on May 16.

In response to a request for the Olympic Regional Development Authority's "subject matter list", you were provided with a copy of the list on which your note appears. You have questioned the adequacy of the list.

In this regard, section 87(3)(c) of the Freedom of Information Law requires that each agency shall maintain:

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

In my view, an agency's subject matter list is not required to identify each and every record of an agency. However, it is required to include reference, by category to all records maintained by an agency, whether or not the records are available to the public. Further, in my opinion, the purpose of the subject matter list is to enable the public to know of the categories of records maintained by an agency. With that kind of knowledge, requests for records can be made by means of reference to a category of records appearing in the list. As stated in regulations promulgated by the Committee on Open Government, which have the force of law: "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [see attached regulations, 21 NYCRR Section 1401.6(b)].

Having reviewed the subject matter list in question, it appears to be insufficient.

While I am not familiar with the records maintained by the Authority, there are no references to categories of records involving insurance, attendance of employees, contracts, litigation, legal advice, budgets and a variety of other records series common to agencies. As such, it does not appear that the list in question meets the requirements of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Donald J. Krone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6656

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

May 29, 1991

Mr. Richard Sokolow
National Alliance
500 Greenwich Street
New York, NY 10013

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

Dear Mr. Sokolow:

I have received your letter of May 14, as well as a variety of correspondence related to it.

You have sought assistance concerning several requests for records of the New York City Police Department that have been denied. One request involved the roster of all Department personnel assigned to work at a demonstration that occurred on January 12 in Brooklyn. Another involved records pertaining to the investigation of a shooting death occurring in the Bronx. You indicated that representatives of the District Attorney said that the investigation of the matter had ended and that the staff of your newspaper had been told that, in conjunction with a grand jury investigation, it was determined that the police officers who shot the victim were justified in their actions. Both of those requests were denied pursuant to section 87(2)(e)(i) and (ii) of the Freedom of Information Law. You added that the Department's denial with respect to the shooting death is based on a contention that the FBI and U.S. Department of Justice are conducting an investigation of the matter. The remaining request involves a "critique" report concerning the demonstration that was the subject of the first request. In denying access to the report following an appeal, it was stated that "[t]his report is exempt from disclosure pursuant to section 87(2)(g)(iii) of the Public Officers Law. This report is intra-agency material which does not constitute a final agency policy or determination."

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 contain both accessible and deniable information. Moreover, 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. Although portions of records might be deniable, the remainder of the records should be disclosed after appropriate deletions are made.

Second, I stress that courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than a decade ago:

> "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 sole bases for denial offered by Department officials with respect to the roster and the investigation of the shooting death are subparagraphs (i) and (ii) of section 87(2)(e) of the Freedom of Information Law. Those provisions state 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..."

From my perspective, a roster that merely identifies Department personnel assigned to work at an event that occurred months ago, without more, should be made public. If the request involved interviews, statements or investigative materials of or pertaining to Department personnel, it might be effectively contended, under appropriate circumstances, that disclosure would interfere with an investigation or deprive a person of a fair trial or impartial adjudication. Nevertheless, in this instance, only the names have been requested, and it does not appear that the provisions cited by the Department would justify a denial.

With regard to the investigation of the shooting death, if your statements are accurate, any investigation by either the District Attorney or the Department has ended. Therefore, it is difficult to envision how, from the perspective of the Police Department, disclosure would interfere with an investigation or deprive any person of a right to a fair trial or impartial adjudication. Further, although federal agencies may be investigating the matter, reliance upon section 87(2)(e)(i) and (ii) appears to be based upon conjecture; there is nothing in the

correspondence other than conclusory statements that would indicate that the harmful effects described in those provisions would arise by means of disclosure of the records requested from the Department.

With respect to the critique, as specified earlier, the denial of your appeal was based on a finding that the report constitutes intra-agency material that is not a "final agency policy or determination". That description of section 87(2)(g) of the Freedom of Information Law is incomplete, for there may be aspects of inter-agency or intra-agency materials that must be disclosed, even though they do not consist of final agency policies or determinations.

Specifically, 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, unless a different ground for denial could 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.

Further, the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, 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)].

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

In sum, while I cannot provide specific guidance concerning the extent to which the critique may have been withheld with justification, that blanket denial of the request might have been overbroad.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Department 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: Susan R. Rosenberg, Assistant Commissioner
Sgt. Louis J. Capasso, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6657

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

May 30, 1991

Mr. Joseph Schuster
[redacted]

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

Dear Mr. Schuster:

I have received your letter of May 17 in which you requested assistance in obtaining "copies of full credentials, licenses, [and] salaries" concerning certain employees of the Division of Human Rights.

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. This office cannot obtain records on behalf of an applicant, nor is it empowered to compel an agency to grant or deny access to records. However, I offer the following comments concerning rights of access to the records in which you are interested.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is emphasized that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial. Based upon the language quoted in the preceding sentence, I believe that a single record may be accessible or deniable in whole or in part. Moreover, that language, in my view, imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In my opinion, two of the grounds for denial may be relevant to rights of access to the records in question. In conjunction with the ensuing analysis, I believe that they would be accessible or deniable, perhaps in part, depending upon their contents.

One 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". While that standard is flexible and often may result in subjective interpretations, there are numerous decisions that pertain to the privacy of public employees. In brief, the courts have held that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980].

I point out, too, 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)].

The other ground for denial 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 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. Presumably an application would consist of factual information that would be available, except to the extent that different basis for denial [i.e., section 87(2)(b) concerning privacy) may be cited.

With respect to access to records indicating the "credentials" of a public employee, while sections 87(2)(b) and section 89(2)(b)(i) of the Freedom of Information Law may be cited to withhold portions of records, 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, educational accomplishments, licenses or certifications as a condition precedent to serving in an particular position, those aspects of records indicating that those conditions have been met 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 whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that the records at issue contain information pertaining to the requirements that must have been met to hold a position, they should be disclosed, for I believe that disclosure of those aspects of documents 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.

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)]. However, 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.

Lastly, as indicated in previous correspondence, I do not believe that the Secretary of State performs any specific role concerning the enforcement of the Public Officers Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

bcc: Herb Herskowitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6658

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

May 30, 1991

Mr. Robert F. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your note concerning a response to an appeal by the Fairview Fire District.

According to the correspondence, you requested "various payroll records" relating to your period of employment with the District. The response to your appeal stated that the Secretary to the Board supplied the records sought to the extent that they could be located. As such, the determination on appeal indicates that there was no denial and that access was provided in accordance with your request.

You have contended that you "asked for a record with 40 names on it", but that you "got a fabricated record with one name", presumably yours.

You requested an opinion on the matter.

Having reviewed earlier correspondence involving the same request, you requested certain "payroll register[s] covering wages earned..." by you during certain periods. Based upon the response to your appeal, it appears that portions of the registers that could be located that pertain to you were disclosed. However, you appealed the "denial of access to complete payroll registers", stating that "payroll information is open to public access".

From my perspective, it appears that there may have been a misunderstanding or lack of clarity of communication concerning the scope of the request. Stated differently, although the request could have been interpreted to include payroll registers in their entirety, which appears to be your contention, the request

could also have been interpreted to include only those portions of the registers pertaining to you. Further, assuming that the District copied those portions after having deleted the remainder, I do not believe that it would have "fabricated" a record. In short, despite what might have been an absence of clear communication, it appears that District officials acted in good faith by providing access to the material thought to have been requested. It is suggested that you discuss the matter with the District's secretary.

Lastly, I am unfamiliar with the specific contents of the payroll registers. Insofar as they include public employees' names and gross wages, I believe that they must be disclosed [see Freedom of Information Law, section 87(3)(b)]. However, to the extent they include employees' social security numbers, home addresses, references to exemptions claimed, net pay and the like, I believe that they could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)]. While those items as they pertain to you would be available to you, for you could not invade your own privacy, they could in my opinion be withheld to the extent that they pertain to others.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank T. Simeone, Attorney
Thalia Wade, Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6659

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

May 30, 1991

Mr. James T. Hall
90-A-0627
Washington Correctional Faciltiy
Lock 11 Road
P.O. Box 180
Comstock, NY 12821-0180

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

Dear Mr. Hall:

I have received your letter of May 20 in which you asked that this office "take immediate steps to look into...why..." the Office of the Westchester County District Attorney has failed to respond to a request made under the Freedom of Information Law. In brief, you submitted a request to the Office of the District Attorney on May 6 citing the Freedom of Information Law and section 255 of the Judiciary Law. As of the date of your letter to this office, your request had not been answered.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office has no investigative authority, nor is it empowered to compel an agency to grant or deny access to records.

Second, requests for records should generally be directed to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests.

Third, 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)].

Lastly, since you cited section 255 of the Judiciary Law, I point out that that statute pertains to records maintained by court clerks rather than district attorneys.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Records Access Officer, Office of the Westchester County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1660

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

May 30, 1991

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 May 14 in which you requested an advisory opinion concerning the Freedom of Information Law.

You have asked whether "diaries/appointment records kept by public college administrators and their secretaries should be available for examination 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. 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.

Second, I believe that two of the grounds for denial are likely relevant to rights of access to appointment books and similar documents. 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 Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting

> objective reality'. (10 NYCRR 50.2 [b].) Additionally, pages 7-11 (ambulance records, list of interviews, and reports of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181, mot for lv to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

In short, even though factual information may be "intertwined" with opinions, 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; 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, 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 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 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 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."

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, or if notations would if disclosed result in an unwarranted invasion of personal privacy with respect to persons named in an appointment book, I believe that those portions of the records could be deleted. Similarly, in the context of the functions of college administrators, if reference is made to 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 student. As such, to the extent that the records include references to students, for instance, I believe that those references could be deleted prior to public disclosure.

In sum, subject to the qualifications described above, it appears that the records in question should be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6661

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

May 30, 1991

Ms. Marnie Kirchgessner
Human Rights Investigator
Tompkins County Human Rights Commission
Room 116
301 Harris B. Dates Drive
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. Kirchgessner:

I have received your letter of May 20 in which you requested guidance.

In your capacity as an investigator for the Tompkins County Human Rights Commission, you wrote that you "have been contacted by several parents who feel their children are being discriminated against by the Ithaca City School District's policies". However, when you sought to meet with the Pupil Personnel Services Committee of the Board at a parent's request, you were excluded. You indicated that you recognize that federal law requires that records identifiable to students be kept confidential, and you asked whether you can be legally excluded when a parent has requested that you attend. You added that the parents attend the gatherings that you seek to attend with them.

In this regard, I offer the following comments.

While I do not believe that there is any provision of law that offers specific direction, the federal Family Educational Rights and Privacy Act (hereafter "FERPA"; 20 USC section 1232g) and the regulations promulgated pursuant to it provide guidance.

The 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 to the parents of the students. Concurrently, it generally prohibits the disclosure of those

records to others, unless the parents waive the right to confidentiality. I point out that the federal regulations promulgated under FERPA define the phrase "education records" broadly to include, with certain exceptions, those records that are:

> "[1] Directly and related to a student; and
>
> [2] Maintained by an educational agency or institution or by a party acting for the agency or institution" (34 CFR 99.3).

Therefore, parents of students enjoy broad rights of access to records pertaining to the students.

It is also noted that the same provision of the regulations defines "disclosure" to mean:

> "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including, oral, written, or electronic means."

Consequently, information identifiable to a student derived from education records could not be disclosed to a third party, such as yourself, without having received consent to disclose by a parent of a student.

With respect to parents' consent to disclose, section 99.31 of the federal regulations states in relevant part that:

> "[a] ...an educational agency or institution shall obtain a signed and dated written consent of a parent... before it discloses personally identifiable information from the student's education records.
>
> [b] The written consent must -
> [1] Specify the records that may be disclosed;
> [2] State the purpose of the disclosure;
> [3] Identify the party or class of parties to whom the disclosure may be made.

> [c] When disclosure is made under paragraph [a] of this section -
> [1] If a parent...so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed..."

If a parent consents to disclosure to you in the manner described above, such consent in my view would result in a waiver of the confidentiality restrictions otherwise applicable to education records. By means of such consent, I believe that District staff would be permitted if not obliged to disclose the records or information derived from them to you that may be discussed at a meeting. Further, since the parents may choose to permit disclosure to you, it logically follows, in my opinion, that they may choose to authorize your attendance at the kind of meeting that is the subject of your inquiry.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Pupil Personnel Services Committee, Ithaca City School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6662

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

May 31, 1991

Mr. Robert F. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your note of May 20, which appears on a response to an appeal rendered by Mr. Frank T. Simeone, attorney for the Fairview Fire District.

In related correspondence, you wrote that your request was "very precise", for you sought to "inspect all records created during [your] terms of office as Secretary and Treasurer of the Fairview Fire District". You were advised by the District's records access officer that the request failed to reasonably describe the records, and Mr. Simeone affirmed her response. You have asked how a request could be "more specific than all records created by a specific person".

In this regard, as indicated in previous correspondence, section 89(3) of the Freedom of Information Law requires that an applicant reasonably describe the records sought. It was advised that a request meets that standard when agency officials can locate and identify records based upon the terms of a request and that the nature of an agency's filing, retrieval and record-keeping systems may be relevant factors in determining whether records can be located.

If all the records that you created were kept in a particular file, agency officials could likely readily locate the records. However, in your capacity as secretary and treasurer, it is likely that you prepared a variety of different kinds of records. Some of those records might be filed by subject matter, others in chronological order; some might remain in ongoing use, others may be in storage in view of their diminished importance and the passage of time. In short, the records that you created may be kept in a number of locations and may not be retrievable

by means of your name or other personal identifier. If that is so, I do not believe that the request would have reasonably described the records as required by section 89(3) of the Freedom of Information Law.

Perhaps a request for records by subject would enable you to reasonably describe the records. For example, minutes or financial reports prepared during a certain period might be retrievable.

I hope that the foregoing serves to clarify the requirements of the Freedom of Information Law.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank T. Simeone, Attorney
Thalia Wade, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6663

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

May 31, 1991

Mr. Peter Alisco
90-A-5734
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Alisco:

I have received your letter of May 16 in which you complained with respect to the fees for copies of medical records assessed by the Westchester County Medical Center.

In this regard, I offer the following comments.

Although the Freedom of Information Law deals generally with access to government records and the fees that may be charged for the reproduction of those records, 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.

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."

As such, the issue is whether the Medical Center is charging a "reasonable fee for copies".

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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6664

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

May 31, 1991

Barry R. Buhler, 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. Buhler:

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

According to the materials, on March 29, you sent a request to the records access officer at the SUNY Health Science Center at Syracuse for copies of all records pertaining to you. You specified that the request was intended to encompass "letters to and from Hospital Administrators, Chiefs of Opthalmology, Credentials Committee members, and hospital officials", as well as "memoranda, and notes prepared by hospital employees, residents, and correspondence to and from New York State legislators, or State agencies". Although patient records concerning your admission to the hospital in the late 1960's were forwarded to you, the records to which you specifically referred were not sent.

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

First, due to the breadth of your request, it appears that there may have been a degree of misunderstanding, for it appears that you had relationships with the hospital in two capacities. One category of records, those sent to you, involved your treatment as a patient; the other apparently relates to you as member of staff. Further, you seem to have recognized the problem, for your second letter described some of the locations where the records might be filed and you wrote that the "records of interest...were created between 1981 and 1989".

Relevant to the foregoing is the standard for requesting records. Sections 89(3) of the Freedom of Information Law and 95(1) of the Personal Privacy Protection Law, which will be discussed later, require 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 and identify 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 and record-keeping systems. To the extent that the records sought are not filed in a manner that enables agency officials to locate or retrieve them, I do not believe that a request would, under the circumstances, reasonably describe the records. On the other hand, insofar as your request, particularly in view of the additional guidance offered in your letter of April 29, enables agency officials to locate the records, presumably by means of your name or similar identifier, the request would likely have met the requirement that the records be "reasonably described".

Second, as inferred earlier, two statutes in my opinion are relevant to rights of access, the Freedom of Information Law and the Personal Privacy Protection Law.

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

The Personal Privacy Protection Law pertains to records maintained by state agencies, such as the State University, about individuals or "data subjects". A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law,section 92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [section 92(7)]. For purposes of the Personal Privacy Pro- tection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [section 92(9)]. With certain exceptions, section 95 of the Personal Privacy Protection Law requires that a state agency disclose records pertaining to a data subject to that person. As such, in terms of rights of access by individuals to records pertaining to themselves, the Personal Privacy Protection Law in many instances provides rights of access in excess of rights conferred by the Freedom of Information Law.

Further, sections 89(3) of the Freedom of Information Law and 95(1) of the Personal Privacy Protection Law provide direction concerning the time and manner in which agencies must respond to requests. In brief, within five business days of the receipt of a request that reasonably describes the records sought, an agency must make the records available, deny access in writing providing the reasons for the denial, or acknowledge the receipt of the request in writing and a statement of the approximate date when the request will be granted or denied. If a request is denied in writing, or if no response is given within the requisite time, thereby resulting in a constructive denial of access, I believe that an applicant may appeal pursuant to section 89(4)(a) of the Freedom of Information Law or section 95(3) of the Personal Privacy Protection Law as the case may be.

Under the circumstances and for purposes of clarity, it may be worthwhile to seek the records under both the Freedom of Information Law and the Personal Privacy Protection Law, with as much detail as possible, in order to enhance the ability of agency officials to locate the records.

Enclosed for your review are copies of the Freedom of Information Law and the Personal Privacy Protection Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, SUNY Health Center

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6665

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

May 31, 1991

Mr. Weiner
88-A-3710
Clinton Correctional Facility
Box 367B
Dannemora, NY 12929

Dear Mr. Weiner:

I have received your recent letter in which you wrote that you would like "to know what the D.A. said when [you saw[the parole people in Sept 1989" and asked that I send you "a copy of what he said".

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office does not maintain records generally, nor is it empowered to obtain records on behalf of an applicant or compel an agency to disclose records. Nevertheless, I offer the following comments.

First, a request for records should be made 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.

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 records.

Third, the Freedom of Information Law pertains to existing records, and section 89(3) states that an agency need not create a record in response to a request. Therefore, if there is no record of the district attorney's statement to parole officials, an agency in receipt of a request would not be required to prepare a new record in response to a request.

Lastly, 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.

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-6666

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

June 3, 1991

Mrs. Joan Sergison
[redacted]

The staff of the Committee on 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. Sergison:

I have received your letter of May 20 in which you requested advice concerning the Freedom of Information Law.

According to your letter and the material attached to it, you submitted a request on May 8 "regarding the 1991 reassessment roll" from the office of the assessor of the Town of Hyde Park. As of the date of your letter to this office, you had received no response, and you contacted the assessor. He indicated that the request was "forwarded to the Freedom of Information Officer and [you] would have to contact him". You did so and later learned that the request was in turn forwarded to the town attorney.

It is your view that Town officials may be acting in a manner inconsistent with 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. 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 an agency response" to requests and assuring that agency personnel act appropriately in response to requests.

In my opinion, 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.

Second, the Freedom of Information Law provides additional 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)].

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

I 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)].

In an effort to enhance compliance with and understanding of the Freedom of Information 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: Records Access Officer
Town Assessor
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1666?

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

June 3, 1991

Mr. William D. Bavoso
Bavoso, Fox & Coffill
19 East Main Street
P.O. Box 3139
Port Jervis, NY 12771

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

Dear Mr. Bavoso:

I have received your letter of May 21 in which you requested an opinion concerning the Freedom of Information Law.

In your capacity as attorneys for the City of Port Jervis Community Development Agency, which administers state and federal community development programs in the City, you wrote that you received a request from the local newspaper for:

> "a list of all Section 8 Housing Units within the City of Port Jervis; the address of the properties; the size of the dwellings; the number of bedrooms; the number of occupants; the names of landlords; information on the rental agreement including monthly rental amount and the amount of subsidy paid on each unit."

You added that:

> "The Section 8 Rent Subsidy Program is a program by which moderate and low income individuals and families can have a portion of their monthly rent paid directly by the United States Department of Housing and Urban Development. The purpose of this program is to provide decent, safe and sanitary housing to individuals or families who

> may comply with the program's criteria for assistance. The applicants for the program are potential tenants of properties that meet HUD specifications. The applicants provide information to the Community Development Agency and to HUD on their individual and family income, family composition and status, rent, bills, etc."

You wrote further that "[t]here is no documentation in the current files of the Port Jervis Community Development Agency which lists the landlord without the name of the tenant/client and the address of the property. This includes computer records".

It is your view that the information sought may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

In good faith, I have discussed the matter with the person who made the request. He informed me that he sought similar data from HUD in Washington and that he received "a basic breakdown of Section 8 units in Port Jervis by bedroom number; how long they've been in the program; amount of rent and subsidy; and amount paid as of March '91 to property owner". He added that, as he understands the data, it does not include the addresses of Section 8-assisted housing, property owner names or the number of occupants per unit. He also indicated that a HUD official told him that federal law precludes HUD from releasing addresses of assisted units and tenants' names, "but that local housing authorities are not under [the] same constraints as HUD and would have to follow local guidelines". The reporter expressed particular interest in obtaining the landlords' names and the amount that they are paid by the government.

In this regard, I offer the following comments.

First, in my view, the "local guideline" under the circumstances is 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. 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, as you suggested in your letter, relevant 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 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, insofar as the records sought include the names, addresses or other identifying details pertaining to tenants in Section 8 housing, I believe that those items may be withheld or deleted, as the case may be, from the Agency's records.

Assuming that disclosure of the identities of landlords and the figures indicating the amounts that they are paid, essentially as government contractors, would not reveal the names, addresses or other identifying details pertaining to tenants, I believe that those items would be available under the Freedom of Information Law after the appropriate deletions have been made to protect tenants' privacy.

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
cc: Thomas M. Leek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1625
FOIL-AO-6668

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

June 4, 1991

Ms. Leslie H. Becher
Senior 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, unless otherwise indicated.

Dear Ms. Becher:

I have received your letter of May 23, in which you requested guidance concerning the recent disclosure of home addresses of certain members of the medical staff at the Greenhaven Correctional Facility by the State Education Department.

According to correspondence attached to your letter sent by Counsel to the Department of Correctional Services, Anthony J. Annucci, to Counsel to the State Education Department, Lizette A. Cantres, names and home addresses of certain medical staff employees were discovered during a routine cell frisk at the facility. Having contacted officials at the Education Department, you were informed that disclosure was somewhat routine. It is my understanding that the employees whose home addresses were disclosed are nurses licensed by the State Education Department, and it is possible that Department staff had no knowledge of their employment at a correctional facility. It appears, therefore, that their home addresses were disclosed in their capacities as licensees, rather than as employees of the Department of Correctional Services.

In this regard, I offer the following comments.

First, 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, when a state agency maintains records containing personal information, if it is determined that disclosure would result in an unwarranted invasion of personal privacy, the Personal Privacy Protection Law [section 96(1)] when read in

conjunction with the Freedom of Information Law [section 89(2-a)] would prohibit the agency from disclosing insofar as disclosure would constitute an unwarranted invasion of personal privacy. It is noted, too, that section 89(7) of the Freedom of Information Law states in part that nothing in that statute requires the disclosure of the home address of a current or former public officer or employee.

In the context of the incident in question, the nurses are public employees and are licensed by the State Education Department. It has been consistently advised that when a licensing agency maintains two addresses, business and home, business addresses must be disclosed, for those addresses are not "personal"; rather, they relate to the location in which a licensed activity occurs. It has also been advised that home addresses of licensees may have little to do with one's activities as a licensee. As stated in a decision involving a request for the identities and home addresses of licensees:

> "Respondent argues that revealing the identities of the principals of check cashing licensees would be an invasion of their personal privacy (Sec. 89[2][b][i]). With the possible exception of their home addresses, it would not. After all, the applicants sought, by license, the patronage of the public-at-large. In supplying this information to the agency, the licensees' reasonable expectation probably was that this information would be available to the public" [American Broadcasting Companies, Inc. v. Siebert, 442 NYS 2d 855, 858, (1981)].

In this instance, it appears that the only addresses maintained by the licensing agency were home addresses. Although the result of the disclosure may have been unforeseen, the problem as I see it lies largely with record-keeping practices. While I believe that the disclosure of home addresses of licensees would generally result in an unwarranted invasion of personal privacy, in some cases, licensees conduct licensed activities from their homes (i.e., doctors' and dentists' offices are often at their homes). In a case involving a request for list of names and addresses of mink and ranch fox farmers, the court 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" [ASPCA v. NYS Dept. of Agriculture and Markets, Sup. Ct., Albany County, May 10, 1989]. Further, by using certain information, such as a license plate number, anyone

can obtain a person's driving record under section 202 of the Vehicle and Traffic Law, which includes the home address of a licensee or registrant; similarly, approved pistol license applications, which usually include licensees' home addresses, have been found by the Court of Appeals to be public, not under the Freedom of Information Law, but rather under section 400.00(5) of the Penal Law [see Kwitny v. McGuire, 53 NY 2d 968 (1981)].

While I believe that home addresses may ordinarily be withheld, they can be found, often with ease, from a variety of public sources. Telephone books include most of our home addresses; assessment records identify the names and addresses of owners of real property; voter registration lists include registrants' home addresses and have long been available under the Election Law.

In short, where the Freedom of Information and Personal Privacy Protection Laws are applicable, and where license records indicate the location where the business activity is carried out by the licensee, I believe that there is adequate protection of privacy, for home addresses may be withheld. Problems arise, however, when the only address concerning a licensee that is maintained by the agency is a home address, particularly when the agency cannot ascertain from its record whether the address is home or business, or when other statutes require that particular records that include home addresses be disclosed. While I do not intend to suggest that there is a lack of sensitivity on the part of this or other agencies regarding the issue, absent statutory changes or modifications in agencies' record-keeping practices, similar problems will likely continue to arise.

In terms of record-keeping, it is recommended that licensing agencies, and others where appropriate, seek to collect and maintain addresses reflective of the locations where licensed activities are performed. In situations in which home and business addresses may be the same, or which there is no employer (as in the case of private duty nurses), perhaps consideration could be given to informing licensees that certain addresses may be disclosed to the public, unless an alternative address (i.e., a post office box) is used for mailing and disclosure purposes.

I regret that I cannot offer more substantial guidance, for it appears that there is no clear and certain method of protecting against the disclosure of home addresses of licensees and members of the public generally, for those addresses are often contained and disclosed in a variety of public sources.

If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lizette A. Cantres, General Counsel
Robert Bentley, Director, Division of Professional Licensing
Eugene Snay, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6669

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

June 4, 1991

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 recently received two items of correspondence from you, one of which is dated May 21, the other is dated May 24.

The first deals with a response to a letter from your attorney to Jules St. Germain, attorney for the Village of Island Park, and the ensuing response. Their exchange of correspondence was preceded by the preparation of an advisory opinion on May 2 which dealt in part with the obligation of Village officials to make records available for inspection and/or copying "on a specified date between certain business hours".

While I do not mean to belabor the point, I expressed the belief that the issue should be determined on the basis of reasonableness in conjunction with a section of the Committee's regulation that states that:

> "Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business" [21 NYCRR 1401.4(a)].

It was added that:

> "Assuming that the Village has regular business hours, that a request has been granted and that records have been retrieved and are ready to be inspected and copies, I believe that the records should be made available during regular business hours."

As such, my response involved the presence of certain facts and conditions. To be sure, I do not believe that an agency must respond to a request instantly. As you are aware, section 89(3) of the Freedom of Information Law requires that an agency respond in some manner to a request within five business days of its receipt. However, when the circumstances described in the opinion are applicable, it is my view that the agency must produce records during regular business hours.

The second set of correspondence includes the Village's "latest application for inspection and/or copy of public records", and you asked whether I "understand it". I believe that I do understand it, and I offer the following comments regarding its contents.

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. Similarly, 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)], neither the Law nor the regulations refer to or authorize 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.

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, the application states that one form is required to be completed for each record requested. There is nothing in the Freedom of Information Law that would so require, and numerous judicial decisions have involved situations in which large numbers of records have been sought be means of a single request.

Third, the application requires that a record sought be "described specifically". The phrase quoted in the preceding sentence is inconsistent with the Freedom of Information Law. Under the original Freedom of Information Law enacted in 1974, an applicant was required to seek "identifiable" records. That standard resulted in a variety of problems, for in many instances, without knowledge of the name of a particular record, a person could not identify the record sought. In the current Freedom of Information Law, which has been in effect since 1978, section 89(3) requires 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 and identify 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 established that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

In an effort to enhance their understanding of 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: Ann Leonard, Records Access Officer
Board of Trustees
Jules St. Germain, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6670

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

June 5, 1991

[redacted]

The staff of the Committee on 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 May 24 in which you requested assistance in obtaining records from the Office of the New York County District Attorney.

According to your correspondence, you were the victim of what you characterize as a "bias assault" that occurred nearly three years ago. Although three persons were arrested, your efforts in obtaining records concerning the disposition of the charges and those related to yourself have been denied or otherwise rebuffed. As a victim, it is your belief that you have a right of access to the records sought and that you should be "included in the proceedings".

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 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 potentially 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.

I point out that in a 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, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

Second, the preceding comments were based upon the assumption that the case in question remains active. However, it is possible that the case might have been closed and the records pertaining to it sealed. The initial ground for denial in the Freedom of Information Law, section 87(2)(a), concerns records that "are specifically exempted from disclosure by state or federal statute". One such statute is section 160.50 of the Criminal Procedure Law. In brief, under section 160.50, when criminal charges against an accused are dismissed in favor of that person, records relating to the charges are sealed. If that occurred, I believe that the records would be confidential.

Lastly, it is reiterated that I am unfamiliar with the status of the case or the contents of the records you seek. While I regret that I cannot be of greater assistance, I hope that the foregoing commentary will be useful to you. Should any further questions arise, please feel free to contact me.

In an effort to assist you, copies of this opinion will be forwarded to the Office of the District Attorney.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Irving Hirsch, Assistant District Attorney
Nina Keller, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6671

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

June 5, 1991

Mr. Matthew Lee
Inner City Press
Community on the Move
P.O. Box 416
Hub Station
Bronx, NY 10455

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

Dear Mr. Lee:

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

Your letter pertains to requests made under the Freedom of Information Law for records of the New York City Department of Housing Preservation and Development. Although you were asked to permit the Department to take additional time to make the records available, you have encountered continual delays. As of the date of your letter, you had not received any of the records sought, even though some of your requests were made in early April.

In this regard, I offer the following comments, some of which are somewhat repetitive of advice rendered previously.

As you are aware, 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 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 division 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

As you requested, in an effort to enhance compliance, copies of this opinion will be forwarded to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Fiocca, FOIL Appeals Officer
Alfred Schmidt, Records Access Officer
Peter Cantillo, Division of Relocation Operations

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6672

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

June 5, 1991

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:

On May 28, I received a letter from you dated November 13, 1989. In view of your greeting, however, and the dates of the attached correspondence, the latest of which is April 8, 1991, it appears that your letter was prepared recently.

According to the correspondence, you requested various records maintained by the State Department of Health relating to the detection and measurement of radon. The request specified that you were not seeking "any information that might reveal the names of the persons who have had their homes monitored by the DOH for radon". Although much of the data sought has been or is in the process of being made available, the Department's appeals officer wrote that the records "will not contain all the data items you requested, because [the] staff believes that home addresses must be kept confidential".

You have questioned whether you may have a valid basis for appealing insofar as the request was denied. You added further that you "can understand the need for some sort of confidentiality", but you contend that "there is also an important public health issue here, namely should the Health Department be withholding information which could identify high levels of radon, a highly toxic substance capable of posing a significant health risk."

In this regard, despite the policy concerns that you expressed, based upon the provisions of a statute dealing directly with the issue, it appears that the Department lacks the authority to disclose the data in any manner in which dwellings could be identified.

As you are aware, section 11(b) of Chapter 645 of the Laws of 1986 states in part that:

> "Notwithstanding the provisions of any other law to the contrary, the department shall not disclose the results of any specific analysis to any person other than the dwelling owner or tenant, provided however, that the department may use and disclose aggregate data obtained from such analysis to establish a statewide data base."

From my perspective, the language quoted above precludes the Department from disclosing data identifiable to any person, including a person's name or residence address, to anyone other than the owner or tenant of a dwelling. Further, although the Freedom of Information Law provides broad rights of access, 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 section 11(b) of Chapter 645 of the Laws of 1986 constitutes a statute that exempts certain information from disclosure, the Freedom of Information Law in my opinion would not affect the prohibition against disclosure imposed by section 11(b).

If you believe that the provision is question represents inappropriate public policy, the remedy would involve action to be taken by the State Legislature.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Slocum

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6673

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

June 5, 1991

Mr. Steven Briecke
85-A-4706
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

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

Dear Mr. Briecke:

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

As I understand your correspondence, you were denied access by the records access officer at your correctional facility to "the specific name of the individual who conducted the investigation into [your] institutional record which ultimately caused [you] to be denied access to the Family Reunion Program". You appealed the denial to Counsel to the Department of Correctional Services on April 23. However, as of the date of your letter to this office, the appeal had not been determined.

You have asked that this office "conduct an investigation into this matter and instruct the FOIL officer to comply with [your] request as it can not be deem 'security'".

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 enforce the Freedom of Information Law or direct an agency or grant or deny access to records.

Second, section 89(4)(a) 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 records 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It appears that the record was denied pursuant to 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". The appropriate assertion of that provision must in my opinion be based upon the facts and circumstances relating to the situation. I do not have sufficient knowledge of the matter to advise regarding the propriety of the denial.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6674

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

June 5, 1991

Mr. Peter Fanelli
[redacted]

The staff of the Committee 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. Fanelli:

I have received your letter of May 24 and the correspondence attached to it.

You have requested my views concerning the propriety of a denial of your request by the Town of Poughkeepsie. As I understand the situation, the Town and City of Poughkeepsie retained a consultant to prepare an analysis relating to a proposed joint water project. The records access officer for the Town denied your request for the consultant's report pursuant to section 87(2)(c) and (g) of the Freedom of Information Law, stating that disclosure "would impair contract negotiations and is a confidential intra-agency document prepared by the Town's consultant". You apparently appealed the denial, for the Town forwarded to this office a copy of a determination of your appeal as required by section 89(4)(a) of the Freedom of Information Law. The Town Board affirmed 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, I believe that both of the grounds for denial cited by the Town are relevant to a determination of rights of access. However, in my opinion, the propriety of their assertion is dependent upon the effects of disclosure and the specific content of the record.

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". Therefore, if, for example, the Town is in the process of negotiating toward the consummation of a contractual agreement and disclosure would adversely affect the negotiations or its negotiation strategy, the record, in my opinion, could be withheld to that extent. If, on the other hand, disclosure would not affect contractual negotiations, section 87(2)(c) could not in my view be asserted. I point out that in a recent decision involving section 87(2)(c), where the parties to the negotiations each had possession of the records sought, it was found that, due to absence of an "inequality of knowledge" of the contents of records on the part of the parties, section 87(2)(c) did not serve as an appropriate basis for denial (see Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991).

The other ground for denial of relevance is section 87(2)(g). That provision permits an agency to withhold records that:

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

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

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 tabula-

> tions 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 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

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 hope that I have 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
Catherine A. Farrell, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6625

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

June 6, 1991

Ms. Marion N. Perrault
[redacted]

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

Dear Ms. Perrault:

I have received your letter of May 21, which reached this office on May 28.

According to your letter, you have directed requests to various officials of the Village of Waterford but none have been answered. The request involved copies of an ordinance "stating that no fence higher than 4 ft. can be erected without a permit" and a permit issued to a resident at a particular address.

You have requested assistance in obtaining the records. 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. 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 an agency response" to requests and assuring that agency personnel act appropriately in response to requests. In my view, if those in receipt of your requests were unable or unauthorized to locate and disclose the records sought, the requests should have been forwarded to the records access officer.

Second, section 89(3) of the Freedom of Information Law requires that an applicant for records must "reasonably describe" the records sought. 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, 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)]. I would conjecture that your request includes sufficient detail to enable Village officials to locate the records.

Third, 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)].

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, assuming that they can be located, the records in question would be available, for none of the grounds for denial would be applicable.

In an effort to enhance compliance with and understanding of 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: Hon. Frank Falcone
Hon. Al Renzi, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6676

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

June 7, 1991

Mr. Anthony D. Amaker
89-T-2815
[redacted]

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

Dear Mr. Amaker:

I have received your letter of May 28 in which you asked how you may obtain an "audiotape" from the Kings County District Attorney's office.

In this regard, I offer the following comments.

First, a request made under the Freedom of Information Law should be directed to the designated "records access officer" at the Office of the District Attorney. The records access officer has the duty of coordinating an agency's response to requests. The name and address of the records access officer are as follows: Margaret E. Mainusch, Assistant District Attorney and Records Access Officer, District Attorney of Kings County, Municipal Building, Brooklyn, NY 11201.

Second, section 89(3) of the Freedom of Information Law requires that a request "reasonably describe" the record sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the record in which you are interested.

Third, while I am unfamiliar with the content of the audiotape, 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 some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1938
FOIL-AO- 6677

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

June 7, 1991

Mr. Alan Siegel
[redacted]

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

Dear Mr. Siegel:

I have received your letter of May 31, as well as the documentation attached to it.

Your initial comment involves an unsuccessful attempt to obtain information from the Department of Correctional Services concerning safety measures employed by the Department relative to inmates treated at hospitals. Specifically, your question is how "we...know we are safe when we, by happenstance, visit a hospital at the same time that inmates might be there being treated". Although the determination of your appeal included an assurance that "adequate safety precautions are taken when inmates are transported to public hospitals for treatment", the materials requested were denied on the ground that disclosure "may present a danger to the life or safety of inmates, staff or the general public".

The basis for the denial was section 87(2)(f) of the Freedom of Information Law, 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 contents of the records in question, the denial appears to have been appropriate.

Your remaining area of inquiry pertains to a policy adopted by the Schodack Town Board. In brief, the policy refers to regular meetings and "workshop sessions". In the case of regular meetings, "periods will be set aside for public comment". With respect to workshops, the policy states that "the Town Board does not expect to pass resolutions or take other official action". For that reason, "there normally will not be a public comment period at workshop sessions". The policy states further,

however, that "[s]hould it become necessary at any workshop session to enact a resolution or take other official action, a comment period will be allowed to provide members of the public with an opportunity to address the subject matter of the specific resolution or action".

You have asked whether "the restriction on public address [is] proper in light of the Open Meetings 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 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, 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).

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. As such, in terms of the Open Meetings Law, there is no distinction between a regular meeting and workshop session.

Second, although the Open Meetings Law provides the public with the right to attend open meetings and listen to the deliberative process, the Law is silent with regard to public participation. Therefore, a public body is not required to permit the public to speak or otherwise participate at meetings, whether they are characterized as "regular meetings" or "workshop sessions". Certainly a public body may choose to permit public participation, and when it does so, it has been advised that it may permit the public to speak in accordance with reasonable rules or policies that treat the members of the public equally.

In short, I believe that the Board's policy, which authorizes the public to speak during certain kinds of meetings, exceeds the requirements of the Open Meetings Law. Therefore, in my view, it is proper.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6678

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

June 10, 1991

Mr. George Persico
[redacted]

Dear Mr. Persico:

I have received your letter of May 30, which you characterize as a "Notice of Appeal", as well as the materials attached to it.

The correspondence relates to a request for records of the City of Amsterdam, and it appears that you have appealed a partial denial of the request to the Committee on Open Government.

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 cannot compel an agency to grant or deny access to records, nor is it empowered to render a determination following an appeal. The provision pertaining to the right to appeal a denial of a request is section 89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

As I understand the correspondence, you requested various records from the City of Amsterdam Municipal Civil Service Commission. The attorney for the Commission appears to have reviewed the request and advised that the Commission respond to five of six aspects of the request. He instructed the Commission

"not to respond to number 5 which asks that a list of applicants be provided" and added that "[t]he legal basis for refusing to respond to number 5 is Public Officers Law Section 89(2)(b)(i)". In the response itself, certain records or information were provided, others were either "not available" or not "on file", and no reference was made to the list of applicants.

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 a record in response to a request. Therefore, if, for example, the agency no longer maintains an announcement concerning a certain position, it could neither grant nor deny access to that record, and the Freedom of Information Law would not be applicable.

Second, when an agency maintains records and grants access to some but withholds others, it cannot in my view fail to respond with respect to those that are withheld. Section 89(3) of the Law requires that a denial of access be made in writing. Moreover, the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law, require that agency personnel must:

> "Upon locating the records, take one of the following actions:
>
> (i) Make records available for inspection; or
> (ii) Deny access to the records in whole or in part and explain in writing the reasons therefor" [21 NYCRR 1401.2(b)(3)].

In addition, 21 NYCRR 1401.7 states 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."

Third, assuming that the list of applicants refers to persons who were not hired, I believe that the names of those persons could be withheld pursuant to section 89(7) of the Freedom of Information Law. That provision states in part that nothing in the Freedom of Information Law shall require the disclosure of "the name or home address...of an applicant for appointment to public employment...".

I hope that I have interpreted your correspondence accurately and 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: Nicholas J. Pallotta, Executive Secretary
Philip V. Cortese, Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6679

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

June 10, 1991

Ms. Dale Joan Young
Property Tax Savers
117 Grand Boulevard
Scarsdale, NY 10583

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

Dear Ms. Young:

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

The enclosures include a number of requests, responses to certain of the requests, an article indicating that "the assessor admits to both knowing what [you] want to obtain, and her denying the information because [you] didn't perfect [your] request". You have sought my views concerning the requests, the responses to them, and the statement appearing in the article.

By way of background, in response to one of the requests, you were informed that it was "too vague" and that the agency is "not required to create lists or documents". The records sought involved "[a]ny and all identifying information about any and all homes removed from the list compiled by the State to determine 1990 Residential Assessment Ratio; and the same information for 1991 properties & R.A.R.". In another request, which involved entries in an assessor's field book pertaining to a particular property for a certain period and an assessor's field books for certain years, you were informed that you needed authorization from property owners and that the request was not sufficiently specific.

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law pertains to existing records. Further, 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, a list is

requested but an agency does not maintain such a compilation, it would not be obliged to prepare a list on your behalf in order to comply with the Law.

Second, section 89(3) of the Freedom of Information Law also states that an applicant must "reasonably describe" the records sought. It has been held by the Court of Appeals, the State's highest court, that a request reasonably describes the records when the agency can locate and identify 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 and record-keeping systems. To the extent that the records sought are not filed in a manner that enables agency officials to locate or retrieve them, I do not believe that a request would reasonably describe the records. On the other hand, when agency officials are able to locate and identify records, despite the breadth of a request, the applicant would, in my opinion, have met the standard of "reasonably describing" the records sought. For instance, assuming that field books are retrievable by year, a request for those records on that basis would likely

be appropriate in view of the decision rendered by the Court of Appeals. I am not suggesting necessarily that a request that reasonably describes records, thereby enabling an agency to locate them, must be honored in its entirety; rather, those records, when they are located, would be subject to whatever rights of access may exist under the Freedom of Information Law.

Third, assuming that records sought have been reasonably described, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, 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 have long been accessible to the public. 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 fool 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; see also Property Valuation Analysts v. Williams, 563 NYS 2d 545, ___ AD 2d ___ (1990)].

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 of 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).

Based upon the foregoing, under ordinary circumstances, the consent of a property owner is not required as a condition precedent to disclosure of records concerning that person's property. Further, it has been held that when records are accessible under the Freedom of Information Law, they should be made equally available to any person, regardless of one's status or interest [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984); Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)].

I am unfamiliar with the specific contents of assessor's field books. However, section 87(2)(g) of the Freedom of Information Law may be relevant to rights of access to those documents and others referenced in the documentation attached to your letter. 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 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.

Statistical or factual information used or developed by an assessor in reaching a certain figure or rate would constitute "intra-agency material"; however, I believe that it would be available under section 87(2)(g)(i). Further, as suggested earlier, if "back up" materials used in "RAR adjustments" were disclosed to a local newspaper, I believe that they would be equally available to any person.

Lastly, I point out that section 574(5) of the Real Property Tax Law states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection of copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced above are usually "EA 5217" forms, which include the selling price of a parcel when real property is transferred.

To give effect to section 575(5) of the Real Property Tax Law, I believe that information derived from EA 5217 forms that is transferred to other records should be considered confidential to the same extent as that statute confers confidentiality with respect to the forms (see Property Valuation Analysts, supra). Any different result would, in my opinion, essentially nullify the direction given in section 574(5). Further, while the Free-

dom of Information Law grants broad rights of access to records, the first ground for denial, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". In this instance, section 574(5) of the Real Property Tax Law, a statute, would exempt the form or reports from disclosure, except as otherwise provided.

However, the fact that information contained in the 5217 forms may be transferred to other records does not require that those records be kept confidential in their entirety. Records containing information derived from the forms might include a variety of other kinds of information, which, in my opinion, would be available to the extent required by the Freedom of Information Law. For instance, a record might include the key aspect of the EA 5217, the sale price of real property, as well as other items of information that were not transferred from the EA 5217. In that circumstance, the sale price could be deleted from the record, while the remainder might be available.

Further, EA 5217 forms are not confidential in every situation in which they may be requested. As specified in section 574(5) of the Real Property Tax Law, the forms are confidential, "except for purposes of administrative or judicial review of assessments". Therefore, if the forms or other records containing information derived from the forms are request in conjunction with a grievance (i.e., the administrative review of an assessment), the confidentiality restrictions otherwise imposed by section 574(5) would not apply. In that kind of case, I believe that the information contained in the form would be accessible.

Due to the possible significance of Property Valuation Analysts, enclosed is a copy of that decision for your review.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Hon. Lowell Tooley, Village Manager
John Galloway, III

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6680

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

June 11, 1991

Ms. Kathleen Fedele
Assistant Counsel
NYS Department of Economic Development
One Commerce Plaza
Albany, New York 12245

The staff of the Committee 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. Fedele:

As you are aware, I have received your letter of June 5 in which you raised questions concerning the applicability of the Freedom of Information Law.

According to your letter, the Department of Economic Development "currently has an inventory of approximately 80,000 I [Love] NY posters, the majority of which are artistically appealing and are believed to be marketable for a price which exceeds the cost of production". You added that although "the Department can point to no specific statutory authority to undertake the sale or promotion for sale of such posters", you raised the following issues:

> "(1) Could such a poster be termed a 'record' pursuant to the definition contained in Section 86 of Article 6 of the Public Officers Law?
>
> (2) If so, would the Department be limited to charging only the production cost of such a 'record?'."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and section 86(4) of the Law defines the term "record" to mean:

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

The language quoted above is expansive and the courts have interpreted the definition as broadly as its 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); Russo v. Nassau Community College, 554 NYS 2d 774 (1990)].

It is noted that the definition of "record" makes specific reference to designs, drawings and photos. Those kinds of materials in the context of the Freedom of Information Law are in my view intended to represent media containing information used in the context of some governmental or government-related activity. Designs and drawings are commonly used and maintained in conjunction with architecture, building or technical plans, for example. Photographs may be used or maintained as part of motor vehicle accident reports or investigations. Works of art, such as those found at the Empire State Plaza, may be intended by artists to convey ideas or sensations; despite their ownership by the State, however, I do not believe that they constitute records. While the posters might convey information concerning an event or region of the State, it is difficult, in my opinion, to characterize them as "records" as that term is generally used.

In the only judicial decision of which I am aware that may be somewhat analogous, an applicant sought evidentiary material, such as statements made by a witness, as well as tools and clothing, under the Freedom of Information Law. In that case, it was found that physical evidence, such as tools and clothing, did not constitute records that fell within the scope of the Freedom of Information Law, even though they might have been used in an evidentiary manner to convey information relating to a crime [Allen v. Strojnowski, 129 AD 2d 700 (1987); motion for leave to appeal denied, 70 NY 2d 871 (1989)]. Although the posters are not akin to physical evidence, they likely represent physical or artistic renditions or interpretations of events or locations. Notwithstanding the terms of section 86(4) and the absence of any clear judicial interpretation on the issue, the posters, from my perspective, are not records as that term is ordinarily used in the context of the Freedom of Information Law.

If the posters could be considered "records", under section 87(1)(b)(iii) of the Freedom of Information Law, inspection would be free; if copies are requested, the fee would be based upon the actual cost of reproduction, unless "a different fee is otherwise prescribed by statute". I have no knowledge of whether posters could be reproduced, and in view of the size of the inventory, reproduction may not be an issue. Similarly, I have no knowledge of the nature of any agreements that might exist between the Department and the makers of the works, or whether the works have been copyrighted. While I lack expertise on the subject, it might be worthwhile to investigate copyright protection, which might enable the Department to sell the works based upon the terms of a copyright and an agreement with the artists who prepared the works.

Lastly, it is suggested that consideration be given to the establishment of fees pursuant to section 15 of the State Finance Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1940
FOIL-AO- 6681

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

June 12, 1991

Mr. Bernard J. Blum
President
Rockaway Bay Sierra Club Task Force
[redacted]

The staff of the Committee on Open 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 May 31. As in the case of previous correspondence, your inquiry deals with the "potential for circumvention of secret ballot prohibition in open government laws" by a public body, such as Community Board #14.

In your letter, you described the following scenario involving the election of a chairperson:

> "Hypothetically let three alternatives be voted on by secret ballot. There is a clear winner but two become invalidated in some manner (or drop out) and there is a vote of acclamation for the choice obtained be secret ballot.
>
> "Complaints are made that the choice was by secret ballot and that there was no roll call vote. The agency maintains that the previous two alternatives have been invalidated (or dropped out) and votes again for the alternative chosen by secret ballot but this second time it votes in roll call style."

You questioned whether "the secret ballot prohibition [has] been circumvented given that the two other alternatives or any other alternatives did not run the second time to challenge the choice obtained by secret ballot".

In my view, if there had been no "clear winner" and two of three candidates dropped out, a vote by acclamation, including the names of those who might have abstained, would be appropriate. However, if there was a "clear winner", a failure to record the votes of the members of a public body might be inconsistent with the requirements of "open government laws".

From my perspective, the provisions of both the Freedom of Information Law and the Open Meetings Law are pertinent to the issues raised. First, as you are aware, section 106 of the Open Meetings Law pertains to minutes of meetings and states in relevant 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."

Second, in one of the few instances in the Freedom of Information Law that requires that records be maintained, section 87(3)(a) provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, 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 that manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

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. 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 and states that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able

> to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

As indicated in earlier correspondence, 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)].

There is only one decision of which I am aware that deals specifically with the notion of a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated further that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

In the context of the situation that you described, when a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous rati-

fication does not indicate how the members actually voted, the public may be unaware of the members' views on a given issue. If indeed a consensus represents action upon which a public body relies in carrying out its duties, I believe that the minutes should reflect the actual votes of the members.

Lastly, you asked whether there should be a "new election when Mr. Castellano [the individual elected as Chairperson] has challengers". I cannot answer the question. Further, there are many elections in which an individual is chosen unopposed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Community Board #14

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6682

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

June 13, 1991

Mr. Ferd S. Thering
[redacted]

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

Dear Mr. Thering:

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

The attachments consist of requests for records, all of which have been made by the same individual. Several of the requests are quite broad. For example, one of them involves:

> "[a]ll assessor notes, judgments, or other papers or legal documents relating to the lowering of any property assessment - that is - all property assessments that have been lowered by the assessor in the Town of Otsego during the period 1986-1991."

Another pertains in part to:

> "[a]ll assessor notes, judgments, papers or other legal documents that serve as a guide to the valuation of lakeside or farmland or residential properties - to include all property inventory sheets for each property bordering on Otsego Lake within the Town of Otsego...".

You wrote that you do not have specific office hours, and you asked whether the Town Clerk, whose office hours are 9 a.m. to 3 p.m. on Mondays and Wednesdays, can "produce the records and copy them without [your] presence". You also asked whether a point is reached "where Access to Records could be termed harassment".

In this regard, I offer the following comments.

First, it is emphasized that section 89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. It has been held by the Court of Appeals, the State's highest court, that a request reasonably describes the records when the agency can locate and identify 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 and record-keeping systems. To the extent that the records sought are not filed in a manner that enables agency officials to locate or retrieve them, without searching through a great number of files, I do not believe that a request would reasonably describe the records. On the other hand, when agency officials are able to locate and identify records, despite the breadth of a request, the applicant would, in my opinion, have met the standard of "reasonably describing" the records sought. For instance, assuming that legal documents relating to the

lowering of assessments are retrievable by year, a request for those records on that basis would likely be appropriate in view of the decision rendered by the Court of Appeals. However, if those kinds of records are filed by means of a parcel identifier, i.e., tax map designations, addresses, or owners' names, that kind of request in my opinion would not likely reasonably describe the records. Perhaps if the nature of your record-keeping system is described to the applicant, he could modify his requests in a way that would permit you to retrieve the records in a reasonable manner.

Second, pursuant to regulations promulgated by the Committee on Open Government, each agency must designate one or more "records access officers". A records access officer has the duty of coordinating an agency's response to request [21 NYCRR 1401.2(a)]. If you are the records access officer concerning the records in question, I believe that that you could ask the clerk to disclose records on your behalf. Further, as you may be aware, section 30 of the Town Law states in part that the town clerk is the custodian of town records. Therefore, I believe that the clerk could produce the records, even though you may not be present.

The regulations also provide guidance concerning the hours during which records should be made available. Specifically, section 1401.4 of the 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 purposed of making an appointment."

Since there are no daily business hours, appointments could be made at mutually agreeable times during which the applicant could review the records.

Lastly, there are no judicial decisions rendered under the Freedom of Information Law of which I am aware that deal with the issue of harassment. Nevertheless, as suggested earlier, it appears that certain of the requests do not meet the requirement that the applicant reasonably describe the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6683

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

June 13, 1991

Ms. Janet A. McCue
[redacted]

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

Dear Ms. McCue:

I have received your letter of June 6, as well as the correspondence attached to it.

You have sought an advisory opinion concerning the propriety of a partial denial of access to records by Jacqueline Papatsos, Mayor of the Village of Island Park.

By way of background, you wrote that you "have been requesting any and all legal bills concerning all HUD-related matters" in which the Village is involved. Although you have been given "itemized bills" that include dates, time spent, copying costs, travel expenses, court fees and the like, you were told that "names" on attorneys' bills could be withheld. You added that you are not "looking for details of any pending litigation"; rather you "simply want access to dates, hours, miscellaneous fees, etc., as well as names of individuals represented." Following your appeal of an initial denial of those kinds of details, Mayor Papatsos affirmed the denial, stating that "the itemizations are privileged as an attorney/client communication and also as an attorney's work product", and that "[a]s they relate to pending litigation their release would compromise the Village's position in these cases.

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, 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 informa- tion 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 ex- empted 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 and other details to be discussed further 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.'"

Most recently, in a case that appears to have involved facts somewhat similar to those presented, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the applicant ("petitioner") sought billing statements for legal services provided to the Board ("respondents") by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements, petitioner contended 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". As in the situation in which you are involved, "[r]espondents maintain[ed] that releasing any additional information on the billing statement would jeopardize the client confidentiality protected by CPLR 4503(a)...".

In its discussion of the issue, the court found that:

"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. Henessy, 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 general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...

"...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, 46 NY 2d 906, 908.)...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."

In sum, subject to the qualifications discussed above, I believe that the records sought should be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Jacqueline Papatsos, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6684

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

June 17, 1991

Mr. Allan D. Selvy
[redacted]

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

Dear Mr. Selvy:

I have received your letter of June 10.

You wrote that, last month, you submitted several requests under the Freedom of Information Law to several "governmental units of New York State". Although you received one response, you have not received any response from the others. As such, you requested information concerning the "appeal process" and the "procedure for court review".

In this regard, I offer the following comments.

As you may be aware, 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)].

Further, the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law state in part that:

> "The time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of written appeal identifying:
>
> (1) the date and location or requests for records;
> (2) the records that were denied; and
> (3) the name and return address of the appellant.

Lastly, when a denial is affirmed following an appeal, pursuant to section 89(4)(b) of the Freedom of Information Law, a person denied access may seek judicial review by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6685

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

June 17, 1991

Ms. Catherine Z. Gilmore
Deputy County Attorney
County of Onondaga
Department of Law
John H. Mulroy Civic Center
421 Montgomery Street, 10th Floor
Syracuse, New York 13202

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

Dear Ms. Gilmore:

I have received your letter of June 6 in which you requested an advisory opinion in conjunction with our conversation of the preceding day involving a request for a County employee's personnel records.

According to your letter, "[t]he record in issue consists of a counseling memorandum placed in the employee's personnel file" and includes reference to the fact that "the County withheld vacation days from the employee's benefits."

The question involves the extent to which the record in question should be disclosed. You asked further whether the "professional status of a government employee [i.e., as management confidential, civil service or licensed by the State] would require a different analysis under the Freedom of Information Law".

In this regard, I offer the following comments.

First, 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.

Further, the Freedom of Information Law does not contain provisions that distinguish public employees by their employment classification as civil service or management confidential, for example. Again, I believe that the contents of records pertaining to public employees and the effects of disclosure in accordance with the grounds for denial are the factors used to determine rights of access. I point out, however, that there may be other provisions of law dealing with particular classes of public employees that may affect rights of access to records relating to those persons. For example, rules promulgated by the Department of Civil Service refer specifically to the publication of eligible lists in section 71.3; section 50-a of the Civil Rights Law pertains to certain personnel records of police and correction officers, as well as paid firefighters.

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 emphasized that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial. Based upon the language quoted in the preceding sentence, I believe that a single record may be accessible or deniable in whole or in part. Moreover, that language, in my view, imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In my opinion, two of the grounds for denial are relevant to rights of access to the record in question. However, in conjunction with the ensuing analysis, I believe a portion of the record should be disclosed; while other aspects of the record could likely be withheld.

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 public employees. In brief, the courts have held that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a

permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 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 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 [i.e., section 87(2)(b)] 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 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 15, 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, insofar as it includes a decision to impose disciplinary action, a demotion or a penalty upon a public employee, is accessible under the Freedom of Information Law. It has been advised that 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 Co. v. School District of City of Syracuse, 430 NYS 2d 460 (1989)]. Further, to the extent that charges are dismissed, I believe that they may be withheld.

In the context that you presented and in view of the terms of the Freedom of Information Law and its judicial interpretation, I believe that the portion of the counseling memorandum specifying that action was taken, i.e., that aspect of the record indicating that vacation days had been withheld, would be available, for it represents a final determination to impose disciplinary action. Other aspects of the memorandum dealing with a personal problem, i.e., marital or familial, a medical problem, or perhaps a drug or alcohol problem, would in my opinion represent intimate details of one's life and would if disclosed constitute an unwarranted invasion of personal privacy. Further, if as is common in counseling memoranda, the record in question involves a warning or admonition or advice, I believe that portion could be withheld, for it would not represent a final determination.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: John O'Brien

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1944
FOIL-AO- 16686

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

June 17, 1991

Ms. Audrey L. Glover
[redacted]

Dear Ms. Glover:

I have received your letter of June 6, the materials attached to it, and tape recordings of certain events involving the Town of Kirkwood. The focus of your correspondence is the proposed construction of an incinerator in Broome County.

It is unclear whether you are seeking advice or comment relative to the correspondence or the content of the tape recordings. However, in an effort to enhance your understanding of the Freedom of Information and Open Meetings Laws, I offer the following remarks.

First, as a general matter, the Freedom of Information Law pertains to existing records. Therefore, to the extent that your requests involved records that are not maintained by the Town, the Freedom of Information Law would be inapplicable. Further, section 89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, if, for example, transcripts of meetings or discussions between Town officials and officials of the Broome County Resource Recovery Agency have not been prepared, neither the Town nor the Resource Recovery Agency would be obliged to prepare transcripts on your behalf.

Second, certain aspects of your correspondence consist of "interrogatories". While agency officials may answer questions, the Freedom of Information Law is not a vehicle that provides the public with the right to cross-examine public officials or elicit answers to questions. Again, that statute pertains to existing records. While it requires agencies to respond to requests for records and furnish records to the extent required by law, it does not compel officials to respond to interrogatories. Similarly, although persons may express their views at public hearings, I am unaware of any statute that requires public officials to answer questions at those hearings.

Third, since you referred to minutes and transcripts of meetings, the term "meeting" in the context of the Open Meetings Law refers to a gathering of a quorum of a public body for the purpose of conducting public business. A gathering between a representative of Town government and persons representing other entities would likely not constitute meetings subject to the Open Meetings Law, for no quorum of any public body (i.e., the Town Board) would have convened.

Fourth, when a public body does conduct a meeting, 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 no action is taken, there is no require-

ment that minutes of an executive session be prepared. It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law.

Lastly, you questioned the propriety of an executive session held to discuss litigation. In this regard, The provisions in the Open Meetings Law concerning litigation are found in section 105(1)(d). The cited provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the language quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors.

I am returning your audiocassette, which is enclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Carolyn W. Fitzpatrick, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6687

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

June 17, 1991

Mr. David S. Shaw
Shaw & Silveira
40 South Roberts Road
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 Mr. Shaw:

I have received your letter of June 5, which did not reach this office until June 14. Please note that the zip code used in addressing your letter to this office was inaccurate.

At the request of the Board of Education and Superintendent of Schools of the Pocantico Hills Central School District, you inquired "into the requirements of the Freedom of Information Law with respect to disclosing the substantive provisions of a settlement agreement between a teacher who has been subject to Section 3020-a proceedings and the Board of Education". You indicated that "[w]hen the matter was settled, an agreement was executed which included a provision that the terms of the settlement agreement would not be publicly disclosed except as required by law". As such, you wrote that the "question focuses upon whether or not there can be a 'private' settlement agreement with a teacher who has been brought up on Section 3020-a charges".

In this regard, based upon the language of the Freedom of Information Law and its judicial interpretation, I believe that the settlement agreement in question, 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 but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

Another more recent decision also required the disclosure of a settlement agreement between a teacher and a school district following the initiation of disciplinary proceedings under section 3020-a of the Education Law (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.

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 abuse. 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 promised 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)].

Under the circumstances, it is my view that the terms of the settlement would result in a permissible rather than an unwarranted invasion of personal privacy. That record is, in my opinion, relevant to the performance of the official duties of the Board of Education and the teacher.

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.

Further, it is my view 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 opinion, the substitution of an agreement in lieu of a report of the hearing panel, which apparently was never prepared in this situation, 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 that you presented.

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, it does not appear that the teacher was acquitted. On the contrary, charges were apparently withdrawn in conjunction with an agreement to settle the matter. As such, in my opinion, 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, 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).

In sum, I believe that the Freedom of Information Law as judicially interpreted requires that the terms of the settlement agreement in question be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0688

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

June 17, 1991

Mr. Ruben Diaz
91-A-0238 H-Blk-R96
[redacted]

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

Dear Mr. Diaz:

I have received your letter of June 6. You wrote that you are attempting to obtain records from the City of Yonkers Police Department relating to your conviction. However, you indicated that you are "a little unclear on how to go about the procedure", and you asked for the name of the person to whom a request should be directed.

In this regard, first, a request should be directed to an agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests. The person to whom a request may be made is:

Ms. Linda DiGangi, Public Access Officer
c/o Department of Planning
Suite 311
87 Nepperhan Avenue
Yonkers, NY 10701

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 in which you are interested.

Third, for your information, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 or the effects of disclosure. Therefore, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of rights of access.

Of potential significance is section 87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself.

Perhaps the most relevant provision concerning access to 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. 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.

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-6689

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

June 17, 1991

Mr. Jerome Johnson
90-A-6600
Franklin Correctional Facility
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. Johnson:

I have received your letter of June 7 in which you requested assistance.

You wrote that you "have been informed that there are arrests on [your] current New York Division of Criminal Justice Rap Sheet that list 'No Disposition Reported'." You have requested records under the Freedom of Information Law indicating the "certified disposition" of the arrests from "the court clerk where the arrests took place". However, it appears that your requests have not been answered.

In this regard, 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 on the foregoing, the Freedom of Information Law does not apply to the courts or court records.

The foregoing is not intended to suggest that court records are confidential, for other provisions of law (see e.g., Judiciary Law, section 255) often grant substantial rights of access to court records. It is suggested that you resubmit a request to the clerk of the court that maintains the records, citing an appropriate provision of law as the basis for the 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-6690

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

June 17, 1991

Mr. Daniel Lynch
82-A-6183
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

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

Dear Mr. Lynch:

I have received your letter of June 8 and the correspondence attached to it.

According to the materials, you submitted a request to the New York City Police Department seeking police records about your grandfather, who was born in Brooklyn in 1908 and "was involved with some kind of criminal activities in the early 1930's and got himself shot by an on duty New York City Police Officer." You requested details concerning the incident, the "gang" your grandfather was "working with" and his last known address. The request was denied by Sgt. Louis Capasso, the Department's records access officer, on the ground that the request is "too broad", that it does not reasonably describe the records in question, and that "the Freedom of Information Law allows access to documents, not answers to interrogatories".

In this regard, I offer the following comments.

First, as suggested by Sgt. Capasso, the Freedom of Information Law in section 89(3) requires that an applicant must "reasonably describe" the records sought. It has been held by the Court of Appeals, the State's highest court, that a request reasonably describes the records when the agency can locate and identify 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 and record-keeping systems. To the extent that the records sought are not filed in a manner that enables agency officials to locate or retrieve them without searching through a great number of files, I do not believe that a request would reasonably describe the records.

Since your request includes only a name and a brief description of an incident that might have occurred approximately 60 years ago within a time frame of as much as five years, it is unlikely in my view that the request met the requirement that the records be reasonably described. Under the circumstances, with such minimal information, it may be all but impossible to locate the records in which you are interested, if they continue to exist. In order to enable Department officials to locate the records, it is recommended that you attempt to provide additional details concerning your grandfather and the incident.

Second, although Sgt. Capasso's response was written as a denial, in my opinion, a request is denied when an agency locates records and withholds them in accordance with the grounds for denial appearing in section 87(2) of the Freedom of Information Law. In this instance, absent the ability to locate the records, the Department could neither make them available nor withhold them.

Third, I cannot advise as to the records that would be available, for I know little of their nature or whether such records continue to exist.

Fourth, also in conjunction with the response, I point out that the Freedom of Information Law does not require that agency officials answer questions or prepare records in order to respond to questions. While an agency is obliged to respond to a request, the Freedom of Information Law pertains to existing records. In addition, section 89(3) states in part that an agency is not required to create a record in response to a request.

Lastly, while I do not believe that an appeal would be appropriate or would result in a response different from that offered by Sgt. Capasso, the person designated to determine appeals for the Department is Susan R. Rosenberg, Assistant Commissioner, Civil Matters. Her office is located in Room 1406 at 1 Police Plaza.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis J. Capasso, Records Access Officer
Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1691

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

June 18, 1991

Mr. Todd Young
89-A-6469
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

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

Dear Mr. Young:

I have received your letter of June 11 in which you described problems in using the Freedom of Information Law and sought assistance.

According to your letter, you have made a series of requests to the Queens County District Attorney and the New York City Police Department, but the requests of "have either been ignored or denied". You added that "they neglected to inform [you] where to file [your] administrative appeals. Further, you indicated that you are "having trouble obtaining the Master Index for the Police Department...".

In this regard, I offer the following comments.

First, as you may be aware, a request should be directed to an agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests. The records access officer for the New York City Police Department is Sgt. Louis J. Capasso, and I believe that the records access officer designated by the Queens County District Attorney is Daniel T. McCarthy, Assistant District Attorney.

Second, 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)].

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state 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" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch 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 the proceeding that the 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" [74 NY 2d 907, 909 (1989)].

In sum, the records access officer has the duty individually or in that person's role of coordinating the response to a request of informing a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

The person designated to determine appeals for the New York City Police Department is Susan R. Rosenberg, Assistant Commissioner. Since I do not know the name of the person so designated at the Queens County District Attorney's office, it is suggested that an appeal be made to the District Attorney, specifying that if he does not render determinations on appeal, your appeal should be forwarded to the proper person.

Third, the phrase "master index" is used in the regulations promulgated by the Department of Correctional Services under 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. Rather than seeking a "master index" from the New York City Police Department, it is suggested that you request the subject matter list maintained pursuant to section 87(3)(c) of the Freedom of Information Law.

Lastly, as requested, enclosed is a copy of the Committee's latest annual report to the Governor and the State Legislature.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis J. Capasso, Records Access Officer
Daniel T. McCarthy, Assistant District Attorney
County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6692

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

June 18, 1991

Mr. Anthony Logallo
90-B-1210
Box 2000
Pine City, NY 14871

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

Dear Mr. Logallo:

I have received your recent letter, which reached this office on June 13.

In conjunction with your earlier inquiry, you raised questions concerning appeals and judicial review if requests for records are denied by "a private youth home and/or public school".

In this regard, I offer the following comments.

First, as indicated in my letter of May 16, the Freedom of Information Law is applicable to records maintained by agencies. The definition of "agency" [see Freedom of Information Law, section 86(3)] generally includes entities of state and local government. Therefore, a public school district would constitute an agency subject to the Freedom of Information Law. A private youth home, however, would likely fall beyond the requirements of the Freedom of Information Law.

Second, when a record is denied by an agency, 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."

As such, in a school district, an appeal would be made to the board of education or the person or body designated by the board to determine appeals.

If a request is denied following an appeal, a proceeding to seek judicial review of the denial may be initiated in Supreme Court under Article 78 of the Civil Practice Law and Rules.

Lastly, as suggested in the opinion of May 16, records maintained by a youth home are generally confidential under section 372 of the Social Services Law; I do not believe that they can be disclosed with the authorization of a court, the Department of Social Services or, where appropriate, the Division for Youth. It is suggested that you might seek authorization to disclose from the proper agency.

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-1946
FOIL-AO-6693

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

June 19, 1991

Mr. Francis Thompson
President
Hoosic Valley Teachers Association
Schaghticoke, NY 12154

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

Dear Mr. Thompson:

I have received your letter of June 13 in which you requested an advisory opinion concerning a motion carried by the Hoosic Valley Central School Board of Education at a recent meeting.

In your capacity as president of the Hoosic Valley Teachers Association, you enclosed a copy of the minutes of the meeting in question, which includes reference to a motion "[t]o bring 3020A charges of incompetence against [a named teacher] and pursuant to Section 913 of the Education Law, to order a psychiatric evaluation of said teacher". The motion was carried without dissent. You specified that no finding of probable cause under section 3020-a of the Education Law has yet been made.

You have asked whether, in my view, it is "appropriate for a Board of Education to print the name of the teacher as well as information that charges may be brought against the teacher and that the teacher is to undergo psychiatric examination".

In this regard, while I believe that the Board of Education clearly had the authority to consider the matter in private and withhold the name of the teacher, it does not appear that any statute would prohibit the disclosure of the teacher's identity.

With respect to consideration of the issue in public, I direct your attention to the Open Meetings Law. As a general matter, that statute requires that public bodies conduct their meetings in public, except when an executive session may properly be withheld. In this instance, an executive session could, in my view, have been conducted, for 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..."

Nevertheless, the Open Meetings Law is permissive. Stated differently, although a public body may be authorized to hold an executive session, nothing in that statute requires that an executive session be held. I point out that the Law includes a requirement that a procedure be accomplished, during an open meeting, before an executive session may be convened. Specifically, the introductory language of section 105(1) states that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, when the subject matter under consideration may properly be discussed behind closed doors, an executive session may be held if the requirements imposed by section 105(1) are accomplished. Further, even when the subject matter qualifies for discussion in executive session, a public body may choose to hold an open meeting, or a motion to enter into an executive session may be defeated. Therefore, notwithstanding the prudence of discussing or voting upon the issue during an open meeting, I do not believe that the Board would have been required to enter into an executive session.

I point out that the next step in the process, according to section 3020-a of the Education Law, requires that certain action be taken in executive session. Subdivision (2) of that statute states in part that:

> "[U]pon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine by a vote of a majority of all the members of such board, whether probable cause exists."

For reasons analogous to those discussed with respect to the Open Meetings, the Freedom of Information Law, in my view, would permit the Board to withhold the name of the teacher but would not require that the name be withheld.

Like the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access. In brief, all records of an agency are available, except to the extent 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 it has been found in a variety of circumstances that public employees enjoy a lesser degree of privacy than others, for they are required to be more accountable than others, it has been advised that when allegations have been made 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 would in most circumstances result in an unwarranted invasion of personal privacy [see e.g., Herald Co. v. School District of City of Syracuse, 430 NYS 2d 460 (1989)]. Further, to the extent that allegations are found to be without merit or charges are dismissed, I believe that they may be withheld. Therefore, I believe that records or information indicating the teacher's identity could have been withheld.

Nevertheless, the language of the Freedom of Information Law indicates that an agency may withhold records, but that it is generally not required to do so. Specifically, the introductory language of section 87(2) states in relevant part that: "Each agency shall...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof" that fall within the grounds for denial that follow (emphasis added).

Moreover, the Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, although an agency may in appropriate circumstances withhold records, I do not believe that it is obliged to do so.

In sum, irrespective of the wisdom of disclosure and my belief that the matter could validly have been discussed in executive session under section 105(1)(f) of the Open Meetings Law and that reference to the teacher's identity could have been withheld under section 87(2)(b) of the Freedom of Information Law, nothing in those statutes, in my opinion, would require confidentiality.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6694

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

June 19, 1991

Mr. Oswald G. Dawkins
89-A-2152
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. Dawkins:

I have received your letter of June 13.

You wrote that you are seeking information relating to your appeal, and you indicated that witnesses who testified against you later pleaded guilty. The documents in which you are interested include a "plea and sentencing minutes", "rap sheets" and warrants.

In this regard, I offer the following comments.

First, it is likely that pleas and sentencing minutes would be maintained by the court or courts in which proceedings were conducted. Here I point out that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

In turn, section 86(1) defines "judiciary" to mean:

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

As such, while the Freedom of Information Law would include police departments and office of district attorneys within its coverage, it does not apply to the courts or court records.

The foregoing is not intended to suggest that court records are generally confidential, for other provisions of law often grant broad rights of access to court records (see e.g., Judiciary Law). Insofar as the records you seek may be maintained by a court, it is suggested that a request be directed to the clerk of the appropriate court with sufficient detail to enable court officials to locate the records.

Second, with respect to "rap sheets", the general repository of criminal history records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain the record from the Division, it has been held that criminal history records maintained by that agency are exempted from disclosure pursuant to section 87(2)(a) of the Freedom of Information Law. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that the district attorney must disclose those records [see Thompson v. Weinstein, 150 AD 2d 782 (1989); also Geames v. Henry, ___ AD 2d ___, App. Div., Second Dept., NYLJ, June 7, 1991].

Third, as a general matter, requests made under the Freedom of Information Law should be made to the agencies that you believe maintain the records in which you are interested. It is assumed that warrants would be maintained by the arresting agency, such as a police department, or perhaps the office of a district attorney. To seek those records or any records from an agency, a request should be directed to the agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests.

Lastly, 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.

Enclosed is a brochure that describes the Freedom of Information Law and contains a sample letter of request.

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-6695

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

June 19, 1991

Mr. James T. Hall
#9A0627 Dorm J-1-17
Green 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. Hall:

I have received your letter of June 13 in which you requested advice concerning the Freedom of Information Law.

You wrote that you are interested in obtaining information concerning a police officer consisting of "length of employment as a police officer, shield number, and when and where this particular police officer was sworn in." The officer in question is employed by the Town of Mamaroneck Police Department. You added that you are unsure of the procedure for making a request and the address of the agency that should receive such a request.

In this regard, I offer the following comments.

First, 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.

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)]. In my view, records indicating an officer's length of service, the initial date of his employment and his shield number would be available, for those kinds of records are relevant to the performance of the officer's duties.

It is noted that section 50-a of the Civil Rights Law makes confidential police officers' personnel records that are "used to evaluate performance toward continued employment or promotion". From my perspective, the records in question appear to be routine and would not likely be used to evaluate performance toward continued employment or promotion. If that is so, section 50-a of the Civil Rights Law would not serve as a basis for denial.

Second, a request should be made to the agency that maintains the records sought. I am unaware of any agency other than the Town of Mamaroneck that would maintain each of the items in which you are interested. Further, a request should be directed to an agency's designated "record access officer". The records access officer has the duty of coordinating an agency's response to request. As such, it is suggested that a request be made to the Records Access Officer, Town of Mamaroneck, 740 West Post Road, Mamaroneck, NY 10543.

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.

Enclosed is a brochure that describes the Freedom of Information Law and includes a sample letter of request.

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-6696

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

June 19, 1991

Mr. Howard R. Schneider
[redacted]

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

Dear Mr. Schneider:

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

As in the case of previous correspondence, the issues involve a request directed to the Amagansett School District. The materials indicate that you appealed a denial of a request for records on May 22. Since no determination of the appeal had been rendered as of the date of your letter to this office, you have sought advice "concerning the penalties that the law allows against the entity itself", as well as those that may be imposed "against individuals who fail to respond as the law requires". You also requested information concerning the agencies you may contact "to institute an audit of the school district's practices".

In this regard, I offer the following comments.

First, to reiterate points offered in the opinion rendered at your request on May 16, pursuant to section 89(4)(a) of the Freedom of Information Law, a person denied access to records may appeal the denial. That provision states in relevant part that:

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

> plain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

Further, if the person or body designated to determine appeals fails to do so within the appropriate time, the appeal can be considered to have been constructively denied, the appellant would have exhausted his or her administrative remedies, and that person could initiate a proceeding under Article 78 of the Civil Practice Law and Rules to seek judicial review of the denial.

Section 89(4)(c) of the Freedom of Information Law states that a court in such a proceeding has discretionary authority to award reasonable attorney's fees and other litigation costs when certain conditions are met. Specifically, 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."

The only other provision involving what might be characterized as a "penalty" is section 89(8), which 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."

That provision does not, in my view, deal with a failure to respond to a request or a denial of access in accordance with the grounds for withholding records, but rather with situations in which an agency official denies the existence of records known to be maintained or destroys records as a means of precluding disclosure.

Lastly, while I am not entirely sure which agencies are authorized to conduct audits of school districts, those that likely have such authority are the State Education Department and the Department of Audit and Control. I believe that both have offices in Hauppauge. They can be reached, respectively, at 360-6357 and 360-6534.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Harold Carr, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6697

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

June 19, 1991

Mr. Augustine Carmona
91-A-0993
[redacted]

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

Dear Mr. Carmona:

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

According to your letter, you requested records under the Freedom of Information Law from "Special Narcotics Prosecutor Sterling Johnson in New York", but you have not received any response to the request. You wrote that you would like to appeal the denial in view of the failure to respond, but that you "do not know whom is the appealing body for his office". Further, you questioned whether you could appeal to the Committee on Public Access to Records.

In this regard, I offer the following comments.

First, the Committee on Public Access to Records was the original designation of the agency that is now designated as the Committee on Open Government. As such, they are not separate agencies. Further, the Committee is authorized to advise with respect to the Freedom of Information Law; this office is not empowered to determine appeals.

Second, it is my understanding that the Office of Prosecution for the Special Narcotics Courts Program was created by Article 5-B of the Judiciary Law (sections 177-a to 177-e) and is headed by a Special Assistant District Attorney appointed by the five district attorneys in New York City. Further, the Office of Prosecution has city-wide jurisdiction concerning the prosecution of narcotics law violators. As such, it appears to be an entity related to but separate from the five offices of district attorney in New York constituting an "agency" subject to the Freedom of Information Law [section 86(3)].

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 that statute (21 NYCRR Part 1401). In turn, section 87(1) of the Freedom of Information Law requires each agency to adopt regulations consistent with the Law and the Committee's regulations. One aspect of the regulations involves the designation of a "records access officer". Ordinarily, requests for records should be directed to the records access officer, who has the responsibility of coordinating an agency's response to requests. In this instance, it appears that Mr. Johnson should have responded to your request or forwarded it to the records access officer or other appropriate staff for the purpose of responding.

Fourth, the Freedom of Information Law provides direction concerning the time and manner in 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)].

Under the circumstances, it appears that Mr. Johnson is the "head" or "chief executive" of the Office of Prosecutor and that an appeal would properly be made to him or his designee.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Sterling Johnson, Jr., Special Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1698

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

June 21, 1991

Mr. Henry Wirtz
[redacted]

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

Dear Mr. Wirtz:

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

According to your letter, you recently requested and soon received a copy of the budget adopted by the town board in the community where you reside. However, you wrote that when you sought a copy of the school district budget "so that [you] could inspect it when [you] had the time, they said that they would not furnish a copy, but that [you] may come in, and an officer would 'go over it with [you]' at their office". It is your belief "that this is a subtle manner of making it difficult".

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. In my view, budgets adopted by a town board or a school board would clearly be available, for none of the grounds for denial would be applicable.

Second, section 87(2) of the Law specifies that accessible records must be made available "for public inspection and copying". Moreover, section 89(3) of the Freedom of Information Law states in relevant part that, in response to a request for an accessible record, "[u]pon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record...". Consequently, based upon the language of the Freedom of Information Law, I believe that you have the right to inspect an accessible record and to obtain a copy upon payment of the

requisite fee. I point out that no fee may be assessed for the inspection of records. However, 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 copies are requested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6699

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

June 21, 1991

Mr. Robert Shedrick
80-B-0731
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

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

Dear Mr. Shedrick:

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

According to your letter, following unsuccessful attempts to obtain records from the Office of the Steuben County District Attorney, the County's records access officer, Ms. Christine Kane, indicated that "the file of the District Attorney does not come under the Freedom of Information Law". The records in which you are interested include documents prepared by your attorney and "photographs of the crime scene which were mutually used by both counsel."

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 that statute 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, and 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; 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)].

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, with respect to requests for a copy of an accessible record, section 89(3) of the Freedom of Information Law states in relevant part that "[u]pon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record...". Under section 87(1)(b)(iii) of the Law, an agency may charge up to twenty-five cents per photocopy, or the actual cost of reproducing other records, i.e., those records that cannot be photocopied.

Third, with regard with your "attorney's files", which you contend are missing, it is assumed that the records were used in your proceeding and were submitted to the District Attorney. If that is so, it does not appear that any of the grounds for denial would be applicable. With regard to the photographs, the only ground for denial of apparent 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."

As such, to be applicable as a basis for denial, disclosure must result in one or more of the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e). If indeed the photographs were shared with or used by your attorney, or were used in a public judicial proceeding (see Moore v. Santucci, supra, 679), I do not believe that the provision cited above could be applied as a basis for denial.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: District Attorney, Steuben County
Christine Kane, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6700

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

June 21, 1991

Mr. Anthony Dixon
86-A-4087
Box 2000
Pine City, NY 14871

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

Dear Mr. Dixon:

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

You wrote that you are interested in obtaining records for the purpose of verifying that a particular individual was in a county jail during a certain period.

In this regard, although the Freedom of Information Law pertains generally to agency records, I believe that a different statute is more relevant to your inquiry. Specifically, I direct you to section 500-f of the Correction Law, which pertains to records kept at county jails and states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what and by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the office of the keeper."

As such, under section 500-f of the Correction Law, by seeking the information concerning a prisoner and by indicating the approximate dates of confinement, I believe that you could verify whether or when a prisoner was confined in a county jail.

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-6701

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

June 25, 1991

Mr. Carlo Huston
91-A-1506 /HB-B-S-150
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Huston:

I have received your recent letter in which you requested "a booklet on [the] Committee on Open Government".

Enclosed is "Your Right to Know", which describes the duties of the Committee on Open Government and the provisions of the Freedom of Information Law.

Since you referred to court papers, I point out 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 on the foregoing, although the Freedom of Information Law is applicable to records of police departments or offices of district attorneys, for example, it does not apply to the courts or court records. This is not to suggest that court records are generally confidential, for other provisions of law often grant substantial public rights of access to those records (see e.g., Judiciary Law, section 255).

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-6702

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

June 25, 1991

Mr. Edward Lomba
88-A-2269
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Lomba:

I have received your letter of June 14 in which you described difficulty in obtaining records pertaining to your case from the Bronx County District Attorney, the New York City Police Department and the clerk of the court in which the proceeding was conducted. You asked what this agency can do and what its authority is.

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 enforce the Freedom of Information Law or to compel an agency to grant or deny access to records.

Second, I point out that the Freedom of Information Law pertains 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, while the Freedom of Information Law clearly is applicable to a police department or the office of a district attorney, the courts and court records fall beyond the coverage of that statute. This is not to suggest that court records are uniformly confidential, for other statutes (i.e., Judiciary Law, section 255) often require that court records be made available. Rather than seeking court records under the Freedom of Information Law, it is suggested that a request be resubmitted to the clerk of the court under an applicable provision of law.

Third, 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)].

For your information, the person designated to determine appeals at the New York City Police Department is Susan R. Rosenberg, Assistant Commissioner.

Lastly, in compliance with section 89(4)(a) of the Freedom of Information Law, I recently received a copy of a determination of your appeal from Anthony J. Girese of the Office of the Bronx County District Attorney. Since Mr. Girese affirmed the denial, it appears that two options remain in your efforts to obtain the records sought. One involves a renewed attempt to obtain the records from the court; the other involves the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules challenging the denial of the request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis J. Capasso, Records Access Officer
Anthony J. Girese, Couunsel to the District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6703

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

June 25, 1991

Mr. Anthony Logallo
90-B-1210
Box 2000
Pine City, NY 14871

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

Dear Mr. Logallo:

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

You wrote that you were denied access to records by the Department of Correctional Services solely "because they wanted copy fees and were not willing to waive such fees". As such, you raised the following question: "Can a person be denied access solely because of inability to pay copy fees?"

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. If a record is accessible under the Freedom of Information Law and an applicant seeks only to inspect the record, no fee may be charged.

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 Department of Correctional Services is authorized by the Freedom of Information Law to charge for photocoying in accordance with section 87(1)(b)(iii) of that statute.

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-6704

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

June 25, 1991

Ms. F.J. Thompson
[redacted]

Dear Ms. Thompson:

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

According to the materials, you sought records in March from the Financial Control Board, and it was determined that the Board maintains certain of the requested records. As such, you were informed that, if you are interested in inspecting the records, you could do so on any business day between 10 a.m. and 6 p.m. "upon five days' notice". You have asked that I contact Cathy A. Bell, General Counsel, "to let her know that it is not necessary to provide her agency with 'five days' notice', in order to inspect records". Your request is based on the contention that an agency's records must be made available "during all regular business hours".

In this regard, your claim appears to be based upon a provision in the regulations promulgated by the Committee on Open Government, 21 NYCRR 1401.4(a), which states that:

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

In my opinion, the foregoing does not require that an agency must respond instantly to a request by providing access to requests at the time that a request is made. Often agency officials in receipt of a request must search for requested records to determine the extent to which they are maintained by the agency and review records that have been located to determine the extent to which they must be disclosed. Further, the introductory language of 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 acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If, after receiving a request, it is determined that the records sought are maintained by an agency and are available, I believe that the applicant should be so informed in accordance with section 89(3). Since I am unfamiliar with the requests made for records of the Board, I am unaware of the volume of records sought or the means needed to retrieve them. While it is possible that the request that you provide five days' notice prior to inspection may be reasonable, if a request involves records that are readily retrievable and which are clearly accessible under the Freedom of Information Law, I believe that a response to such a request should indicate that the records will be made available as of a certain date. In that kind of situation, the five business day notice requirement would appear to be unnecessary and perhaps inappropriate.

A copy of this letter will be forwarded to Ms. Bell.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Cathy A. Bell, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6705

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

June 25, 1991

Ms. Carol Young Himes
Town Clerk
Town of Cicero
Town Hall
Cicero, NY 13039

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

Dear Ms. Himes:

As you are aware, I have received your letter and a variety of correspondence attached to it.

You wrote that the Cicero Town Board "has expressed a desire to determine if there is any avenue of relief" concerning broad and voluminous requests that require a great deal of search time and effort. Having reviewed the requests attached to your letter, 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. It has been held by the Court of Appeals, the State's highest court, that a request reasonably describes the records when the agency can locate and identify 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 and record-keeping systems. While I am not familiar with the Town's filing systems or the means by which records may be located and retrieved, to the extent that records are not filed in a manner that enables agency officials to locate or retrieve them without searching through a great number of files, I do not believe that a request would reasonably describe the records. In such a situation, it may be worthwhile to describe the nature of a filing system to an applicant in order to enable that person to submit an appropriate request.

Second, several of the requests are phrased in terms of questions (i.e., did a town engineer have to supply a bond; "advise when moneys are due the Town under the '277' rule"); others seek "amounts" paid or expended by the Town for certain services during particular periods of time. In this regard, the title of the Freedom of Information Law may be somewhat misleading. Although it requires agencies to disclose records in most instances, the Freedom of Information Law is not a vehicle that enables the public to cross-examine public officers or that requires those officials to provide information by answering questions. If an official wants to answer questions, generally he or she may do so; nevertheless, the Freedom of Information Law does not require that questions be answered. Similarly, 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 there is no existing record reflective of the total amount expended for a service, the Freedom of Information Law would not require that officials review bills or vouchers and create a new record by tabulating a series of figures.

Third, when copies of accessible records are requested, I believe that an agency may require payment prior to preparing copies (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

Lastly, the introductory language of of 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 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 from the receipt of a request are needed to locate or review records, or if other duties preclude agency officials from granting or denying a request within that time, additional time may be taken by acknowledging the receipt of a request in writing, including an estimate of the date when the request will be granted or denied. So long as the estimate is reasonable under the circumstances, I believe that an agency would be acting in compliance with 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-6706

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

June 25, 1991

Mr. Michael Gaines
87-A-6059
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021

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

Dear Mr. Gaines:

I have received your letter of June 17, as well as related correspondence.

In brief, your request to the Office of the New York County District Attorney for certain records concerning your case was denied on the ground those records had been disclosed in conjunction with the proceeding. Specifically, Assistant District Attorney Gary J. Galperin, who acted as the Freedom of Information Law Appeals Officer, indicated that the Assistant District Attorney who tried you "did provide all relevant material on witnesses for the prosecution", as well as copies of "the UF-61 and responses to motions". Nevertheless, attached to your letter is correspondence addressed to your attorney raising questions involving his receipt of the materials that was returned and marked "addressee unknown".

The decision upon which Mr. Galperin based the denial, Moore v. Santucci, held in relevant part that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The re-

> spondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee (see, Public Officers Law [section] 87; Sheehan v City of Syracuse, 137 Misc 2d 438), unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" [151 AD 2d 677, 678 (1989)].

It is suggested that you might renew your request in accordance with Moore if it can be established that copies of the records no longer exist. Alternatively, although the Freedom of Information Law does not apply to the courts or court records, you may seek the records from the clerk of the court in which the proceeding was conducted under a different provision of law (see e.g., Judiciary Law, section 255).

Enclosed is the correspondence addressed to your attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary J. Galperin, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6707

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

June 26, 1991

Mr. Collin Fearon, Jr.
74-B-395
Attica Correctional Facility
Attica, NY 14011-0419

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

Dear Mr. Fearon:

I have received your letter of June 14.

You wrote that you requested records from the Superintendent of the Green Haven Correctional Facility in accordance with the rules and regulations promulgated by the Department of Correctional Services on May 23. Having received no response "within the time frame allowed", you appealed to Counsel to the Department. It appears that the records sought involve the names of officials employed at Green Haven on a particular date.

In this regard, I offer the following comments.

First, 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)].

Second, since you did not forward a copy of your request, the nature of the records sought is unclear. 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. I point out, too, that section 87(3)(b) of the Freedom of Information Law requires that each agency maintain:

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

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-6708

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

June 26, 1991

Mr. Dennis 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 June 19.

You wrote that you have attempted without success to obtain transcripts of hearings under the Freedom of Information Law from the clerk of the Rensselaer County Family Court, and you 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 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."

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 are confidential, for other provisions of law may authorize disclosure (see e.g., Family Court Act, section 166; Judiciary Law, section 255). It is suggested that you seek the records under an applicable provision of law and 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-6709

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

June 26, 1991

Ms. Lisa DiBenedetto
Account Manager
Digital Equipment Corporation
2 Penn Plaza
New York, NY 10121

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

Dear Ms. DiBenedetto:

I have received your letter of June 17, as well as the correspondence attached to it.

According to the materials, on April 8, you submitted a request to the New York City Department of Transportation (DOT) for "all information in the file pertaining to the Request for Proposal #C89-1097/RFP for the Furnishing and Installation of Office Automation Equipment and Telecommunications Networking", including "the WANG proposal and records of the scores for the Tier I (Technical Review) and Tier II (Cost Review)". The receipt of the request was acknowledged on April 8 by the Department's acting records access officer and was later denied on May 2 on the ground that "negotiations are not completed, and disclosure of any information at this time may impair negotiations". On May 6, based upon a discussion between your manager and Counsel to the Department, Digital amended its request to include only the Tier I and Tier II documentation with a proviso that WANG's proposal would be requested after an award is made. Nevertheless, your appeal resulted in an affirmance of the denial. On June 11, a new request was submitted.

You have questioned the "validity of the denial", for the "RFP award has been disclosed in a public hearing and Digital is no longer involved in negotiations with DOT (negotiations ceased in January 1991)". You added that a review of the file is important to determine whether Digital should proceed with a protest of the award. As such, you wrote that you "need to examine the scores stated in Tier I (Technical Review) and Tier II (Cost Review)", which you believe contain statistical data to which you are entitled.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is also noted that the introductory language of section 87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record may be accessible or deniable in whole or in part. That phrase, in my view, also imposes an obligation upon agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Therefore, even though some aspects of a record may be withheld, the remainder would be available.

Second, it appears that three of the grounds for denial may be relevant in ascertaining rights of access to the records in question. However, the extent to which they may properly be asserted is dependent upon the specific contents of the records and the effects of disclosure.

As you are aware, section 87(2)(c) permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards...". While that provision might properly be asserted prior to submission of bids, for example, or during the process of negotiations relating to an RFP, if, as you indicated, an "RFP award has been disclosed in a public hearing", I do not believe that section 87(2)(c) would constitute an appropriate basis for withholding. According to the facts, disclosure would not "impair" the process, for DOT has apparently awarded the contract to WANG.

With respect to the Tier I and Tier II reviews, I believe that the only ground for denial of relevance under the circumstances 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, as I understand their contents, the records at issue contained 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, 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 NY 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:

> "It 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 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.

In addition, in Miracle Mile Associates v. Yudelson, in a discussion of section 87(2)(g), it was found that:

> "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)].

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)].

Lastly, although it is unclear whether you remain interested in obtaining the WANG proposal, the provision which in my view is most relevant with respect to rights of access to that record or series of records is section 87(2)(d). That provision states that an agency may 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.).

From my perspective, the nature of the records submitted and the area of commerce in which the firms submitting proposals are involved would determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a particular firm. 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.

In an effort to enhance compliance with the Freedom of Information Law and diminish the possibility of the initiation of litigation, copies of this opinion will be forwarded to officials at DOT.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Diane L. Sack, Associate Counsel
Joseph Bianco, Acting Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-610

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

June 27, 1991

Mr. Harvey Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your note of June 19, which appears on a letter addressed to Jeffrey D. Friedlander, Records Access Appeals Officer for the New York City Law Department.

You have requested an advisory opinion regarding the propriety of a response to a request for numerous records of the Law Department.

Items a) through g) of the request involve the administration of the Freedom of Information Law by the Law Department, and in some instances by other City agencies. Those records were denied pursuant to section 87(2)(b) of the Freedom of Information Law, which enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

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

Insofar as the items specified above pertain to requests and appeals and the responses thereto, the records would in my opinion be available, except to the extent that disclosure would result in an unwarranted invasion of personal privacy. From my perspective, the nature of a request would bear upon whether disclosure would indeed constitute an unwarranted invasion of personal privacy. For example, if a request is made by a recipient of public assistance, I believe that identifying details concerning that person (i.e., name and address) could be withheld. If, however, a request is made for minutes of a public meeting, the request by its nature would not involve personal information about the applicant. Arguably, the home addresses or perhaps the names of applicants could be withheld as an unwarranted invasion of personal privacy. On the other hand, the names and addresses of entities or persons seeking records on behalf of entities would likely be public.

Item f) involves letters of complaint regarding requests and appeals, as well as the conduct of records access or appeals officers, including allegations relating to the administration of the Freedom of Information Law. Item g) pertains to letters "sent out in response to the aforementioned letters of complaint".

Again, section 87(2)(b) of the Freedom of Information Law is relevant. It has been advised in a variety of contexts that identifying details concerning complainants may be withheld as an unwarranted invasion of personal privacy. In brief, from the perspective of an agency in receipt of a complaint, the identity of a complainant is largely irrelevant; what is relevant is whether the complaint has merit. Depending upon the nature and context of a complaint, its substance may be available following the deletion of identifying details concerning the complainants.

Further, although it has been found in a variety of circumstances that public employees enjoy a lesser degree of privacy than others, for they are required to be more accountable than others, it has been advised that when allegations have been made 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 would in most circumstances result in an unwarranted invasion of personal privacy [see e.g., Herald Co. v. School District of City of Syracuse, 430 NYS 2d 460 (1989)]. Moreover, to the extent that allegations are found to be without merit or charges are dismissed, I believe that they may be withheld.

In item h), you requested "all internal memoranda, notes, routing slips, log books, etc. generated during the last five years which make reference, in any way, to either the Freedom of Information Law, the regulations of the NYS Committee on Open Government, or to the correspondence which was received from the public and press pursuant to such". That aspect of your request was denied "pursuant to Public Officers Law 87(g)(i)", which likely is an error in citation and should be section 87(2)(g)(i).

Aside from the issue of rights of access, it is questionable whether that aspect of the request "reasonably describes" the records sought as required by section 89(3) of the Freedom of Information Law. Although it was found in Konigsberg v. Coughlin [68 NY 2d 245 (1986)] that an agency can 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 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 and record-keeping systems. While I am not familiar with the Department's filing systems or the means by which records may be located and retrieved, to the extent that records are not filed in a manner that enables agency officials to locate or retrieve them without searching through a great number of files, I do not believe that a request would reasonably describe the records.

With respect to the stated basis for the denial of item h), section 87(2)(g)(i) refers to portions of inter-agency or intra-agency materials that must be disclosed. In its entirety, section 87(2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. As such, the contents of such materials are factors relevant to a determination involving the extent to which they are available under subparagraphs (i) through (iv) of section 87(2)(g) or deniable because the contents do not consist of the kinds of information described in those subparagraphs.

The remaining records that were denied, also citing section 87(2)(g)(i), were items m) and n). The former involves "the last three years worth of case files relating to matters in which NYC Law Department attorneys were disciplined, forced to resign, or dismissed"; the latter pertains to "the last three year's worth of attorney performance evaluation appeal case files, handled by the Agency Service and Review Board or the Corporation Counsel, including but not limited to, the performance evaluations that were appealed, the statements of appeal, the factual data that was presented, and the decisions on appeal".

I believe that both paragraphs (b) and (g) of section 87(2) are relevant to the issue of rights of access to those records.

With regard to disciplinary action taken concerning public employees, as suggested earlier, the courts have held that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 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 15, 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, insofar as it includes a final agency determination to impose disciplinary action, a demotion or a penalty upon a public employee, is accessible under the Freedom of Information Law.

A similar analysis is offered concerning access to evaluations of staff. Although I am unfamiliar with the form of any evaluation that you requested, I believe that a typical evaluation 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 any of the records sought contain information analogous to that described, I believe that some portions 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 a reviewer's subjective analysis or opinion of how well or poorly the standards or duties have been carried out or the goals have been achieved. In my opinion, 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 an opinion 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 in my view result in an unwarranted invasion of personal privacy if disclosed.

As you requested, a copy of this opinion will be forwarded to the Law Department.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey D. Friedlander, Records Appeals Officer
Jonathan N. Thalasinos, Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6711

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

June 27, 1991

Ms. Diana L. Danin
[redacted]

The staff of the Committee 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. Danin:

I have received your letters of June 20 and June 21 in which you requested advisory opinions concerning the Freedom of Information Law.

The first involves a request for "payroll vouchers" pertaining to two employees of the Mount Vernon Housing Authority. You specified that you are "only seeking the job title under which these payrolls were issued, and the salary paid for the positions...". Although the request was made on May 14, you had received no response as of the date of your letter to this office. Further, according to correspondence attached to your letter, having spoken with the Chairman of the Authority, you were informed that it has not designated a records access officer and that "payroll records of an individual required approval of that individual in order to be released."

The second request was directed to the New York State Division of Housing and Community Renewal and involves approved budgets for the Mount Vernon Housing Authority and employment related information.

In this regard, I offer the following comments.

First, having contacted Ms. Elizabeth Hegy, the Division's acting records access officer, I was informed that the budget documents, which comprise 208 pages, have been located and are available, but that the other records, those involving employment matters, are not maintained by the Division. Ms. Hegy also indicated that a response to that effect has been sent to you.

Second, with respect to the Authority, I point out by way of background 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."

Section 3(2) of the Public Housing Law states that municipal housing authorities are public corporations, and section 419 of the Public Housing Law specifies that the Mount Vernon Housing Authority "shall constitute a body corporate and politic". Since the definition of "agency" includes public corporations, I believe that the Mount Vernon Housing Authority is clearly an "agency" required to comply with the Freedom of Information Law. Moreover, it has been held judicially that a municipal housing authority is subject to the Freedom of Information Law [Washington Rockland Newspapers, Inc. v. Fischer, 101 AD 2d 840 (1985)].

Third, 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)].

I point out, too, that section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations governing the procedural aspects of the Freedom of Information Law (21 NYCRR Part 1401). In turn, section 87(1) requires that each agency adopt regulations consistent with the Law and the Committee's regulations. Relevant to your inquiry is section 1401.2 of the Committee's regulations, which provides in 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..."

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 addition, section 1401.7 of the regulations states 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."

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

Among the few instances in the Freedom of Information Law that requires agencies to maintain particular records relates to 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..."

As such, a payroll record that identifies all agency officers or employees by name, public office address, title and salary must be prepared and maintained by an agency to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, this Committee has advised and the courts have upheld the general principle 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Similarly, it has been held that records indicating the year in which public employees were hired and the "step" upon which employees were hired are available under the Freedom of Information Law (Steinmetz, supra).

In short, records reflective of public employees' wages are and have long been public. Therefore, I do not believe that disclosure of the information sought may be conditioned upon the receipt of consent to disclose by a public employee.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Chairman of the Authority. A copy will also be sent to Ms. Hegy.

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: Ben Harper, Chairman
M. Elizabeth Hegy, Acting Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6712

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

June 27, 1991

Mr. Walter F. 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 June 21 in which you requested assistance concerning a request made under the Freedom of Information Law.

According to your letter, on April 11, you asked to review "97 checks issued by the Valley Central School System". Although the initial request was denied, following an appeal, you were informed that you "could review only five checks at a time" and that you could arrange mutually convenient times to review them. You informed the Superintendent that you would be available from 8 a.m. to 4 p.m. every working day, and he advised you that you "could review five checks between 2:00 p.m. and 3:00 p.m., on Tuesdays and Thursdays". You indicated that, due to travel time and other factors, the arrangement has resulted in hardship.

In this regard, I offer the following comments.

First, I am unaware of the record-keeping or filing system used to maintain the records in question. It is noted, however, that section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Although it was found in Konigsberg v. Coughlin [68 NY 2d 245 (1986)] that an agency can 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 docu-

> ments 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 and record-keeping systems. While I am not familiar with the District's filing system or the means by which the records may be located and retrieved, if they are not filed in a manner that enables agency officials to locate or retrieve them without searching through a great number of files, I do not believe that the request would reasonably describe the records. If the request, despite its specificity, does not reasonably describe the records and involves a great deal of search time to locate and retrieve them, it is possible that the District may be acting in a manner that exceeds the requirements of the Freedom of Information Law. On the other hand, if the records can be readily located, I do not believe that there would be any basis for delaying your ability to inspect them during a single visit to District offices.

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, state in section 1401.4(a) that:

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

In my opinion, the foregoing does not require that an agency respond instantly to a request. However, once an agency has located records and determined that they are accessible, I believe that the records must be made available during regular business hours. As such, in my view, after records have been retrieved, your ability to inspect them could not be restricted to a specified one hour time period on particular days.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James Coonan, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6713

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

June 27, 1991

Ms. Agnes M. Marturano
[redacted]

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

Dear Ms. Marturano:

I have received your letter of June 22 in which you sought assistance concerning the Freedom of Information Law.

Attached to your letter is correspondence sent to the New York State Low Level Radioactive Waste Siting Commission by a landowner in Cincinnatus in which he offered a parcel for sale to the Commission. The portion of that document containing the "asking price" was deleted. You wrote that you spoke to Douglas Eldridge, Counsel to the Commission, regarding the procedure to be followed to obtain that aspect of the document. Mr. Eldridge, according to your letter, suggested that you may request it under the Freedom of Information Law, that you "would most likely be denied", and that you could, in that event, appeal the denial to him.

You have questioned your right to the information and whether Mr. Eldridge's remarks represent "a conflict of interest", for you contend that an "impartial person" should make that "final judgement".

In this regard, I offer the following comments.

First, pursuant to regulations promulgated under the Freedom of Information Law by the Committee on Open Government (21 NYCRR Part 1401), each agency must designate at least one "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and a request should be made to the records access officer. If a request is denied, an appeal may be made pursuant to section 89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

It is noted that section 1401.7(b) of the Committee's regulations states that "[t]he records access officer shall not be the appeals officer". As such, although an appeal is determined within an agency, the person making such a determination cannot be the same person who initially denied a request.

If an appeal is denied, the person denied access may seek judicial review of the denial under Article 78 of the Civil Practice Law and Rules. Therefore, that person may seek a "final judgement" from a court.

Second, in terms of rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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 properties, thereby potentially precluding the agency from obtaining optimal prices for the properties. In this instance, disclosure of the asking price of a property that the Commission might seek to acquire might encourage speculation, for others may offer or perhaps purchase

the property, defeating the Commission's capacity to do so. In short, if disclosure would impair the Commission's ability to acquire the property at a price beneficial to the public, based upon Murray, supra, I believe that the asking price could properly be withheld pursuant to section 87(2)(c) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Douglas Eldridge

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1714

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

June 28, 1991

Mr. Charles B. 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, unless otherwise indicated.

Dear Mr. Smith:

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

Your inquiry involves requests to Rensselaer County and the Rensselaer County Industrial Development Agency (IDA) for records reflective of legal fees earned by the IDA's bond counsel, as well as "any guidelines or formula by which such fees are calculated". Both agencies have indicated that they maintain no such records.

You have sought my opinion on the matter. In this regard, I offer the following comments.

First, as indicated by Robert A. Smith, Rensselaer County Attorney, the County and the IDA are separate entities. Under section 66 of the General Construction Law, a county is a municipal corporation constituting a public corporation. Under section 856 of the General Municipal Law, an industrial development agency is characterized as "a corporate governmental agency, constituting a public benefit corporation", which is a kind of public corporation. Further, the Rensselaer County IDA was created by the enactment of section 903-d of the General Municipal Law. Since the IDA is an entity separate from the County, there may be no reason for the County to maintain the records in which you are interested.

Second, as a general matter, the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency need not "prepare any record not possessed or maintained" by the agency. Therefore, if the IDA does not maintain the records sought, it would not be obliged to create or obtain the records that you seek.

Third, in an effort to assist you, I have attempted to learn of the manner in which bond counsels may be paid in situations similar to those presented in the materials that you forwarded. Having discussed the matter with a representative of the State Department of Economic Development having expertise concerning industrial development agencies, I was informed that bond counsel may generally be paid by means of one of two methods. One method would involve an agreement between an industrial development agency under which bond counsel is paid "up front" pursuant to a written agreement. That method apparently was not employed in the situation that you described. The other, which pertains to the issuance of tax exempt bonds, permits up to two percent of the face value of the bonds to be earmarked as "issuance costs". In such a case, those costs are paid by the borrower out of the proceeds of the bond issue. I was informed further that provisions specifying the manner in which proceeds of the bond issue are distributed would be included in the "bond document". It appears that this latter method would represent the means of payment in this instance. If that assumption is accurate, it is assumed that the "bond document" would be maintained by the IDA. As I understand the nature of its contents, such a document would be available, for none of the grounds for denial appearing in section 87(2) of the Freedom of Information Law could be asserted as a basis for denial of access. Perhaps you could determine the method and amount of payment by reviewing that document.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: G. Glen King, Director
Robert A. Smith, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6715

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

July 2, 1991

Mr. Fred M. Anderson
Box 8000 (1A)
Bradford, PA 16701-0980

Dear Mr. Anderson:

I have received your letter of June 18, which reached this office on June 27.

You have requested information and guidance concerning the use of the Freedom of Information Law to obtain a "personnel listing" for the Albany County Sheriff's office, for you are attempting to ascertain whether a particular individual is still employed by that agency.

In this regard, I offer the following advice.

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. I believe that the records access officer for agencies operating within Albany County government, including the Sheriff's office, is the County Clerk. As such, a request may be made to the County Clerk, Albany County Courthouse, Albany, NY 12207.

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, pursuant to section 87(3)(b) of the Freedom of Information Law, each agency is required to maintain:

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

Further, a record the fact of one's public employment is in my view clearly available under the Freedom of Information Law.

Third, 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)].

Enclosed, as you requested, are copies of the Freedom of Information Law and an explanatory brochure on the subject.

Lastly, the "Ms. Shaffer" to whom you referred is Gail S. Shaffer, the Secretary of State. Prior to being designated in that position, Secretary Shaffer was a member of the Assembly.

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-6716

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

July 2, 1991

Ms. Marla Goldberg
The Lakeville Journal
P.O. Box 353
Lakeville, CT 06039-9989

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

Dear Mr. Goldberg:

I have received your letter of June 28 in which you requested assistance in obtaining records.

According to your letter, in brief, an employee of the Webutuck Central School District was the subject of a criminal investigation and was charged with grand larceny and criminal possession of a forged instrument. The charges, however, were dismissed, and the Board of Education moved to initiate a civil suit against that person. You wrote that "[t]he board's decision to undertake a second legal action has caused an outcry among some members of the local community, who insist that the legal fees incurred by continuing to prosecute...are greater than the losses to the district via her supposed embezzling".

You have requested from the District Superintendent and the District's Attorney copies of all bills submitted by the attorney to the District "pertaining specifically to the investigation" of the employee who was charged "from the time any work on the investigation commenced through July 1, 1991", as well as "all documentation of any other expenses related to said investigation".

In this regard, I offer the following comments.

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

Second, 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 and other details to be discussed further 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., 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.'"

Most recently, in Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the applicant ("petitioner") sought billing statements for legal services provided to the Board ("respondents") by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements, petitioner contended 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". However, "[r]espondents maintain[ed] that releasing any additional information on the billing statement would jeopardize the client confidentiality protected by CPLR 4503(a)...".

In its discussion of the issue, the court found that:

> "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. Henessy, 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 general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...
>
> "...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, 46 NY 2d 906, 908.)...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."

In sum, to the extent that the records sought exist and subject to the qualifications discussed above, I believe that they should be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Brenda Luck, Superintendent
Raymond Kuntz, Csq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1954
FOIL-AO- 6717

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

July 3, 1990

Ms. Kathleen O'Brien Frazer
Attorney-At-Law
36 Washington Avenue
Kingston, NY 12401

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

Dear Ms. Frazer:

I have received your letters of June 26 and June 27. In both, and in your capacity as a member of the Board of Education of the City of Kingston School District, you described problems and raised questions concerning the Open Meetings Law.

In the first letter, you referred to notice given to Board members on the afternoon of June 19 "that the Superintendent wanted [the Board] to meet in executive session that evening at the beginning of a previously scheduled open meeting". When you sought clarification of the purpose of the executive session, you were told that the topics involved "ESP negotiations (a designated bargaining unit for certain employees) and nonaligned raises (a group of employees, including upper administrators and some central office staff people, who are not represented by any bargaining unit)".

Although you were not present when the meeting began, you expressed the belief that those who were did not first meet in public or vote to conduct an executive session; rather, you believe "that arriving members just went directly into executive session in the superintendent's office with no preliminaries in open session". You surmised that, prior to your arrival, a presentation was made by the Superintendent "admonishing certain members of the board for questioning his budgetary decisions and for planning to offer resolutions to amend the budget in open session". When you were present, "the board discussed the decision reached in the previous evening's executive session to freeze salaries of nonaligned employees this year due to the budget crunch". You added that one member "offered a proposal to postpone the vote on nonaligned raises until later in the summer and a vote was taken" to the effect that "that amount would re-

main as a part of the budget to be adopted before the end of June". Neither the motion nor the vote were recorded. In addition, you stated that "[v]otes taken during our executive sessions are frequently disguised and designated as 'checking for consensus' or an 'informal vote'."

You requested an opinion concerning the foregoing description of facts.

In your second letter, you asked that I clarify "the differing responsibility of a Board present and board members" concerning the ability or desire to enter into executive sessions. You also expressed uncertainty as to "how to categorize votes in executive session not to take an action in open session". Finally, you raised the following questions:

> "1. Does a Board president have greater responsibility, or a different responsibility, than a regular Board member for insuring that the Open Meetings Law and other applicable statutes are followed by a public body?
>
> 2. What actions should a board member take if he believes that the actions of the board are not in conformance with the Open Meetings Law or other applicable statutes, taking into consideration that a board member occupies an unpaid, part-time position without secretarial staff or access to the school district attorney without specific board approval?
>
> 3. What amount of time may transpire between a vote in executive session, however designated, and a vote in public session (minutes, hours, days, weeks, months or years)?
>
> 4. Can a vote in executive session not to take an action or introduce a motion in open session, which may indirectly have financial impact, constitute a violation of the Open Meetings Law?"

In this regard, I offer the following comments.

First, with respect to the Board's procedures and the responsibility of a board president as opposed to other members, those kinds of issues are in many instances unrelated to the Open Meetings Law. I point out that section 1709(1) of the Education Law authorizes a board "[t]o adopt such by-laws and rules for its government as shall seem proper in the discharge of the duties required under the provisions of this chapter". However, implicit in that grant of authority is the requirement that any such rules or by-laws be reasonable. It has been held that the authority conferred by section 1709(1) "is not unbridled" and that "[i]rrational and unreasonable rules will not be sanctioned" [Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. While it is clear that a board of education is empowered to adopt rules concerning its proceedings and the president of the board presides at meetings, that person has the same voting power as other board members.

Second, in terms of the action a board member should or may take if he or she believes that the board is not complying with law, it is suggested that the member attempt to become knowledgeable concerning areas of interest and that he or she seek to educate the members concerning that area of expertise.

Third, certain aspects of your questions appear to be based upon what I consider to be inaccurate assumptions. For example, for reasons to be described later, the discussion of nonaligned raises likely did not qualify for discussion in executive session; moreover, in general, boards of education cannot vote during executive sessions.

In this regard, in an effort to educate, to enhance understanding of the Open Meetings Law, and to put the issues raised in perspective, I offer the following comments.

It is noted at the outset that the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. 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) 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..."

Based upon the foregoing, it is clear that an executive session is not separate from an open meeting but rather is a part of such meeting and that a meeting must be convened in public before an executive session may be held. The procedure also indicates that the Open Meetings Law is permissive regarding the ability to enter into an executive session; while a mtion carried by a majority vote of a public body may authorize the holding of an executive session, the members may vote against such a motion, even if a basis for closed door discussion exists. Moreover, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may properly be considered during executive sessions.

With respect to the executive sessions described in your correspondence I believe that "ESP negotiations" could appropriately have been discussed in private, for section 105(1)(e) permit a public body to enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14, as you may be aware, is commonly known as the Taylor Law, and it pertains to the relationship between public employers (i.e., a school district) and public employee organizations (i.e., a teachers union). However, the discussion involving non-aligned staff, as you described it, would not fall within the scope of section 105(1)(e), for those employees are not members of a union.

Although the matter might have related to personnel, the language of the so-called "personnel" exception for entry into executive session is limited and precise.

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, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be conducted in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in section 105(1)(f) are considered.

In reviewing minutes that referred to various bases for entry into executive session, it was held that:

> "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..." [<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, July 21, 19981]; see also <u>Becker v. Town of Roxbury</u>, Sup.

Ct., Chemung Cty., April 1, 1983; please note that the Open Meetings Law was renumbered after Doolittle was decided].

As section 105(1)(f) relates to matters concerning the budget review process, issues of policy, such as those involving the allocation of public moneys, must in my opinion generally be discussed in public. Discussion of the abolishment of position, for example, could not likely be considered during an executive session. In brief, only when an issue focuses upon a "particular person" in conjunction with one or more of the topics specified in section 105(1)(f) can an executive session be properly held pursuant to that provision.

If discussions of raises or related matters pertained to nonaligned staff as a group and did not focus upon any "particular person", I do not belief that any ground for entry into executive session would have been applicable. Similarly, if the Superintendent's presentation or dialogue with the Board involved questions pertaining to "budget decisions" or plans to introduce resolutions to amend the budget, those topics should in my view have been discussed in public, for none of the grounds for entry into executive session could justifiably have been asserted.

With respect to minutes and voting in 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 [i.e., see Education Law, section 3020-a(2)]. Therefore, when a board of education acts in accordance with those decisions, rarely will there be minutes of executive sessions, for votes or actions taken will occur during open meetings.

The issue of decisions effectively made by consensus or "informal votes" relates to both the Open Meetings Law and potentially the Freedom of Information Law.

Section 106(1) of the Open Meetings Law pertains to minutes of open meetings 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."

As such, proposals and motions, including motions to enter into executive sessions, must be recorded in minutes, whether or not a motion is approved.

In one of the few instances in the Freedom of Information Law that requires that records be maintained, section 87(3)(a) provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, 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 board of education, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of section 87(3)(a), it appears that the State Legislature sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. 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 and states that:

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

> deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

There is only one decision of which I am aware that deals with the notion of a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated further that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

In the context of the situations that you described, when the Board reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may be unaware of the members' views on a given issue. If indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, takes action by reaching an agreement on a particular subject, I believe that the minutes should reflect the actual votes of the members.

In contrast, if an informal or "straw vote" is not binding and does not represent members' action that could be construed as final but rather represents a means of ascertaining whether additional discussion is warranted or necessary, for example, I do not believe that minutes including the votes of the members would be required to be prepared.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6718

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

July 8, 1991

Mr. Jerry Rodgers
88-A-3723
Drawer B
Stormville, NY 12582

Dear Mr. Rodgers:

I have received your letter of July 1, which is addressed to the Committee on Open Government and the Office of Court Administration. Although unclear, it appears that you may be appealing a constructive denial of a request under the Freedom of Information Law to this office.

In this regard, I offer the following comments.

First, having reviewed the materials attached to your letter, it is unlikely in my view that the Freedom of Information Law is 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 on the foregoing, although the Freedom of Information Law applies to agency records and it has been held that the Office of Court Administration is an "agency" [see e.g., Babigian v. Evans, 427 NYS 2d 688, aff'd 97 AD 2d 992 (1983)], it appears that the records sought are court records maintained by a court clerk. If that is so, the Freedom of Information Law would not be applicable.

Second, 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 1401.5(d)]. However, a judicial 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, 157 AD 2d 486 (1990)]. 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 be granted or denied within a reasonable time after the receipt of a request is acknowledged in accordance with section 89(3) of the Law and that an acknowledgement must include an estimate of the date when a request will be granted or denied.

Lastly, 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, nor it is authorized to render determinations following appeals. The provision concerning appeals 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."

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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6719

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

July 9, 1991

Hon. Carl A. Vergari
District Attorney
County of Westchester
Courthouse
111 Grove Street
White Plains, NY 10601

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

Dear District Attorney Vergari:

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

Specifically, the issue is whether section 437.81(1) of the Laws of Westchester County, which states that "[t]he County Attorney shall decide administrative appeals from denials of access to records", is "in conformity" with section 87(1)(a) of the Freedom of Information Law "insofar as it permits the County Attorney to review denials of access by the Office of the District Attorney."

In reviewing the issue, you asked that the following considerations be addressed:

> "-- Is the Westchester County District Attorney's Office an 'entity' within the meaning of Sections 86(3), 89(3), and, in particular, section 89(4)(a) (which provides that the 'head, chief executive, or governing body of the entity' shall designate the person to hear administrative appeals)?
>
> -- Does Article 6 not provide for the agency obtaining CPLR Article 78 review of an appeal determination granting access to a record (see Section 89(4)(b)) because

> the Legislature contemplated that the agency itself would be the entity granting access upon the administrative appeal?
>
> -- Do the various portions of FOIL which permit the records access officer to deny a FOIL request without setting forth specific reasons (Section 89(3)) and require the appeals officer to 'fully explain...the reasons for further denial, or provide access to the record sought' (Section 89(4)(a)) suggest that a FOIL appeal should be decided on a de novo basis by someone within the agency itself, having authority over the records requested, and in a superior policy-making position to the records access officer?
>
> -- Was it intended that the FOIL determination of a duly elected District Attorney, an autonomous constitutional officer (see NY Const., Article XIII, Section 13), be subject to the unreviewable veto power of an appointed local official?"

In this regard, I offer the following comments.

First, from my perspective, the use of the term "entity" is likely intended to deal with a variety of situations arising under the Freedom of Information Law. In section 86(3), which defines "agency", the term appears to be used in order to ensure that the statute is applicable to all governmental bodies, irrespective of their characterization. For instance, I believe that the term "entity" is used in subdivisions (3) and (4) of section 89 in part to ensure that those provisions apply to agencies and to the State Legislature. Although the definition of "agency" is broad, it specifically excludes the State Legislature. While the State Legislature is not an agency, the Senate and Assembly are required to comply with section 88 of the Freedom of Information Law, and "entity" is likely used in subdivisions (3) and (4) to require that the State Legislature, as well as "agencies", are subject to those general provisions concerning requests and appeals.

Similarly, there are often agencies within agencies. With a county, for example, there may be departments of social services, health, public works, probation, aging, mental health, planning, etc. Each of those departments would in my view constitute an agency; each, however, would function within a public corporation and a single overarching administration. It is for that reason, in my opinion, that section 87(1)(a) of the

Freedom of Information Law requires the governing body of a public corporation to "promulgate uniform rules and regulations for all agencies in such public corporation...pertaining to the administration..." of the Law. Absent such a provision, each department within a county might be responsible for devising procedural rules and regulations, and the result would likely be inconsistencies in the implementation of the Law.

Second, with respect to the appeal process, I believe that the person or body designated to determine appeals has the authority to decide the appeal de novo. There is nothing in the Freedom of Information Law, nor is there any judicial decision of which I am aware, that would in any way bind an appeals officer or body to any reasons for denial that might have been cited by a records access officer. Further, although the Freedom of Information Law does not so specify, in practice and based upon judicial decisions, review of a denial by a court in an Article 78 proceeding is de novo, in that an agency is not restricted to the grounds for denial offered in an appeal determination when it defends the denial in a judicial proceeding. Presumably, the person or body that renders determinations following appeals would have some authority or control over the records sought and would be "in a superior policy-making position to the records access officer". That factor would in my opinion be particularly relevant in a situation in which the records access officer denies access to records, and the appeals officer, based upon a review of the records, reverses a denial and grants access to the records. One might analogize the relationship between the records access officer and the appeals officer to elements of a "chain of command".

Of potential significance to the issue is section 700(7) of the County Law, which suggests that a district attorney maintains control of the records of his office. That provision states that:

> "The district attorney shall keep and preserve all records now or hereafter in his care or custody or under his control and all records, books and papers relation to the functioning of his office or the performance of his duties. No such record, book or paper shall be destroyed or otherwise disposed of, except pursuant to law. At the expiration of his term, the district attorney shall, within sixty days, turn over all such records, books or papers to his successor in office."

Another area which deals with custody and control of records involves the duties of a district attorney in relation to investigations and grand jury proceedings. In a Court of Appeals decision concerning that issue, and whether "the presence of an unauthorized prosecutor may create the possibility of prejudice", it was stated that "[g]enerally, the District Attorney is the prosecutorial officer with the responsibility to conduct all prosecutions for crimes and offenses cognizable by the courts of the county in which he serves", and that "[d]uring the actual proceedings, the legal adviser of the Grand Jury is the District Attorney and legal advice from any other source is improper" [People v. DiFalco, 44 NY 2d 482, 486-487]. The Court held further that "[s]ecrecy is a vital requisite of Grand Jury proceedings (CPL 190.25, subd 4) and its actions and deliberations must be 'uninfluenced by the presence of those not officially and necessarily connected with it'...The unauthorized appearance of this prosecutor infringes upon the secrecy requirement, thereby, impairing the integrity of the proceeding" (id., 488).

In conjunction with the foregoing, there may be situations in which requests are made for records that may potentially be used in grand jury proceedings. In those cases, it would appear that only the district attorney would or should have the authority to review records for the purpose of determining an appeal made under the Freedom of Information Law. One such case involved your office and a request for "copies of maintenance and inspection records for four (4) amusement rides at Playland, Rye, New York" a facility operated by Westchester County (Westchester-Rockland Newspapers, Inc. v. Vergari, Supreme Court, Westchester County, NYLJ, April 22, 1988). Although the court found that it was "not genuinely dispute[d] that the records sought are kept in the ordinary course of business by the County of Westchester and would routinely be available to petitioner under FOIL", the District Attorney denied access "on the basis that since the records were in the possession of the People for review and possible submission to the Grand Jury as evidence of alleged criminal conduct, the records are secret withing the purview of Section 190.25(4) of the Criminal Procedure Law and hence, are exempt, and may not be released without an order of the Court". The Court upheld the denial, generally confirming the contentions made by the District Attorney, stating that "[i]t is by means of such secrecy that the District Attorney is enabled to carry out his duty of criminal investigation without disclosure of potential evidence, target(s) of the investigation and finally potential witnesses before the Grand Jury".

In my opinion, the specific language of the Freedom of Information Law does not constitute a clear basis for ascertaining whether the County Attorney should properly determine appeals made under the Freedom of Information Law. However, in view of the statutory role of the District Attorney, the nature of the duties of his office, and the secrecy requirements that often exist, a person or body outside of his office may have no author-

ity to review records that are the subject of an appeal. If that is so, it might be contended that the ability to determine appeals by such a person or body is anomalous and inconsistent with the appropriate administration of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6720

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

July 10, 1991

Nancy Lew Lee, Councilwoman
Town Board
Town of Callicoon
P.O. Box 218
Callicoon Center, NY 12724

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

Dear Councilwoman Lee:

I have received your letter of June 29.

According to your letter, in your capacity as a member of the Callicoon Town Board, you requested a copy of minutes from "Tax Grievance Day". In response to the request, you were informed that you "needed to file a formal request under the Freedom of Information Law and it would cost [you] $12.00 (.25 per page x 49)". It is your view that the response "makes no sense", for you believe that "it was necessary to get the minutes since some of [your] constituents had asked [you] what criteria was used by the Grievance Board to lower tax assessments", and that your "official duties include being well informed on the issues raised by those [you] represent".

In this regard, I offer the following comments.

It is noted initially that neither the Freedom of Information Law nor any other statute of which I am aware specifically addresses the issue that you raised. In general, I believe that the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might

not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a Board rule or policy to the contrary, I believe that a member of public body should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. The Town Board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of the total membership (see Town Law, section 63). In my view, in most instances, a 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 or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6721

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

July 10, 1991

Ms. Katherine Cayea, Director
Plattsburgh Public Library
15 Oak Street
Plattsburgh, NY 12901

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

Dear Ms. Cayea:

I have received your letter of June 24 in which you requested advice concerning the disclosure of library patron information.

By way of background, you wrote that the Plattsburgh Public Library is trying to increase its funding from the Town of Plattsburgh by informing Town officials that approximately half of the Library's patrons are Town residents. The Town Supervisor has asked that you "prove the figures...by letting a person of his choice look through [y]our patron registration file...[and] make note of the addresses and verify the number of Town residents using [y]our Library". You included a blank copy of the Library's registration card, which includes spaces for a registrant's name, mailing address, home address, business, home and business phone numbers, business or school, grade, residency and "patron type" (i.e, age bracket, college, military).

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". One such statute is section 4509 of the Civil Practice Law and Rules, which is entitled "Library records". That provision 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, inter-library 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."

Based upon the foregoing, I believe that registration cards or other library records containing "names or other personally identifying details" concerning library users are confidential.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6722

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

July 11, 1991

Mr. Matthew Lee
Inner City Press
Community on the Move
P.O. Box 416
Hub Station
Bronx, NY 10455

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

Dear Mr. Lee:

I have received your letter of June 29, as well as the correspondence attached to it.

Your correspondence involves requests for records made on June 10 to the records access officers at the Office of the Mayor of New York City and the Bronx Borough President. As of the date of your letter to this office, you had not received responses to either request. You have asked that I "clarify" the responsibilities imposed by the Freedom of Information Law and send copies of my remarks to both offices.

In this regard, 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)].

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, Office of the Mayor
Records Access Officer, Office of the Bronx Borough President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6723

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

July 11, 1991

Mr. Paul Williams
80-A-1977
P.O. Box AG
Fallsburg, 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. Williams:

I have received your letter of June 29. You requested assistance in obtaining records from the New York City Human Resources Administration concerning "all the times [you] were hospitalized".

In this regard, I offer the following comments.

First, a written 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 is the person designated to coordinate an agency's response to requests. It is suggested that such a request be addressed to the records access officer at the Human Resources Administration, 250 Church Street, New York, NY 10013.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, you should include sufficient detail to enable agency officials to locate the records 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 records identifiable to recipients of public assistance, 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."

Lastly, if you are interested in obtaining medical records from the hospitals where you were treated, I point out that section 18 of the Public Health Law generally provides patients with rights of access to those records. Any such request should be made to the hospitals where you received treatment.

To obtain additional information concerning access to medical records and the fees that may be assessed for copies, you may write to:

Access to Patient Information Coordinator
NYS Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, NY 12237

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-6724

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

July 11, 1991

Mr. Frank Perrella
86-A-7876 E 3 30
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. Perrella:

I have received your letter of July 3. Your inquiry concerns access to "crime scene print evaluation reports".

Since print evidence was gathered, you asked initially whether the "omnibus motion requesting discovery should have covered this material". 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. As such, I have neither the authority nor the expertise to provide guidance concerning the provisions or scope of the Criminal Procedure Law.

To seek such reports under the Freedom of Information Law, a request should be directed 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.

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

The provision of most likely relevance with respect to the records in question in my view 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 of 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, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, 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 the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the

> standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by those so inclined. Disclosing to unscrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility 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)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in

> the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed"(id. at 573).

While I am unfamiliar with the records in question, those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. Nevertheless, other portions of the records might be "routine" and would not if disclosed preclude law enforcement officials from carrying out their duties effectively.

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-6725

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

July 11, 1991

Mr. Daniel Lynch
82-A-6183
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

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

Dear Mr. Lynch:

I have received your letter of June 30 in which you raised questions and requested information from this office.

With respect to your request, this office does not maintain any guide or brochure "on how to use" the federal Freedom of Information Act, nor do we have Missouri's statutes. I believe that copies of other state's statutes could likely be obtained from the State Library through your facility librarian. I have, however, enclosed the advisory opinions to which you referred.

You alluded to a request mailed on May 15 addressed to the New York County District Attorney that had not been answered as of the date of your letter to this office. In a related vein, you asked whether a request for certain records should be addressed to the head of the New York City Transit Authority.

In this regard, rather than sending a request directly to the District Attorney or the head of an agency, you would likely be better served by addressing requests to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests.

With respect to appeals, section 89(4)(a) of the Freedom of Information Law states in relevant part that:

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

It is noted, too, that when an initial request is denied, the person denied must be informed of the person or body designated to determine appeals [see 21 NYCRR 1401.7(b)].

I believe that the person designated to determine appeals at the Office of the New York County District Attorney is Mr. Irving Hirsch. Since I do not know the names of the persons so designated at the other agencies, it is suggested that any appeals be made to the heads of those agencies, specifying that if they do not render determinations on appeal, your appeal should be forwarded to the proper person.

Since your request to the District Attorney refers to a "master index", I point out that the phrase "master index" is used in the regulations promulgated by the Department of Correctional Services under 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. Rather than seeking a "master index" from an agency, it is suggested that you request the subject matter list maintained pursuant to section 87(3)(c) of the Freedom of Information Law.

Another area of inquiry involves the New York City Municipal Archives, which is a unit of the Department of Records and Information Services. That agency's records access officer according to the New York City Official Directory, is Mr. Tyrone Butler. It is suggested that you direct your inquiry to him.

If you are considering challenging a denial in court, in order to exhaust your administrative remedies, you must appeal the denial and be denied pursuant to the appeal.

With respect to the possible award of attorney's fees, section 89(4)(c) of the Freedom of Information Law 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.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1955
FOIL-AO- 6726

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

July 11, 1991

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, unless otherwise indicated.

Dear Mr. Quinn:

I have received your letter of July 4 in which you raised a series of questions concerning voting by boards of education.

Specifically, you raised the following issues:

> "When a Board of Education votes on a very important issue such as a new negotiated teachers contract, please explain to me, what vote is needed. Does it need a majority, 2/3 majority? What about voting on other issues?
>
> "Is the president of the Board obligated to poll each and every member of the Board on every issue or just important issues?
>
> "Can the Board make their own laws on such matters or are there State Laws and/or State Education laws."

In this regard, I offer the following comments.

First, in general, I believe an affirmative vote of a majority of the total membership of a public body, including a board of education, is required to take action. Section 41 of the General Construction Law, entitled "Quorum and majority", 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.

There is only one instance of which I am aware in which a board of education is required to take action by means of an affirmative vote of greater than a majority. Section 3016(2) of the Education Law states that:

> "No person who is related by blood or marriage to any member of a board of education shall be employed as a teacher by such board, except upon the consent of two-thirds of the members thereof at a board meeting and to be entered upon the proceedings of the board."

The provisions of both the Freedom of Information Law and the Open Meetings Law are pertinent to the second question. Section 106 of the Open Meetings Law pertains to minutes of meetings and states in relevant 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."

In one of the few instances in the Freedom of Information Law that requires that records be maintained, section 87(3)(a) provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, 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 board of education, a record must be prepared that indicates that manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of section 87(3)(a), it appears that the State Legislature sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. 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 and states that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

Further, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found 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), aff'd 72 NY 2d 1034 (1988)].

Lastly, having discussed the remaining issue with an attorney for the New York State School Boards Association, I was informed that a board of education may, within certain limitations, require greater than a majority vote to take action. For example, in Matter of Miller (17 Education Department Reports 275), it was found that a requirement to approve an action by four-fifths of a board exceeded the board's authority; however, in Matter of Volpe (25 Education Department Reports 398), it was found that a requirement that two-thirds of the board approve the appointment of a superintendent was "not unreasonably restrictive".

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-6727
PPPL-AO-126

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

July 12, 1991

Greg D. Lubow, Esq.
Public Defender
Greene County Office of the
Public Defender
Court House - P.O. Box 413
Catskill, NY 12414

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

Dear Mr. Lubow:

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

In your capacity as Greene County Public Defender, you wrote that you represent several persons incarcerated by the Department of Correctional Services, and that your representation "stems from crimes they are alleged to have committed while in correctional facilities". You added that, following the events that led to the criminal charges, "each of the inmates was subjected to an administrative disciplinary proceeding commonly referred to as a Superintendent's or Tier III Proceeding". During those proceedings, inmates are served with "misbehavior reports" and are advised in accordance with 7 NYCRR 251-3(a) as follows:

> "You are hereby advised that no statement made by you in response to the charge or information derived therefrom may be used against you in a criminal proceeding."

You pointed out further that:

> "[P]ursuant to Section 710.30 of the Criminal Procedure Law which requires the People of the State of New York, within fifteen days of arraignment, to serve a Notice of Intention to Offer Evidence of, in these cases,

> a statement made by the defendant to a person engaged in law enforcement activity, [your] office has been served with such a notice which specifies that the evidence consists of a statement made by the defendant (inmate) to a public servant engaged in law enforcement activity. The notice goes on to specify the intention of the District Attorney to utilize the Tier III Proceeding."

Consequently, you asserted that:

> "it appears that the District Attorney has been provided access to [your] client's disciplinary file and the record of this disciplinary hearing which primarily consists of a tape recording of the proceeding as well as any written statement [the] defendant or his witnesses may have chosen to make along with the various notices, charges, etc."

You specified that your client "has not consented to or given any authority whatever to the District Attorney to obtain these records", and it is your belief that no subpoena has been requested.

Based upon the foregoing, you have sought advice with respect to the following questions:

> "1. Is the Department of Correctional Services authorized to permit access to the disciplinary proceeding to the District Attorney or any other governmental agency without the consent of the inmate, in this case, a defendant.
>
> 2. What remedies are available to a defendant who has had his disciplinary record given to the District Attorney without his consent.
>
> 3. What steps can be taken to prevent future dissemination of inmate records by the Department of Correctional Services."

In this regard, I offer the following comments.

From my perspective, two statutes, the Freedom of Information Law and the Personal Privacy Protection Law, are relevant to the matter.

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. Among the grounds for denial 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 under the provisions of subdivision two of section eighty-nine of this article". Further, section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

The Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, section 92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [section 92(7)]. For purposes of Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [section 92(9)].

With respect to disclosure, section 96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves when a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter."

It is noted, too, that section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Therefore, if a state agency cannot disclose records pursuant to section 96 of the Personal Privacy Protection Law, it is precluded from disclosing under the Freedom of Information Law. Further, the foregoing in my opinion indicates that the

relationship between the Freedom of Information Law and the Personal Privacy Protection Law is somewhat circular and, consequently, an initial question in this situation is whether the disclosure by the Department of Correctional Services would result in an unwarranted invasion of personal privacy.

It is noted that there is an unreported decision that dealt with a request by a district attorney for the same or related records maintained by the Department of Correctional Services. In Kavanagh v. Department of Correctional Services (Supreme Court, Albany County, April 22, 1986; see enclosed), the District Attorney of Ulster County sought all misbehavior reports concerning Gerald McGiven, a celebrated inmate whose life and proceedings were the subject of considerable attention. The court upheld the denial on the ground that disclosure would constitute an unwarranted invasion of personal privacy, stating that:

> "Said reports contain numerous allegations, many of which were not accepted. In addition, the nature of the reports alone requires a holding that their disclosure constitutes an unwarranted invasion of privacy, per se. The detailed nature of said reports is as an open book to all of the wrongs and alleged wrongs committed by inmate McGiven while in prison. Disclosure of same would surely be an unwarranted invasion of said inmate's personal privacy under any definition of those terms (cf. Department of Air Force v Rose, 425 US 352; Berry v Department of Justice, 733 F2d 1343; Cooper v Department of Justice (FBI), 578 F Supp 546).
>
> "In addition, respondent is correct that, due to the nature of the materials being sought, deletion of identifying details is not possible or practicable (cf. Matter of Nicholas, 117 Misc 2d 630)."

It appears that the records at issue under the facts described in your letter involve the records of or relating to hearings conducted following the issue of a misbehavior report. If that is so, based upon the holding in Kavanagh, it would appear that disclosure would constitute an unwarranted invasion of personal privacy.

The remaining issue in terms of disclosure is whether the Department of Correctional Services is authorized to disclose the records in question under section 96(1) of the Personal Privacy Protection Law. In Kavanagh, the Court rejected the District Attorney's contentions that the records should be disclosed under paragraphs (d) and (e) of section 96(1). Those provisions authorize disclosure:

> "(d) to those officers or employees of another governmental unit if each category of information sought to be disclosed is necessary for the receiving governmental unit to operate a program specifically authorized by statute and if the use for which the information is requested is not relevant to the purpose for which it was collected; or
>
> (e) for a routine use, as defined in subdivision ten of section ninety-two of this article..."

In this instance, it does not appear that paragraph (d) would authorize disclosure, for the use of the information sought is likely relevant to the purpose of which it was collected, i.e., a determination of whether an inmate committed a crime. Similarly, particularly in view of 7 NYCRR 251-3(a), it does not appear that disclosure would constitute a "routine use" as that term is defined in section 92(1) of the Personal Privacy Protection Law.

The other exceptions in section 96(1) authorizing disclosure that may be relevant are paragraphs (k) and (l). Those provisions permit disclosure:

> "(k) to any person pursuant to a court ordered subpoena or other compulsory legal process; or
>
> (l) for inclusion in a public safety agency record or to any governmental unit or component thereof which performs as one of its principal functions any activity pertaining to the enforcement of criminal laws, provided that, such record is reasonably described and is requested solely for a law enforcement function..."

Paragraph (k), based upon your belief, would be inapplicable; paragraph (l) would appears to be inapplicable in view of 7 NYCRR 251-3(a), for the records, according to that provision of the regulations, could not be used against the inmate in a criminal proceeding.

In sum, if none of the exceptions authorizing disclosure under section 96(1) of the Personal Privacy Protection Law would have been applicable, that statute, as well as section 89(2-a) of the Freedom of Information Law, would in my opinion have precluded the Department from disclosing the records in question.

In terms of remedies available under the Personal Privacy Protection Law, section 97 states that:

> "(1) Any data subject aggrieved by any action taken under this article may seek judicial review and relief pursuant to article seventy-eight of the civil practice law and rules.
>
> (2) In any proceeding brought under subdivision one of this section, the party defending the action shall bear the burden of proof, and the court may, if the data subject substantially prevails against any agency and if the agency lacked a reasonable basis pursuant to this article for the challenged action, award to the data subject reasonable attorneys' fees and disbursements reasonably incurred.
>
> (3) Nothing in this article shall be construed to limit or abridge the right of any person to obtain judicial review or pecuniary or other relief, in any other form or upon any other basis, otherwise available to a person aggrieved by any agency action under this article."

Lastly, to attempt to prevent similar occurrences in the future, it is suggested that you confer with appropriate officials at the Department of Correctional Services and the Office of the District Attorney. In addition, in an effort to enhance compliance with law, a copy of this opinion will be forwarded to Counsel to the Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Anthony Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6728

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

July 12, 1991

Mr. John R. Riley
[redacted]

Dear Mr. Riley:

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

As I understand the materials, you were the subject of a criminal complaint in March of 1990. However, any charges against you were apparently dismissed, for the record was ordered sealed by the Jamestown City Court in June of that year. Your request for the complaint directed to the Jamestown Police Department was denied, and the New York Civil Liberties Union suggested that you may appeal the denial to this office.

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 enforce the Freedom of Information Law or compel an agency to disclose records. Further, the Committee is not empowered to render determinations following appeals. The provision in the Freedom of Information Law concerning the right to appeal a denial 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."

Second, the letter from the Civil Liberties Union indicates that the records was sealed pursuant to section 160.50 of the Criminal Procedure Law. While I am not an expert with respect to that statute, once records have been ordered sealed, a police department cannot in my opinion release the records in response to a request made under the Freedom of Information Law. However, I believe that the person charged may generally obtain those records from the court. As such, it is suggested that you explain the circumstances and seek the records from the court. It may also be worthwhile to confer with your attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen Welch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1956
FOIL-AO-6729

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

July 12, 1991

Mr. Alton J. Landsman
New York State Senate
Office of the Minority Leader
270 Broadway, Room 1812
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. Landsman:

I have received your letter of July 3. You have requested an advisory opinion concerning whether business improvement districts, particularly those located in New York City, are subject to the Freedom of Information and Open Meetings Laws.

In this regard, as you are aware, the statutes concerning the creation and functions of business improvement districts are found in Article 19-A of the General Municipal Law, sections 980 and 980-a through 980-p. Having reviewed those provisions, I do not believe that business improvement districts are agencies or public bodies; rather they are geographical areas in which business districts are located within municipalities. Other than district management associations, which will be discussed later, Article 19-A did not create any new governing body to operate those districts. Section 980-c specifies that a local legislative body has various powers with respect to districts, and section 980-d(c) specifies the roles of various New York City entities, i.e., the City Council, community boards, and the Planning Commission, in conjunction with the establishment or extension of a district. Certainly the records of those entities would fall within the scope of the Freedom of Information Law, and their meetings would be subject to the Open Meetings Law.

It is unlikely in my view that district management associations created by section 980-m of the General Municipal Law would be subject to either the Freedom of Information Law or the Open Meetings Law.

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 entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Section 980-m characterizes such associations as not-for-profit corporations. As such, it does not appear that they would perform a governmental function.

The Open Meetings Law applies to public bodies, and 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."

It is noted out that recent decisions indicate generally that entities, such as citizens advisory bodies, 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 government function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group 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)]. Assuming that the associations have no authority to take binding action on behalf of governmental entities, I do not believe that they would constitute 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6730

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

July 15, 1991

Mr. Collin Fearon, Jr.
74-B-395
Attica Correctional Facility
Attica, NY 14011-0419

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

Dear Mr. Fearon:

I have received your letter of July 1 in which you seek an advisory opinion concerning a request and appeal made under the Freedom of Information Law to the Department of Correctional Services.

In your appeal, a copy of which you enclosed, you wrote that:

> "For February 25, 1991, between 6 P.M. and 10 P.M., [you] would like to know:
>
> a) which area of the facility that G-Block inmates had recreation in that night;
>
> b) which companies in G-Block had telephone call;
>
> c) which companies in G-Block had showers."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is a vehicle that pertains to existing records, and section 89(3) of the Law states that an agency need not create a record in response to a request. Similarly, the Freedom of Information Law does not require that agency officials answer questions. Rather, it requires that agencies respond to requests for records and disclose records to the extent provided by law. If, for example,

there are no records containing the information sought, the Department would not be required to prepare a record on your behalf or provide information by answering your questions.

Second, section 89(3) of the Freedom of Information Law also states that an applicant must "reasonably describe" the records sought. As such, a request must contain sufficient detail to enable agency officials to locate and identify records. I am unaware of the method by which the information sought, if it exists, is filed or the means by which it it may be retrieved. If Department officials cannot locate and identify the information sought based on the terms of your request, the request would not have reasonably described the records.

Lastly, assuming that the records exist and can be located, it appears that they would be available. In brief, the the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 would be section 87(2)(g) of the Law, 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. Under the circumstances, it would appear that any such records would consist of factual information available under section 87(2)(g)(i).

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-6731

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

July 15, 1991

Ms. Edna Braham
[redacted]

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

Dear Ms. Braham:

I have received your letter of July 1, which pertains to an "incomplete" response to a request for records of the State Insurance Fund, as well as a second request that had not been answered as of the date of your letter to this office. You asked that I intervene on your behalf.

In this regard, I have contacted the records access officer for the Fund on your behalf and was informed that the eligible list that you requested and a record providing the meaning of the codes to which you referred have been or will shortly be sent to you. It is noted that eligible lists have long been available under section 71.3 of of the rules and regulations promulgated by the State Department of Civil Service.

I was also informed that two items of information that you requested, the names of last persons on the eligible list who were interviewed for a particular position or sent a "search letter for that position", would be withheld. In my opinion, a denial of access to those items would be proper, for I believe that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to section 87(2)(b) of the Freedom of Information Law. It is noted, too, that section 89(7) of the Freedom of Information Law states in part that nothing in that statute requires the disclosure of "the name or home address...of an applicant for appointment to public employment...".

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald McCarthy, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6732

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

July 15, 1991

Mr. Alan Lyons
c/o Poindexter
[redacted]

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

Dear Mr. Lyons:

I have received your note and the correspondence attached to it, which reached this office on July 10.

According to the materials, you submitted a request under the Freedom of Information Law to the District Attorney of New York County on May 31. As of the date of your letter to this office, you had received no response. In the request, you referred to your indictment in 1970 and sought copies of a lab report and transcripts of grand jury proceedings. In a separate letter, you explained that you would like the Committee on Open Government to review the transcript, for you are seeking a pardon.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office has no power to review records and performs no functions in relation to pardons or clemency.

Second, rather than sending a request directly to the District Attorney, you would likely have been better served by addressing the request to the "records access officer". The records access officer has the duty of coordinating an agency's response to requests.

Third, 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 believe that the person designated to determine appeals at the Office of the New York County District Attorney is Mr. Irving Hirsch.

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.

Since I am unaware of the contents of the lab report or the effects of its disclosure, I cannot advise with certainty as to rights of access to it. However, the provision of greatest likely 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."

Also of possible significance is section 87(2)(g), which 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. 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 records of grand jury proceedings, 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 190.25(4)(a) of the Criminal Procedure Law, which 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."

As such, the Freedom of Information Law appears to be inapplicable as a basis for obtaining transcripts of grand jury proceedings. As a defendant, however, you may have other rights of access to records or means of obtaining those records.

Lastly, since the events to which the records relate were prepared more than twenty years ago, I am unaware of the extent to which the records continue to exist. If they no longer exist, the Freedom of Information Law would be inapplicable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6733

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

July 15, 1991

Mr. Stephen A. Tiska
[redacted]

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

Dear Mr. Tiska:

I have received your letter of July 4, as well as the materials attached to it.

It appears that your inquiry concerns the validity of a record maintained by the Town of Masonville and the certification of a record. In this regard, I offer the following comments.

First, the Freedom of Information Law does not distinguish among "official", "unofficial" or "legal" records. The Freedom of Information Law pertains to all agency records and, section 86(4) of that statute 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, any documentation maintained by a municipality would constitute a "record" for purposes of the Freedom of Information Law, regardless of its characterization.

Second, section 89(3) of the Freedom of Information Law refers to the certification of records. When a request for a record is approved, that provision 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 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, a certification prepared pursuant to section 89(3) would not indicate that the contents of a record are complete, accurate or "legal; it would merely indicate that the copy of the record is a true copy.

I hope that I have been of some assistance.

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

OML-AO - 1958
FOIL-AO - 6734

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

July 17, 1991

Ms. Sondra Bauernfeind
Chairman
Sullivan County Conservative Party
[redacted]

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

Dear Ms. Bauernfeind:

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

Your initial area of inquiry relates to a meeting of the Sullivan County Board of Supervisors during which "there was a direct attempt to prevent [you] from addressing several issues which were under consideration by the Board of Supervisors for that meeting". According to your letter, when you were given an opportunity to speak, the Chairman "kept interrupting [you] and demanded to know if [you were] going to speak on a topic which was on the agenda for the meeting". You responded by stating that you did not know what was on the agenda "since the agenda for the meeting was not available before the meeting so that anyone who wished to address particular issues had no way of knowing what the issues to be discussed would be". You added, however, that, after you sat down, the first resolution involved "exactly the topic on which you intended to make [your] remarks".

"Since the public is allowed to speak at the regular meetings of the Board of Supervisors", and "since the public is allowed to speak only on topics and resolutions on the agenda", you asked when the agenda should be made available to the public.

In this regard, 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 parti-

cipate 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 may do so based upon rules that treat members of the public equally.

Further, while 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 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.

In the context of your question, if one can speak only about topics appearing on the agenda, in order to be reasonable, the Board's procedures, must in my view, permit disclosure of the agenda at a reasonable time prior to a meeting. I point out that there is nothing in the Freedom of Information Law or the Open Meetings Law that deals specifically with agendas. However, once prepared, an agenda constitutes a "record" subject to rights conferred by the Freedom of Information Law. Assuming that an agenda consists of a factual list of general topics to be considered at a meeting, I believe that it would be available under section 87(2)(g)(i) of the Freedom of Information Law, which requires that intra-agency materials consisting of factual information be disclosed.

The second area of inquiry involves a request directed to the Monticello Housing Authority for the names of "all employees, their addresses, the position(s) each holds and the salary for each position." Although the request was made on May 31, it appears that there has been no response.

By way of background, I point out that the Freedom of Information Law is applicable to agency records and that section 86(3) of the Law defines the term "agency" to 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."

Section 3(2) of the Public Housing Law states that municipal housing authorities are public corporations, and section 470 of the Public Housing Law specifies that the Village of Monticello Housing Authority "shall constitute a body corporate and politic". Since the definition of "agency" includes public corporations, I believe that the Authority is clearly an "agency" required to comply with the Freedom of Information Law. Moreover, it has been held judicially that a municipal housing authority is subject to the Freedom of Information Law [Washington Rockland Newspapers, Inc. v. Fischer, 101 AD 2d 840 (1985)].

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)].

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

Among the few instances in the Freedom of Information Law that requires agencies to maintain particular records relates to 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..."

As such, a payroll record that identifies all agency officers or employees by name, public office address, title and salary must be prepared and maintained by an agency to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, this Committee has advised and the courts have upheld the general principle 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

It is noted that section 89(7) states in part that the Freedom of Information Law does not require the disclosure of the home address of a public employee. While home addresses of Authority employees need not be disclosed, I believe that records including their names, public office addresses, titles and salaries must 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: Board of Supervisors
Chairman, Monticello Housing Authority
Thomas Mack

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6735

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

July 17, 1991

Mr. Anthony Futia
[redacted]

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

Dear Mr. Futia:

As you are aware, I have received your letter of July 12, as well as the correspondence attached to it.

One of the enclosures is a letter addressed to the Board of Commissioners of the North Castle South Fire District #1 in which you requested information and raised a variety of questions concerning the District's expenditures. A second letter seeks answers to questions pertaining to an award program. You wrote that the second letter "was simply received and filed with no directive to the secretary to respond".

You have asked "how long a period of time should be given in anticipating a response" and whether the information sought should be disclosed.

In this regard, I offer the following comments.

First, it is noted that the title of the Freedom of Information Law may be somewhat misleading, for that statute does not require the disclosure of information per se; rather it requires agencies to respond to requests for records and to disclose records to the extent that rights of access are conferred by law. As such, the Freedom of Information Law is not a vehicle that requires agencies to answer questions or to supply information in response to inquiries. Similarly, 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.

Having reviewed the two letters, although in some instances you requested records, in many others you sought information by raising questions. Further, the first letter includes a mixture of requests for information, records and recommendations offered to the Board of Commissioners. While the Board could have considered both letters to have been requests made under the Freedom of Information Law, it is not fully clear that they were intended to be considered as such. It is suggested, therefore, that you renew your requests, specifying that they are being made under the Freedom of Information Law. Further, rather than seeking to elicit information by raising questions, it is suggested that you request records. For example, rather than asking how much was spent in a given area, you might request records reflective of expenditures for a certain period of time. I have enclosed a brochure describing the Freedom of Information Law and the Open Meetings Law which includes a sample letter of request that may be useful to you.

With respect to the time for response, 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)].

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.

As a general matter, records reflective of the expenditures of public monies, such as books of account, bills, vouchers, contracts and the like, are in my view available, for none of the grounds for denial would be applicable with respect to those records.

Much of the information, insofar as it exists in records, would fall within the scope of section 87(2)(g). Although that provision represents a possible basis for a denial, due to its structure, it often requires 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. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6736

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

July 18, 1991

Dr. Peter W. Sluys
Associate Editor
Our Town
[redacted]

The staff of the Committee on 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. Sluys:

I have received your correspondence of July 3, which reached this office on July 16. Please note that the Committee is housed in the Department of State rather than the Office of the Lieutenant Governor.

According to your letter, you requested and received various records from the South Orangetown Central School District. The documentation disclosed "was entirely mimeographed material which was available at District files and was not photocopied or otherwise specially prepared for Our Town". Nevertheless, the District charged a fee of $81.25. You have sought advice on "whether the provision of mimeographed copies from district surplus authorizes the district to charge a fee under the Freedom of Information Act".

In this regard, I offer the following comments.

First, the provision concerning fees is found in section 87(1)(b)(iii) of the Freedom of Information Law. That provision authorizes an agency, pursuant to its rules and regulations, to establish:

> "the fees for copies of records which shall not exceed twenty-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."

Under the circumstances, making the records available to Our Town did not involve photocopying. Therefore, I do not believe that the District could appropriately have charged twenty-five cents per page. In my view, the fee for making and distributing mimeographed materials could generally be based upon the "actual cost" of reproduction.

Second, I point out that, pursuant to section 89(1)(b)(iii) of the Freedom of Information Law, the Committee on Open Government has promulgated regulations concerning the procedural implementation of the Law and fees (21 NYCRR Part 1401). Under section 87(1), agencies rules and regulations must be consistent with the Law and the Committee's regulations. Section 1401.8(c)(3) of the regulations, which pertains to fees for duplicating records by means other than photocopying, states that such fees:

> "shall not exceed the actual reproduction cost, which is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries."

Based upon the foregoing, assuming that a number of copies of the materials in question were mimeographed, I believe any fee assessed must be based on the average unit cost, which presumably would involve the cost of paper and ink. As such, any fee charged would be significantly less than $81.25.

The other possibility is that multiple copies might have been made for free distribution. If that was the District's intent at the time the materials were mimeographed, it would appear to be inappropriate to assess a fee.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Louise Brandt, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1127
FOIL-AO-6737

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

July 18, 1991

Ms. Patricia L. Hanley
[redacted]

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

Dear Ms. Hanley:

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

According to your letter, the Division for Youth has denied your request made under the Freedom of Information Law for records pertaining to an "affirmative action case" that you initiated. You added that although the "affirmative action agent who was in charge of the investigation...stated that she did find 'probable cause", the "outcome of the case was 'no probable cause'." It is your view that you "should have the right to review the information which was the basis for the decision", and you requested an advisory 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.

While I am unfamiliar with the contents of the records sought, there may be various grounds for denial of relevance.

Perhaps most significant 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. As such, insofar as the records in question consist of advice or opinions that are predecisional in nature, they could in my view be withheld under the Freedom of Information Law.

Also of potential relevance is section 87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute". While I am unaware of the involvement, if any, of the Division's attorneys, I point out that attorney work product, material prepared solely for litigation and communications made pursuant to a privileged relationship between an attorney and his or her client would be confidential (see Civil Practice Law and Rules, sections 3101(c), 3101(d) and 4503 respectively) and, therefore, would be exempted from disclosure.

The remaining ground for denial 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". While you could not invade your own privacy, the records might possibly identify others. To the extent that disclosure would result in an unwarranted invasion of their privacy, the records could be withheld.

While the Freedom of Information Law might not grant substantial rights of access to the records sought, a different statute, the Personal Privacy Protection Law, may grant additional rights of access. The Personal Privacy Protection Law pertains to records maintained by state agencies, such as the Division for Youth, about individuals or "data subjects". A

"data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, section 92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [section 92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [section 92(9)]. With certain exceptions, section 95(1) of the Personal Privacy Protection Law requires that a state agency disclose records pertaining to a data subject to that person. As such, in terms of rights of access by individuals to records pertaining to themselves, the Personal Privacy Protection Law in many instances provides rights of access in excess of rights conferred by the Freedom of Information Law.

From my perspective, there may be two grounds for withholding the records or portions thereof under the Personal Privacy Protection Law. Specifically, section 95(6) of that statute states in part that rights conferred upon a data subject pursuant to section 95(1) do not apply to:

> "(d) attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivisions (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena issued in the course of a criminal action or proceeding, court ordered or grand jury subpoena, search warrant or other court ordered disclosures."

In addition, again there may be aspects of the records sought that identify others, the disclosure of which would result in an unwarranted invasion of those persons' privacy. Other than those reasons, based upon the facts that you provided, it appears that the records sought would be available under the Personal Privacy Protection Law.

It is suggested that you resubmit a request pursuant to the Personal Privacy Protection Law, as well as the Freedom of Information Law. Enclosed is a copy of "You Should Know", which describes the Personal Privacy Protection Law and contains a sample request letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6738

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

July 18, 1991

Mr. Lloyd G. Sutton, 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. Sutton:

I have received your letter of July 12 in which you requested an advisory opinion concerning the Freedom of Information Law.

You have asked whether records indicating city employees' "vacation time, sick time and compensation time are subject to disclosure". Attached to your letter is a memorandum from Richard Fox of the City of Cortland Department of Finance and Administration, who wrote that the information in question is "personal" and "is not subject to freedom of information disclosure...".

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.

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 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 pri-

vacy [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.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Mr. Fox.

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 Fox

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6739

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

July 18, 1991

Mr. Alan F. Cagney
Assessor
Town of Blooming Grove
P.O. Box 358
Horton Rd. & Rt. 94
Blooming Grove, NY 10914

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

Dear Mr. Cagney:

I have received your letter of July 15 in which you requested an advisory opinion under the Freedom of Information Law.

You wrote that a request has been made to review your agricultural exemption files, and you indicated that there is no problem in disclosing an application for an exemption. However, in addition to the applications, the files include "leases, sales receipts, income taxes, and a crop yield form which also shows income". You have questioned whether those aspects of the files must be disclosed.

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.

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

Second, two of the grounds for denial may be relevant to your inquiry.

Specifically, section 87(2)(b) of the Freedom of Information Law enables an agency to withhold records or portions of records the disclosure of which would result in an "unwarranted invasion of personal privacy." While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view enable government to prevent disclosures concerning the personal or intimate details of individuals' lives.

From my perspective, a disclosure that permits the public determine the general income level of an individual 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 at a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Moreover, the New York State Tax Law contains provisions that require the confidentiality of records submitted to the Department of Taxation and Finance reflective of the particulars of a person's income or payment of taxes (see e.g., section 697, Tax Law). Although those provisions are not directly relevant in this instance, it would appear that the Legislature felt that disclosure of records concerning income and related information would constitute an improper or "unwarranted" invasion of personal privacy.

The other ground for denial of possible significance is section 87(2)(d), which enables an agency to withhold records or portions of records 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..."

Although I am unaware of whether section 87(2)(d) is relevant to your inquiry, it authorizes an agency to withhold records submitted by a commercial entity, or information derived from those records, when disclosure would cause substantial injury to the entity's competitive position.

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- 1961
FOIL-AO- 6740

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

July 19, 1991

Ms. June Maxam
The North Country Gazette
Box 408
Chestertown, NY 12817

Dear Ms. Maxam:

As you are aware, Mr. Larry Hackman of the State Archives and Records Administration has forwarded a copy of your letter of May 22 to the Committee on Open Government.

Your inquiry concerns records submitted to town officials of the Town of Chester that are not acknowledged by the Town Board, discussed at meetings or referenced in minutes of meetings. It is your view that "letters and/or petitions etc. should be publicly acknowledged, notation of same made in the official minutes and the letters etc. made part of the public record and subject to the Freedom of Information Law."

In this regard, I offer the following comments.

First, while a public body may choose to acknowledge or read letters or petitions at meetings, I am unaware of any provision of law that requires that it must do so.

Second, the Freedom of Information Law pertains to agency records, and section 86(4) of that statute defines the term "record" to include:

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

As such, any letters, petitions or similar documentation forwarded to a public body or public official in my view clearly 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.

From my perspective, one of the grounds for denial, section 87(2)(b), may be relevant to the kinds of records to which you referred. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Depending upon the contents of a letter, for example, it is possible that the name or other identifying details of a person writing to the Town could be deleted to prevent an unwarranted invasion of personal privacy. In such a case, the substance of such a letter would likely be available following the deletion of identifying details. I point out that there is no requirement that a municipality must delete those details; rather, it may do so to the extent that disclosure would result in an unwarranted invasion of personal privacy. A petition, in my view, would be public in its entirety, for those who sign or submit petitions do so, in my opinion, with an intent to make known the contents of those records and their identities.

Lastly, with regard to minutes, the Open Meetings Law prescribes what may be viewed an 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 reference or 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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1960
FOIL-AO-6741

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

July 19, 1991

Mr. Robert E. Bettmann
[redacted]

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

Dear Mr. Bettmann:

I have received your letter of July 16. You wrote that the president of the Hartsdale Volunteer Fire Department has advised you that its meetings and records are not open to the public.

You have asked that I advise him on the matter. In this regard, I offer the following comments.

First, it is noted that the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines "public body" to mean:

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

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.

I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the Court of Appeals found that a volunteer fire company is an "agency" that falls within the provisions of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland Newspapers v. Kimball, 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.

More recently, another decision confirmed in an expansive manner that volunteer fire companies are subject to the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court stated that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having, by law, control over the prevention or ex-

> tinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "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.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This Court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

In my view, the foregoing bolsters the contention that meetings of boards of volunteer fire companies are subject to the Open Meetings Law and confirms that its records are subject to the Freedom of Information Law.

As you requested, copies of this opinion will be forwarded to president of the Department as well as the other 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Ira Josephson, President
Paul Agresta, Town Attorney
Thomas O'Reilly, Chairman of
Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6742

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

July 19, 1991

Mr. John Goetschius
Greenburgh No. 11 Federation
of Teachers
P.O. Box 184
Dobbs Ferry, NY 10522

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

Dear Mr. Goetschius:

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

The correspondence consists of a request for a settlement agreement between the Greenburgh Eleven Union Free School District and its superintendent. Although you did not include any details concerning the nature of the issues leading to the agreement, you wrote that "both parties to the agreement had agreed that the terms of the agreement would not be disclosed".

You have requested "guidance as to how to proceed should this request be denied...". In this regard, I offer the following comments.

First, if 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 records the reasons for further denial, or provide access to the record sought."

Second, based upon the language of the Freedom of Information Law and its judicial interpretation, I believe that settlement agreements that pertain to public employees are generally 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 but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

Another more recent decision also required the disclosure of a settlement agreement between a teacher and a school district following the initiation of disciplinary proceedings under section 3020-a of the Education Law (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.

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 abuse. 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 promised 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)].

While I am unfamiliar with the facts relating to the agreement, it is my general view that the terms of a settlement would 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 an agency as well as its employee, in this instance, the Board of Education and the Superintendent.

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.

Further, in the context of a 3020-a proceeding, which may or may not be relevant here, it is my view that pending charges against a tenured person 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 person, 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 opinion, 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 that you presented if it involves a tenure proceeding.

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, when charges have been withdrawn by means of a settlement, the withdrawal of charges would not constitute an acquittal. As such, in my opinion, provisions in section 3020-a that confer confidentiality by means of expungement would not be 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, 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).

In sum, I believe that the Freedom of Information Law as judicially interpreted requires that the terms of settlement agreements involving public employees be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Dr. Paul V. Sequeira, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6743

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

July 22, 1991

S. R. Kaplan
[redacted]

Dear Mr. or Ms. Kaplan:

I have received your letter of July 15 in which you requested an investigative report regarding an age discrimination case before the New York State Division of Human Rights.

In this regard, 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.

A request made under the Freedom of Information Law should be addressed 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. 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. In short, it is suggested that you direct your request to the Division of Human Rights.

Lastly, since I am unfamiliar with the nature of the record or the stage of the proceeding to which it relates, I cannot offer specific guidance concerning rights of access. Since there may be issues involving the protection of personal privacy, it is suggested that you include information concerning the nature of your relationship, if any, to the proceeding.

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- 1965
FOIL-AO- 6744

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

July 22, 1991

Mr. Kenute Sterling
[redacted]

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

Dear Mr. Sterling:

I have received your recent letter, which reached this office on July 18.

You have asked whether it is possible to obtain records concerning the vote by the State Legislature to increase tuition at the State University of New York, as well as records of meetings kept by the State Legislature on the subject of the state budget.

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of the Freedom of Information Law states in part that an entity need not create or prepare a record in response to a request, unless there is specific direction to the contrary.

Second, the State Legislature is subject to different provisions of the Freedom of Information Law than agencies of state and local government. Section 88(2) of the Law specifies the kinds of records that must be disclosed by the Senate and the Assembly. Of likely relevance to your inquiry are paragraphs (a) and (e) of section 88(2), which respectively grant access to: "bills and amendments thereto, fiscal notes, introducers' bill memoranda, resolutions and amendments thereto, and index records", and "transcripts or minutes, if prepared, and journal records of public sessions including meetings of committees and subcommittees and public hearings, with the records of attendance of members thereat and records of any votes taken".

Third, I point out that the Open Meetings Law pertains 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 such, I believe that the Senate and the Assembly, as well as committees consisting of their members, are public bodies subject to the Open Meetings Law. With respect to meetings concerning the budget, I would conjecture that those held by the Senate Finance and Assembly Ways and Means Committees would be most relevant.

With regard to minutes of meetings, the Open Meetings Law prescribes what may be viewed an 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.

Fourth, a request made under the Freedom of Information Law should be directed to an entity's "records access officer". The records access officer has the duty of coordinating responses to requests. Both the Senate and the Assembly have designated records access officers. 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 officials to locate the records.

Lastly, you asked whether it is possible to gather records from banks and credit bureaus about yourself. Those entities are not governmental in nature, and their records are not subject to the Freedom of Information Law. Since I am not an expert on the subject, I cannot offer specific guidance. However, under the Fair Credit Reporting Act, a federal statute, I believe that, under certain circumstances, individuals may obtain records pertaining to themselves from credit reporting agencies. It is suggested that you might be able to obtain information on the subject through your congressman.

Enclosed are copies of the Freedom of Information Law, the Open Meetings Law and a brochure describing both statutes.

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-6745

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

July 23, 1991

Mrs. Fay Chapman Rood
[redacted]

The staff of the Committee on 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. Rood:

I have received your letter of July 19. As you requested, enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law in detail and provides guidance concerning the procedure for seeking records.

Since you referred to problems involving a court, I point out that the Freedom of Information Law 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."

As such, although the Freedom of Information Law clearly applies to records maintained by a police department, an office of a district attorney or other municipal agencies, it does not apply to the courts or court records.

The foregoing is not intended to suggest that court records are confidential, for other provisions of law (e.g., Judiciary Law, section 255; Uniform Justice Court Act, section 2019-a) often provide broad rights of access to court records. If the records in which you are interested are maintained by a court, it is suggested that you seek them not under the Freedom of Information Law, but under a different provision of law applicable to court records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6746

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

July 23, 1991

Mr. Anthony Logallo
90-B-1210
Box 2000
Pine City, NY 14871

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

Dear Mr. Logallo:

I have received your letter of July 17, which deals with a request for records concerning yourself from a mental health facility. In brief, you were informed that the fee for copies would be a minimum of twenty-five cents per page. Since you are an inmate, you wrote that you cannot afford to pay the fees in question, and you asked how you can "get all copy fees waived".

In this regard, I offer the following comments.

First, for future reference, 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 NYS 2d 518 (1990)].

Second, in my opinion, it is unlikely that the Freedom of Information Law is applicable in this instance. Provisions concerning access to records involving treatment in mental health facilities are found in the Mental Hygiene Law. Although clinical records pertaining to patients or clients are generally confidential under section 33.13 of the Mental Hygiene Law, section 33.16 provides rights of access, with certain exceptions, to the subjects of those records.

With respect to fees, section 33.16(b)(5) of the Mental Hygiene Law states that:

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

Based on the foregoing, it is suggested that you contact the facility or facilities, explain your circumstances and cite the provision quoted above as a basis for seeking a waiver or reduction of fees.

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-6747

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

July 23, 1991

Ms. Lorraine A. Pickles
Ms. Evelyn Crispell
Town of Hyde Park Planning Board
P.O. Box 20002
Hyde Park, NY 12538

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

Dear Ms. Pickles and Ms. Crispell:

I have received your letter of July 17 in which you raised the following questions concerning the Freedom of Information Law:

> "1. Who is the official Access Officer and who designates the role of Access Officer.
>
> 2. May the Secretary to the Planning Board be an Access Officer?
>
> 3. Who may view the Planning Board files and under what conditions and or requirements?"

In this regard, I offer the following comments.

By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate 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."

As such, an agency's regulations should be consistent with those promulgated by the Committee.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, section 1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more personas as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefore.
>
> (4) Upon request for copies of records:

(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the request to copy those records..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests. Further, there may be one records access officer for all agencies within a town, for example; however, there may be a number of records access officers designated to deal with requests made to particular agencies within town government.

Planning board files are clearly subject to rights conferred by the Freedom of Information Law. Further, that statute does not distinguish among applicants. Stated differently, if records are accessible under the Freedom of Information Law, they should be made equally available to any person, irrespective of one's status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1978) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. I point out, too, that both the Law [section 89(3)] and the regulations [section 1401.5(a)], authorize an agency to require that a request be made in writing. However, an agency may accept oral requests. Further, I believe that the records access officer, in that person's capacity as coordinator of responses to requests, could authorize Planning Board staff to respond to routine requests directly, i.e., those involving minutes, maps, etc., and to provide access to those kinds of records.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6748

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

August 19, 1991

Mr. William J. Dwyer
Senior Attorney
Legal Services Bureau
NYS Department of Transportation
State Campus
Albany, New York 12232

<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. Dwyer:

I have received your letter of July 17 in which you sought guidance concerning a request for records of the Public Transportation Safety Board (PTSB).

By way of background that you offered, the PTSB conducted an investigation of a bus accident occurring in New York City on December 26, 1990. Although PTSB's official report has been disclosed, an attorney for a pedestrian who was struck by the bus has requested the "entire work file". The file includes a variety of items, such as your investigator's notes, both typed and handwritten, photographs taken by the PTSB, the New York City Transit Authority (TA) and others, signed statements of witnesses, and documents received by the PTSB from the TA including "maintenance manuals by the manufacturer of the bus, maintenance procedures prepared by the TA, TA accident form and other similar documents".

It is your view that the applicant for the records is not entitled to:

> "1. Investigator's notes, written or typed.
>
> 2. Material obtained from the TA which
> (a) was not used or considered in the official report, and
> (b) totally irrelevant material."

You added that your greatest concern involves material furnished to the PTSB by the TA, for you contended that if you are required to disclose the information, an agency such as the TA "might refuse to be as cooperative and candid with [you] in the future". Since it is your belief that entities such as the TA and the Metropolitan Transit Authority are subject to the Freedom of Information Law, you questioned whether the PTSB must honor requests for records supplied to the PTSB by those entities.

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."

Due to the breadth of the language quoted above, documentation maintained by the PTSB, irrespective of its origin, function or maintenance by another entity, would in my view constitute a record subject to rights conferred by the Law. Therefore, even though records in possession of PTSB might have been prepared by another entity, I believe that PTSB would be required to respond to a request for those records made under the Freedom of Information Law.

Second, section 86(3) of the Law defines "agency" to mean:

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

Since the definition refers specifically to public authorities, it is clear that the TA and the MTA are agencies that fall within the coverage of the Freedom of Information Law. Therefore,

assuming that two agencies in possession of the same records received requests, both presumably would be required to disclose to the same extent. From my perspective, the concern that disclosure by the PTSB of records prepared or furnished by the TA will result in less cooperation by the TA may be misplaced, for an applicant could seek records from either agency under the same statute. Further, section 217 of the Transportation Law provides the PTSB with the authority to investigate accidents relating to public transportation and subpoena witnesses and documents.

Third, in my opinion, whether materials obtained from the TA were used in preparation of an official report or may be irrelevant has no bearing upon a determination of rights of access conferred by the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. As stated by the Court of Appeals:

> "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" [Farbman v. New York City Health and Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

The Court also emphasized the distinctions between the Freedom of Information Law and Article 31 of the Civil Practice Law and Rules as disclosure vehicles, for it was found that:

> "While speaking also of 'full disclosure', article 31 is plainly more restrictive than FOIL. Access to records under the CPLR depends on status and need. With the goals of truth at trial and the prompt disposition of actions..., discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'...Unlike the rights of a member of the public to inspect and copy the files of government under FOIL, a litigant has no presumptive right under the CPLR to is adversary's files" (id.).

In short, even if records sought are irrelevant or were not used in conjunction with an official report, I believe that they are nonetheless subject to rights conferred by the Freedom of Information Law.

Lastly, investigator's notes, as well as other records prepared by agency staff, used or transmitted within an agency or among agencies, would fall within the scope of section 87(2)(g). Although that provision represents a potential basis for denial, due to its structure, it may require 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.

The fact that a record constitutes inter-agency or 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 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 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.

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

cc: Glenn Roy Cooper

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6749

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

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 July 27. You asked to whom you would write to request information concerning investigations that might be conducted by the New York City Police Department and the Special Narcotics Prosecutor's office.

In this regard, I offer the following comments.

First, a request should be directed to the "records access officers" at the agencies that you believe 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.

The records access officer for the New York City Police Department is Sgt. Louis J. Capasso, whose office is located at 1 Police Plaza, New York, NY 10038. I am unaware of the identity of the records access officer at the other agency. However, a request could be directed to the Records Access Officer, Office of Prosecution-Special Narcotics Court Program, 80 Centre Street, 6th Floor, New York, NY 10013.

Second, although I have no knowledge of the status of any investigation, I point out that section 87(2)(e) of the Freedom of Information Law authorizes 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."

Further, police officers' personnel records used to evaluate performance toward continued employment or promotion may be exempt from disclosure pursuant to section 50-a of the Civil Rights Law. As such, the extent to which the information you seek is available is questionable.

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-6250

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. Kevin Niedermaier
Chairman
Town of Groveland
Planning Board
Groveland, NY 14462

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Niedermaier:

I have received your letter of July 27 in which you requested a written advisory opinion concerning the Freedom of Information Law.

You indicated that the secretary to the Town of Groveland Planning Board contacted me on July 26 relative to a request. The records in question involve copies of a "model site plan review local law which the Planning Board is using as a guideline to establish site plan review for the community". You added that "[i]n the margins of both copies there are notations which reflect opinion, suggestions and recommendations made by the Board during discussions". You indicated that I orally advised that those notations could be withheld, and you have asked that the advice be confirmed.

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, relevant to the issue is section 87(2)(g), which authorizes 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 notations in question clearly constitute intra-agency material. Further, insofar as they consist of "opinions, suggestions and recommendations" expressed by Board members, I believe that they could be withheld.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6251

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. Edward Ramos
87-T-0136
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021

Dear Mr. Ramos:

I have received your letter of July 26 in which you asked where you can request police reports relating to an arrest in Syracuse under the Freedom of Information Law.

In this regard, I offer the following comments.

First, a request should be made to the records access officer at the agency that maintains the records in which you are interested, in this instance, the arresting agency. The records access officer has the duty of coordinating an agency's response to requests.

Second, it appears that a request in Syracuse would likely have been made by the City of Syracuse Police Department or the Onondaga County Sheriff's Department. The address of the Police Department is 511 South State Street, Syracuse, NY 13202. The address of the Sheriff's Department is 407 South State Street, Syracuse, NY 13202.

Lastly, 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.

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-6752

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Barry R. Buhler, 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. Buhler:

I have received your letter of July 25, as well as the correspondence attached to it.

By way of background, as I understand the situation, you have made a series of requests for records pertaining to yourself under the Freedom of Information and Personal Privacy Protection Laws from the State University Health Science Center. Although various materials were disclosed, you have contended that certain aspects of your request were tacitly denied.

You have requested advice on the matter. In this regard, I offer the following comments.

First, having reviewed the correspondence, you referred to a response by Curtis J. Van Buren and indicated that he made no mention of contacting the former chairman of the Department of Opthalmology. Nevertheless, in Mr. Van Buren's letter to you, he specified that the chairman of that Department was "contacted relative to searching [its] files for particulars you had requested". As such, the basis for your contention is unclear.

Second, if you believe that you have been denied access to records, both the Freedom of Information Law and the Personal Privacy Protection Law provide the right to appeal. Specifically, section 89(4)(a) of the Freedom of Information Law states in part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person there-

> for designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

Similarly, section 95(3) of the Personal Privacy Protection Law states in relevant part that any person whose request under section 95(1) of that statute:

> "is denied in whole or in part may, within thirty business days, appeal such denial in writing to the head, chief executive or governing body of the agency, or the person designated as the reviewing official by such head, chief executive or governing body. Such official shall within seven business days of the receipt of an appeal concerning a denial of access...either provide access to...the record sought...or fully explain in writing to the data subject the factual and statutory reasons for further denial and inform the data subject of his or her right to there upon seek judicial review of the agency's determination under section ninety-seven of this article."

I believe that the person designated to determine appeals is Patrick Hunt, Assistant Vice Chancellor for University Relations, State University Plaza, Albany, NY 12246.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Curtis J. Van Buren, Assistant to the Vice President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6753

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. Lenny Durio
86-A-9029
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. Durio:

I have received your letter of July 26 and the correspondence attached to it.

You have sought an advisory opinion concerning a denial of your request for "polygraph test transcripts, questions, graphs, notes and other records generated through the test by the New York City Police Department". The records sought relate to records pertaining to a person other than yourself, and both your initial request and appeal were denied on the basis of section 87(2)(e)(iv).

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 relied to withhold the records 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."

The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, 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 the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v.

> United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by those so inclined. Disclosing to unscrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility 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)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention

> to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed"(id. at 573).

While I am unfamiliar with the records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. 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 might not if disclosed preclude police officers from carrying out their duties effectively.

Third, although the Department officials did not refer to them in their responses, there may be other relevant grounds for denial. Section 87(2)(b) authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". I am unaware of the relationship between yourself and the subject of the testing. Nevertheless, since the records pertain to a person other than yourself, there may be valid considerations of privacy.

Further, 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6754

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. John D. Zerbst
86-D-0105-4-D
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. Zerbst:

I have received your letter of July 29 and the materials attached to it. You have sought assistance in obtaining family court records that you requested under 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."

As such, the Freedom of Information Law excludes the courts and court records from its coverage.

It is noted that section 166 of the Family Court Act sates that records of such a court "shall not be open to indiscriminate public inspection" and that "the court in its discretion in any case may permit the inspection of any papers or records".

It is suggested that you renew your request under an appropriate provision of law or 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-6255

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. Anthony Dixon
86-A-4087
P.O. Box 2000
Pine City, NY 14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dixon:

I have received your letter of July 23 in which you complained that your requests directed to the Nassau County Jail have not been answered.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in 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)].

A second area of inquiry involves a request that a court verify certain facts. Since the courts are not subject to the Freedom of Information Law, I cannot offer guidance.

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-6756

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. James T. Hall
90-A-0627 Dorm J-1-17
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. Hall:

I have received your letter of July 27.

You wrote that you are interested in obtaining records indicating the "commencement and expirations dates" of service of a foreman of a grand jury. That person's name appeared on your indictment.

In this regard, I offer the following comments.

First, I would conjecture that the record or records in question would be maintained by the clerk of the court in which the proceeding was conducted. If that is so, the Freedom of Information Law would not serve as a basis for requesting the record. That statute is applicable to agency records, and section 86(3) of the Freedom of Information Law defines "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, 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. This is not to suggest that court records are confidential, for often they may be available under other provisions of law.

Second, while I lack expertise concerning records relating to grand jury proceedings, I point out that 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."

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-6757

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. Bernard Zabusky
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zabusky:

I have received your letter of July 24, which pertains to a request and appeal made under the Freedom of Information Law concerning records of the New York City Police Department, neither of which had been answered as of the date of your letter.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in 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)].

For your information, the person designated to determine appeals at the Department is not Commissioner Brown, but rather Susan R. Rosenberg, Assistant Commissioner, Civil Matters.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6758

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Ms. Elizabeth L. Mayerat
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Mayerat:

I have received your letter of July 22 in which you requested assistance.

According to your letter and the request attached to it, you sought "all correspondence between the Town of Ashford and any parties involved in any way with the siting of a Low Level Radioactive Waste (LLRW) dump in the Town of Ashford". Although the town clerk provided minutes and resolutions, you wrote that "he stated that any other correspondences that might pertain to this matter were not in his possession, but would be in the hands of William King, Supervisor". He then instructed you to contact Mr. King. You have interpreted the response as a denial of the request.

In this regard, I offer the following comments.

By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, section 87(1) requires the governing body of a public corporation, i.e., a town board, to adopt rules and regulations that are consistent with the Law and the Committee's regulations.

Relevant to your inquiry is section 1401.2 of the regulations, which 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..."

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 this instance, assuming that the Town Clerk is the records access officer, I believe that he would have been responsible for obtaining the records in question, reviewing them and determining the extent to which they are available under the Freedom of Information Law.

I point out, too, that section 30 of the Town Law states in part that the town clerk is the legal custodian of town records. As such, in his capacity as clerk and records access officer, rather than instructing you to make an additional request, the clerk, in my view, should have coordinated the response to the request, even if the records were not in his physical custody.

Lastly, 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

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. John Seltzer, Clerk
Hon. William King, Supervisor

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

August 19, 1991

Mr. Collin Fearon, Jr.
74-B-395
Attica Correctional Facility
Attica, NY 14011-0419

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fearon:

I have received your letter of July 18 in which you requested an advisory opinion.

According to the appeal attached to your letter, you requested "the number of administrative inmate claims that were submitted by inmates at...Green Haven Correctional Facility...indicating that property was stolen from their cells by another inmate...". You also asked that the Department "List the different information from Form 1421, Inmate Claim Form from January, 1974 to February, 1991 for each claim", including the date on the form, the date property was stolen, the cell location, and a "list of property stolen".

In this regard, I offer the following comments.

With respect to both aspects of your request, it is emphasized that the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Law states in part that an agency need not create a record in response to a request.

If the Department has prepared statistics involving claims relating to stolen property or "lists" of the items requested relating to the inmate claim forms, I believe that they would be available. However, if no such statistics or lists exist, the Department would not be required to create such records on your behalf.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6760

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. Collin Fearon, Jr.
74-B-395
Attica Correctional Facility
Attica, NY 14011-0419

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fearon:

I have received your letters of July 19 and 20 in which you requested advisory opinions. Both involve requests for records relating to complaints that you initiated against correction officers, including reports and recommendations prepared by various Department staff.

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, it is likely that three of the grounds for denial are relevant with respect to reports and recommendations prepared in conjunction with the complaints.

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).

Section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". Based upon judicial interpretations of the Freedom of Information Law, it appears that records relating to charges or allegations that have not resulted in any finding of misconduct may be withheld [see Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980); Scaccia v. NYS Division of State Police, 138 AD 2d 50 (1988)].

Lastly, 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. Aside from the application of section 50-a of the Civil Rights Law and 87(2)(b) of the Freedom of Information Law, the reports and recommendations in question would in my view constitute intra-agency materials that fall within the scope of section 87(2)(g).

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-6761

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. Louis Mortillaro
84-A-2781
Box 338
Napanoch, NY 12458-0338

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mortillaro:

I have received your letter of July 16, as well as the materials attached to it.

In brief, in response to a request for records of the Chief Medical Examiner of New York City, you were informed that the records could be denied pursuant to section 557(g) of the New York City Charter. You have asked whether an agency may properly rely upon a local law to withhold records sought under the Freedom of Information Law.

In this regard, the first ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". 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, in my opinion, would be an enactment of the State Legislature or Congress.

I believe that some provisions of the New York City Charter and Administrative Code are enactments of the State Legislature. If section 557(g) of the New York City Charter was enacted by the State Legislature, I believe that it would constitute a statute that would exempt certain records from disclosure

in conjunction with section 87(2)(a) of the Freedom of Information Law. If it was not enacted in that manner, it could not be characterized as a statute that exempts records from disclosure.

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-6762

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Ms. Linda A. Mangano
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Mangano:

As you are aware, I have received your letter of July 25 in which you raised a series of questions concerning the Freedom of Information Law.

The first area of inquiry involves fees and "payment methods". In this regard, by way of background, section 89(1)(b) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of the Law and fees (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 "promulgate uniform rules and regulations for all agencies in such public corporation" consistent with the Law and the Committee's regulations.

Section 87(1)(b)(iii) requires an agency's rules and regulations to 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."

As such, although the governing body of a village, for example, must adopt uniform rules concerning fees to be assessed under the Freedom of Information Law, there is nothing in the Law that deals directly with the method of payment. In my view, since cash is legal tender, an agency must always accept cash as payment for copies of records. Further, since an agency's rules

must be "uniform", if some agencies within a municipality accept personal checks, it appears that others should as well. It might be reasonable in a rare circumstance, as in the case of a large request, to wait to prepare copies until a personal check has cleared. Further, there is a judicial decision indicating that an agency may require payment in advance of making copies (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982). In such a situation, an agency could tabulate or estimate the amount of material to be reproduced, and commence copying after having received the appropriate payment.

There is nothing in the Freedom of Information Law pertaining to the waiver of fees, and it has been held that an agency may charge a fee in accordance with section 87(1)(b)(iii), even if an applicant is indigent [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)]. Nevertheless, as a matter of practice or policy, many agencies waive fees when requests are minimal and the records are readily accessible. Often it may be less expensive in terms of actual expense to waive fees rather than engaging in the clerical tasks of accounting for the receipt of small amounts of money.

Your second area of inquiry involves requests for records. In the event of a denial of a request, an applicant has the right to 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."

It is also noted that a denial must be made in writing [see section 89(3)] and that the person denied access must be informed of the right to appeal and the name of the person or body to whom an appeal may be made [Barrett v. Morgenthau, 74 NY 2d 907 (1990)].

The Freedom of Information Law is silent concerning the scope of a request or the number of requests that a person may make. Further, if a record is accessible under the Freedom of Information Law, it should be made equally available to any person, without regard to status or interest [see Burke v.

Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Therefore, an applicant need not provide a reason for seeking records. I point out, however, that section 89(3) of the Law requires that an applicant must "reasonably describe" the records sought. As such, a request should contain sufficient detail to enable agency officials to locate and identify the records. Section 89(3) also states that an agency need not create or prepare a record in response to a request, unless the Law provides specific direction to the contrary. Therefore, as a general matter, the Freedom of Information Law pertains to existing records.

Lastly, you raised questions concerning "Salary/Budget Information", and you wrote that you would like to know "how many employees are on salary, part-time and full-time", their salaries, and how may are elected, appointed or "civil service". Again, if, for example, there is no record which includes figures concerning the number of part-time, elected or appointed employees, for example, an agency would not be required to prepare a tabulation containing those figures.

Nevertheless, among the few instances in the Freedom of Information Law that requires agencies to maintain particular records relates to 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..."

As such, a payroll record that identifies all agency officers or employees by name, public office address, title and salary must be prepared and maintained by an agency to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, this Committee has advised and the courts have upheld the general principle that records that are relevant to the per-

formance 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Similarly, it has been held that records indicating the year in which public employees were hired and the "step" upon which employees were hired are available under the Freedom of Information Law (Steinmetz, supra). Further, if records exist indicating the status of public employees as part-time, full-time, appointees or civil service, those records would in my view 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: Marian Stahl
Jerry Faiella

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6763

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. D. Duamutef
84-A-1026
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. Duamutef:

I have received your letter of July 19 in which you requested assistance.

According to your letter and the correspondence attached to it, you made a request on June 13 for various records concerning an incident that occurred at the Attica Correctional Facility. 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 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)].

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. However, since I am unaware of your relationship to the matter, the content of the records sought or the effects of their disclosure, I cannot provide specific guidance concerning your right to obtain 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 - 6764

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 19, 1991

Mr. Joseph Fero
90-T-2401
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. Fero:

I have received your letter of July 31 and the correspondence attached to it.

You have sought all records maintained by the Office of the Suffolk County Medical Examiner pertaining to a particular case under the Freedom of Information Law, and it appears that the County has not disclosed all that you requested. Included in the request are papers, notes, telephone logs, laboratory reports, "anything & everything" maintained by that agency relating to the case.

You have asked that this office "find out why" the agency "does not live up to the Freedom of Information Law" and that I "direct Suffolk County to send [me] the requested material" in order that I can send it 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. This office has neither the resources nor the authority to investigate or to compel an agency to grant access to records.

Second, the nature of the records sought is unclear. Often records maintained by a coroner or medical examiner involve autopsies; in other cases, the records deal with different matters.

Assuming that the request relates to an autopsy, I point out that subdivision (2) of section 677 of the County Law states that:

> "The report of any autopsy or other examination shall state every fact and circumstance tending to show the condition of the body and the cause and means or manner of death. The person performing an autopsy, for the purpose of determining the cause of death, shall enter upon the record the pathological appearances and findings, embodying such information as may be prescribed by the commissioner of health, and append thereto the diagnosis of the cause of death and of the means or manner of death. Methods and forms prescribed by the commissioner of health for obtaining and preserving records and statistics of autopsies conducted within the state shall be employed. A detailed description of the findings, written during the progress of the autopsy, and the conclusions drawn therefrom shall, when completed, be filed in the office of the coroner or medical examiner."

Further, subdivision (3)(b) of section 677 states in relevant part that:

> "Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation by made available for his inspection, or that a transcript thereof be furnished to him, or both."

As such, the records prepared by a medical examiner 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.

If you are interested in acquiring the records in conjunction with a legal proceeding, 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, if the records are unrelated to an autopsy, it is likely that the Freedom of Information Law would be applicable. It is emphasized that section 89(3) of that statute requires that an applicant "reasonably describe" the records sought. 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, 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 or record-keeping system. I am unaware of the means by which the Office of the Medical Examiner maintains its records. However, if, for example, a phone log is maintained chronologically, rather than by case, the request would not likely have reasonably described the records, for agency officials might have no way of identifying calls except by reviewing every entry in every log.

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. 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 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 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 sub-paragraphs (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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6765

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 21, 1991

Hon. Owen H. Johnson
Member of the Senate
23-24 Argyle Square
Babylon, NY 11702

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Senator Johnson:

I have received your letter of August 12 and appreciate your interest in compliance with the Freedom of Information Law.

According to your letter and the materials attached to it, one of your constituents has encountered difficulties relating to a request made under the Freedom of Information Law. Specifically, the constituent indicated that he sought to obtain a "verbatim transcript of a public hearing" conducted by the Town of Babylon Planning Board, which you believe lasted more than three hours. In response to the request, the constituent was advised that the Town "was not required to provide a verbatim transcript, and the law provided them with the ability to charge up to $5.00 per page transcription fee for such a document". Further, when he asked for an estimate of the cost of transcription, the Town could not do so without first preparing a transcript. The constituent added that the Town offered to permit him to attempt to tape record the audio tape maintained by the Town, but that technical difficulties precluded the preparation of a fully audible tape. He also questioned whether the Town "violated" the Freedom of Information Law by failing to respond to his request within five business days.

You have asked for my review and opinion concerning the issues. In this regard, I offer the following comments.

First and perhaps most significant in the context of the facts, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not "prepare any record not possessed or maintained" by the agency in response to a request. Therefore, if the Town did not prepare a transcript of the

hearing, the Freedom of Information Law would not require that the Town create a transcript at the request of the constituent. While the Town, in its discretion, could prepare a transcript at his request, such a step would, in my view, represent an action that would exceed the responsibilities imposed by the Freedom of Information Law.

Second, since an agreement to prepare a transcript would involve an action that is not required to be taken, I do not believe that the provisions in the Freedom of Information Law regarding fees would apply. When the Freedom of Information Law is applicable, section 87(1)(b)(iii) generally authorizes an agency to charge up to twenty-five cents per photocopy or the actual cost of reproduction with respect to records that cannot be photocopied (i.e., computer tapes, tape recordings, etc.). Under the circumstances, should the parties agree that a transcript be prepared, the fee for transcription should in my opinion be reasonable and likely should be based upon the actual cost of preparation.

Third, for future reference, I point out that any person may use a portable tape recorder at a meeting of a public body [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)]. In my view, a member of the public could tape record public hearings analogous to that at issue.

Lastly, 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)].

In sum, although I believe that the Town should have responded to the request within five business days in a manner consistent with section 89(3) of the Freedom of Information Law, I do not believe that the Town is obliged to prepare a transcript of the hearing.

I hope that I 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-1970
FOIL-AO-6766

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 22, 1991

Ms. Jocelyn A. McIntee
Chairman
Heckscher Park Area Residents'
Association
51 Prime Avenue
Huntington, NY 11743

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. McIntee:

As you are aware, I have received your letter of July 24 and the materials attached to it. Your inquiry concerns the status of the Heckscher Museum and its Board of Trustees under the Freedom of Information and Open Meetings Laws.

According to your letter, the Heckscher Museum is a non-profit, charitable, educational corporation. Further, you wrote that:

> "The Heckscher Museum building and collection are publicly owned and financed by the Town of Huntington, Suffolk County, Long Island. The facility sits in Heckscher Park also publicly owned and supported. The park predates the Museum by three years and was donated to the town in 1917. It was a gift to the people of the Town of Huntington by philanthropist August Heckscher.
>
> "The relationship between the Heckscher Museum, the private, charitable organization and Heckscher Museum, the facility is unusual. The Town of Huntington, in an agreement from 1964, has contracted the operation and management of the museum to the Board of Trustees of the incorporated Heckscher

> Museum. They supervise exhibitions, etc. and at this time are contributing approximately 1/3 of the operating costs of the museum facility, included in this 1/3 are grant monies from federal, state, and county agencies.
>
> "On the other hand, the Town of Huntington owns the museum, the collection, the Park, pays the director of the museum, by far the greater proportion of the salaries of the staff and pays all of the capital expenditures of the museum."

You have been informed that, due to its corporate status, the Museum is not subject to the Freedom of Information Law and it has been inferred that meetings of the Board of Trustees are outside the coverage of the Open Meetings Law.

In an effort to learn more of the relationship between the Town and the Museum, I have obtained a copy of the agreement between those entities, which was executed on July 28, 1964. As you indicated, the agreement states that the Town owns the Museum and the property upon which it is situated. It further specifies that:

> "Any additions to the buildings occupied by said Museum shall be constructed and owned by the Town and constructed in accordance with plans prepared by the Museum and approved by the Town";

that

> "The Museum may raise by private donations funds sufficient, together with any funds appropriated thereto by the Town, to complete any such addition to said Museum buildings, in accordance with plans and specifications approved by the Museum and the Town";

that

> "The Museum trustees will have control of the maintenance and operation of the buildings and collections subject to approval by the Town. Appointments of personnel to the Museum staff shall be made by the Museum, subject, however, to approval of the Town Board of the Town";

that

> "The Town Board of the Town will annually appropriate such sum or sums of money as it shall, in the exercise of its discretion, deem requisite and necessary, for the payment of the salary of the director of the Museum, for the maintenance of the building or buildings and the guarding of the collection and for such other purposes as it shall deem advisable. The Town will insure the Museum building or buildings against loss by fire and other accepted risks"; and

that

> "The collections and all other property acquired by the Museum which were acquired separately from the Heckscher Trust and which shall continue to be and remain absolutely the property of the Museum, and the Town shall not have any right, title, or interest therein, nor shall the Museum, by reason of occupation and use of said building or buildings under this agreement, acquire or be deemed to have any right, title, or interest in said building or buildings, except insofar as expressly granted by this agreement."

Based upon the foregoing, as well as other aspects of the agreement, the situation appears to represent what might be characterized as a hybrid. While the Museum and its Board of Trustees maintain control with respect to the operation of buildings, collections, and appointments of staff, those functions may be carried out only with the approval of the Town. Although certain aspects of the contents of the Museum are owned by the Museum, the Town clearly owns the real property constituting the Museum. Further, if the Museum fails to carry out the agreement, or if the agreement is terminated by either party, the Town, upon sixty days notice "may reenter and shall have again, repossess, and enjoy the premises aforementioned and in like manner as though these presents have never been made".

In general, I would agree that not-for-profit corporations are not subject to the Freedom of Information Law. Those entities are ordinarily not governmental in nature and they generally function in a manner independent of government, despite the possible receipt of government funds. Moreover, I am unaware of any judicial decisions rendered under the Freedom of Information Law that deal with facts or circumstances analogous to those presented here. Nevertheless, due to the nature of the relationship

between the the Town and the Museum and the degree of control over the Museum's activities enjoyed by the Town, I am inclined to advise that the records maintained by the Museum are subject to the Freedom of Information Law.

That statute 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."

The Town is clearly an agency, for it is a public corporation. From my perspective, it may be contended that the Museum, despite certain elements of separateness from the Town, is part of Town government. Again, the facility is essentially owned by the Town and its activities are subject to the control of the Town. I point out that section 64 of the Town Law, which relates to the general powers of town boards, states in subdivision (4) that a town board "[s]hall have the management, custody and control of all town lands, buildings and property of the town and keep them in good repair and may cause the same to be insured against loss or damage by fire or other hazard". Although the Museum "manages" various aspects of its functions, it apparently does so in great measure subject to the approval and oversight of the Town in a manner generally congruent with section 64(4) of the Town Law. In some respects, it appears that the Museum and its Board of Trustees serve as the agent of the Town in terms of the management of the facility.

Viewing the matter from a different perspective, as indicated earlier the Freedom of Information Law pertains to agency records. Section 86(4) of the Law defines "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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.

While I am unaware of any judicial decisions that deal with facts similar to those presented in this situation, the definition of "record" includes not only documents that are maintained by an agency; it refers to documents "kept, held, filed, produced or reproduced by, with or for an agency". Under the circumstances, it appears that the records in question, although in the physical possession of the Museum, may be kept and produced for the owner of the Museum, the Town of Huntington. Since the Museum is the property of the Town, the records in possession of the Museum would appear to be kept and produced for the Town. If that is so, I believe that they would be subject to the Freedom of Information Law.

Moreover, in a decision cited earlier, the Court of Appeals found that certain not-for-profit corporations, volunteer fire companies, are subject to the Freedom of Information Law despite their corporate status. In its holding, which expansively construed the scope and intent of the Freedom of Information Law, the Court stated:

> "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).
>
> "...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, 579).

With regard to the Open Meetings Law, that statute applies to meetings of public bodies, and section 102(2) 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, the boards of not-for-profit or private corporations do not in my opinion generally constitute public bodies, for they do not conduct public business or perform a governmental function. However, in this instance, due to the relationship between the Museum and the Town and the functions performed by the Museum's Board of Trustees, the Board may be subject to the Open Meetings Law, perhaps with respect to certain of its functions.

There is a decision that involves facts that might have been somewhat comparable to those presented. In Holden v. Board of Trustees of Cornell University [80 AD 2d 378 (1981)], the issue was whether meetings of the Cornell University Board of Trustees were subject to the Open Meetings Law. Cornell University is clearly a hybrid, for it is both a private university and a land grant college. Four of the colleges within the University are so-called "statutory colleges". Under section 350(3) of the Education Law, statutory colleges are "operated by private institutions on behalf of the state pursuant to statute or contractual agreements". In the case of Cornell, there are four statutory colleges, and Cornell acts as the representative of the State University. In its description of the matter, the Court in Holden stated 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...
>
> "The SUNY Board of Trustees retains supervision of Cornell's operation of these colleges (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 SUNY Trustees

> every year about the colleges' expenditures. The statutory colleges receive public moneys which must be kept in a separate fund and used only for the public colleges."

Based upon those considerations, the Court held that the Board was subject to the Open Meetings Law "when its deliberations and actions concern the statutory colleges" (id. 381). In reaching the determination, the Court found that:

> "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 Public Officers 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 moneys appropriated for these four colleges. Management of public moneys 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.
>
> "The Open Meetings Law is to be given a broad and liberal construction so as to achieve the purposes for which it was enacted as evidenced by the legislative declaration contained in section 95 of the law" (id., 380-381; Note: the Open Meetings Law was renumbered

after the Holden decision, and sections 95 and 97 are now sections 100 and 102 respectively).

In the context of your inquiry, I would contend that the Museum Board of Trustees constitutes a "public body" insofar as its meetings involve matters falling with the eventual control or approval of the Town. Other matters, such as those involving collections or museum property, would appear to fall within the sole control of the Museum and, therefore, outside the scope of the Open Meetings Law.

By viewing the definition of "public body" in terms of its components, it may be concluded in my view that the Board, to the extent suggested above, is a public body subject to the Open Meetings Law. Presumably the Board consists of at least two members. It is required to conduct its business by means of a quorum pursuant to applicable provisions of the Not-for-Profit Corporation Law or arguably section 41 of the General Construction Law. Further, insofar as it manages Town property, it appears to conduct public business and perform a governmental function for a public corporation, the Town of Huntington.

In sum, due to its unusual status and relationship with the Town, the status of the Museum under the Freedom of Information Law and Open Meetings Law is unclear. Nevertheless, based upon the preceding commentary and subject to the qualifications described above, it appears that the Museum is subject to both statutes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John E. Coraor, Ph.D.
Jo-Ann Raia, Town Clerk
Mark Grossman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6767

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 22, 1991

Ms. Beverly J. Bechard
Village Clerk
Village of Rouses Point
P.O. Box 185
139 Lake Street
Rouses Point, NY 12979

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Bechard:

As you are aware, I have received your letter of July 31 in which you requested an advisory opinion.

According to your letter, the Village Justice prepared a lengthy report entitled "Recommended Compensation for the Judge and The Acting Judge In the Village of Rouses Point, New York" and presented it to the Board of Trustees during a meeting of the Board. You wrote that the report "compared the judge's salary and work load to many communities" and "contained graphs, newspaper articles and the judge's recommendations for salary raises for himself, the court clerk and the acting judge...". The Supervisor of the Town of Champlain requested a copy of the report and, following consultation with others, including the Mayor, a copy of the report was made available. Following the disclosure of the report, the Village Justice contacted you and said that neither you nor the Mayor had the right to disclose it. It is your view that there is nothing in the report that should be kept confidential.

In this regard, I offer the following comments.

First, 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 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. This is not to suggest, however, that court records are not available, for other statutes often confer rights of access to those records. For instance, in the case of records maintained or generated by a justice court, section 2019-a of the Uniform Justice Court Act 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..."

Second, the Freedom of Information Law is applicable to agency records, and 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."

Therefore, when the report was made available to the Board of Trustees and/or other Village officials, I believe that it constituted an agency record 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.

Although one of the grounds for denial, section 87(2)(g), pertains to "intra-agency materials", i.e., a record prepared by an agency official and transmitted to other agency officials, since a court is not an "agency", it might be contended that a report transmitted by a court to an agency does not constitute intra-agency material. If that is so, none of the grounds for denial in the Freedom of Information Law in my opinion would be applicable.

Even if the report could be characterized as intra-agency material, the language of section 87(2)(g) would require the disclosure of significant portions of the report. Specifically, the cited provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Fourth, again, even if the report constitutes intra-agency material, and if portions of the report could be withheld, there would be no obligation on the part of Village officials to withhold those portions. 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 such records...if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Lastly, a claim of confidentiality, unless it is based upon a statute, is likely 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)]. As such, an assertion of confidentiality without more, would not in my view serve to preclude an agency from disclosing a record. In this instance, I am unaware of any statute that would render the report exempt from disclosure.

In sum, I believe that Village officials had the right to disclose the record in question. Further, the record in my opinion would be available to the public in part, if not in its entirety, under the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6768

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 26, 1991

Ms. Laura Schoenfeld
Kirkpatrick & Associates
Attorneys At Law
Two William Street
White Plains, NY 10601

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Schoenfeld:

As you are aware, I have received your letter of July 30 in which you requested an advisory opinion.

You wrote that you represent a client who resides on property owned by his mother in the Town of Lewisboro. The client was contacted by the Town's code enforcement officer relative to a complaint by a neighbor. The code enforcement officer asked to inspect the property based upon the complaint, and the client asked you to attempt to obtain the letter of complaint. Having made several calls on his behalf, you were informed by the Town Supervisor that "the letter had been addressed to her and therefore was not subject to a FOIL request...", and that she had previously confirmed her position with this office. You later submitted a written request, which was denied on the ground that disclosure would constitute an "unwarranted invasion of personal privacy". Since the identity of the author of the letter is already known by your client, it is your view that the stated basis for the denial is inappropriate.

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.

Assuming that a written complaint has been forwarded to the Town or that a Town employee prepared a record concerning the complaint, section 87(2)(b) of the Freedom of Information Law is often 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.

Under the circumstances, if indeed your client is aware of the identity of the complainant, and if the complaint contains no personal information about the complainant, but rather deals with the property that is the subject of the complaint, I believe that it 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:jm
cc: JoAnn B. Simon, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6769

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 27, 1991

Mr. Chris Hynes
88-A-1221
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. Hynes:

As you are aware, I have received your letter of July 31.

In brief, you wrote that you have made requests for tapes of a Tier III hearing in which you were involved, but that you received no response. As such, you asked whether there is "some type of time frame" for responding to requests.

In this regard, 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)].

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6778

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 27, 1991

Mr. John Eiseman
Deputy Counsel
New York State Office of
Court Administration
270 Broadway
New York, NY 10007

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Eiseman:

As you are aware, I have received your letter of July 31. Please accept my apologies for the delay in response.

You have requested an advisory opinion on behalf of the Gender Bias Committee for the Third Judicial District "as to whether complaints filed with the Committee would be 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, of greatest significance in my view is section 87(2)(b) of the Freedom of Information Law, which authorizes 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); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 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 15, 1981), such a record would "deal with a matter of public concern, that being a public employee's accountability for misconduct". Nevertheless, it has also been advised that 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 would result in an unwarranted invasion of personal privacy [see e.g., Herald Co. v. School District of City of Syracuse, 430 NYS 2d 460 (1989)]. Further, to the extent that any charges that have been initiated are dismissed, I believe that they may be withheld.

Third, if a complaint is made by a government officer or employee, rather than a member of the public, section 87(2)(g) would also be relevant. That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that

affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial [i.e., section 87(2)(b)] 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.

While I believe that a complaint or allegation made by a public employee could be withheld as an unwarranted invasion of personal privacy, it would likely fall within the scope of section 87(2)(g) and would not likely consist of the kinds of information available under subparagraphs (i) through (iv) of that provision. I point out, too, that intra-agency memoranda, notes and similar communications prepared in conjunction with disciplinary matters prior to the issuance of any determination have been found to be deniable pursuant to section 87(2)(g) [see Scaccia, Sinicropi, supra].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6771

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 27, 1991

Mr. Charles B. 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 Mr. Smith:

As you are aware, I have received your letter of August 1. You have sought an advisory opinion concerning a denial of a request by the Office of the Rensselaer County Executive.

According to the materials attached to your letter, you sought "sample correspondence" which is "unsolicited", and which is prepared by the Office of the County Executive and sent to "residents, groups [and] civic organizations", including letters sent to high school and college graduates, business leaders, senior citizens, homeowners and the like. You enclosed an example of such a letter, which would be sent by the County Executive congratulating an individual on a "recent property acquisition", expressing the view that the purchase is an indication of confidence in the County, and referring to to enclosed publications and guides. You also requested "the number of letters of each category mailed" during a particular time period, and "[t]he amount of money spent on postage during the twelve months of 1990 in the Citizens Affairs Office of the County Executive".

In a response by the records access officer, you were informed with respect to the request for sample correspondence that those items "are not documents or records as that term is defined under the Freedom of Information Act...". The second and third aspects of your requests were denied "for the same reason".

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law defines the term "record" broadly 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, letters and similar correspondence, unsolicited or otherwise, would in my view constitute "records" subject to rights conferred by the Freedom of Information Law. While I am unfamiliar with the system used by the County Executive in sending the kinds of correspondence at issue, I would conjecture that certain kinds of samples may be used as the basis for letters, and that those samples may be stored in a word processor or computer disc or tape. Through those devices, routine letters can be prepared and sent simply by inserting the recipients' names and addresses. If sample letters exist in a manner analogous to that described, I believe they would be records and that they would be available, for none of the grounds for denial appearing in section 87(2) of the Law would be applicable.

Second, I point out that section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request must include sufficient detail to enable agency officials to locate and identify the records. If indeed there are sample letters, and if those letters can be located and retrieved, I believe that your request for those letters would have met the requirement that it reasonably describe the records. On the other hand, if there are no "sample letters", it is questionable whether that standard would have been met.

Third, as a general matter, the Freedom of Information Law pertains to existing records, and section 89(3) also states that an agency need not create or prepare a record in response to a request. If, for example, there is no tabulation or numerical breakdown of "the number of letters of each category mailed" or of the amount spent on postage, I do not believe that agency officials would be obliged to prepare totals or figures containing that information on your behalf. If, however, records exist reflective of numbers of letters or postage costs, they would in my opinion be available under section 87(2)(g)(i) of the Freedom of Information Law. That provision requires that intra-agency materials, insofar as they consist of "statistical or factual tabulations or data", be disclosed.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kurt Rumpler, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6772

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 3, 1991

Mr. Robert Campbell
90-T-3286
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Campbell:

As you are aware, I have received your recent letter and the correspondence attached to it.

You have complained that a series of requests directed to Westchester County have gone unanswered, and you asked that I "intervene" on your behalf. In your request, you sought a variety of information relating to your arrest and conviction, including records relating to grand jury proceedings. In addition, you requested a Vaughn index concerning items that might be withheld.

In this regard, I offer the following comments.

First, it is noted that the request attached to your letter was addressed to the Freedom of Information Officer at the County Attorney's Office. In view of the nature of the records sought, it appears that the request should have been directed to the Office of the District Attorney, which is an entity separate from the Office of the County Attorney. As such, it is suggested that the request be resubmitted to the records access officer at the Office of the District Attorney.

Second, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. Consequently, this office cannot "intervene" or compel an agency to grant or deny access to records.

Third, for future reference, 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)].

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. 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 of possible relevance in this instance is section 190.25(4)(a) of the Criminal Procedure Law, which 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."

While the Freedom of Information Law may be inapplicable to some of the records in which you are interested, as a defendant, you may have other rights of access to records or means of obtaining records.

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 materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which would 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; Matters 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 I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6723

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 3, 1991

Mr. John H. Lowe
87-A-7679
Orleans Correctional Facility
3531 Gaines Basis Road
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. Lowe:

As you are aware, I have received your letter of August 4.

According to your letter, you requested certain records under the Freedom of Information Law from the Orleans Correctional Facility on July 21. As of the date of your letter to this office, you had not received the records sought.

In this regard, 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)].

For your information, the person designated to determine appeals at the Department of Correctional Services is 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-6774

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 3, 1991

Mr. Kevin Anthony Alston
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Alston:

As you are aware, I have received your letter of August 2, which reached this office on August 8. Please accept my apologies for the delay in response. You have raised a series of questions concerning access to and the disclosure of records by governmental entities.

In this regard, I offer the following comments.

First, the primary vehicle for seeking government records in New York is the Freedom of Information Law. In brief, the the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Enclosed are copies of that statute and an explanatory brochure which describes the Freedom of Information Law, including the grounds for withholding records.

Second, a police agency may generally disclose to or share records with other agencies. Except in rare circumstances in which other statutes forbid disclosure of certain records, an agency may release or share records.

Third, 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 does not apply to the courts or court records. This is not to suggest that court records are confidential, for other provisions of law often grant rights of access to those records.

Lastly, the Freedom of Information Law does not distinguish among applicants for records. If a record is accessible under the Law, it must be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 Ad 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

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

OML-AO-1971
FOIL-AO-6775

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 3, 1991

Ms. Rebecca James
Cortland Bureau
81-85 Main Street
P.O. Box 742
Cortland, NY 13045-0742

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. James:

As you are aware, I have received your letter of August 4 in which you requested an advisory opinion. Please accept my apologies for the delay in response.

Your inquiry pertains to the Cortland County Legislature's Solid Waste Disposal Committee, which held an executive session "to hear a report from the engineering company working on the county landfill". The report, according to your letter, "dealt with the contractor's work on the landfill and an ongoing dispute between the engineer and the contractor". You added that:

> "Assistant County Attorney William Ames said he believed the committee could discuss the matter in private for two reasons. First, since the areas of dispute are likely to come up in future litigation and arbitration, Ames said he was concerned that a legislator might speak rashly and, for instance, admit some liability, which could be used against the county in court. Second, Ames contends that reports from the engineer, the county's consultant, can be given in executive session. He reasons that

> because some consultant reports, when the report constitutes advice to the county, do not have to be disclosed to the public, then oral reports at a public meeting can also be done in private."

In this regard, I offer the following comments.

First, the Open Meetings Law pertains 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."

Since the definition refers specifically to a committee of a public body, the Solid Waste Disposal Committee, assuming that it consists of members of the County Legislature, would in my opinion constitute a public body required to comply with the Open Meetings Law.

Second, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that the subject matter under consideration may be discussed during an executive session. Further, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may appropriately be considered behind closed doors. Therefore, a public body may not enter into an executive session to discuss the subject of its choice; on the contrary, the Open Meetings Law limits the ability to engage in executive session to certain subjects.

With respect to litigation, section 105(1)(d) of the Open Meetings Law permits a public body to enter into an executive session to discuss "proposed, pending, or current litigation." It has been held that the purpose of the "litigation" exception for executive session "is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983); also Matter of Concerned

Citizens to Review Jefferson Val. Mall v. Town Board, 83 AD 2d 612, 613, appeal dismissed, 54 NY 2d 957 (1981)]. 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).

Based upon the foregoing, except to the extent that a public body's "litigation strategy" is discussed, I do not believe that threatened or possible litigation could validly be considered during an executive session on the basis of section 105(1)(d). As suggested by the court in Weatherwax, virtually any issue discussed by a public body could at some point relate to or become the subject of litigation. That possibility, however, would not in my view constitute an appropriate reason for conducting an executive session. In short, only to the extent that the Committee discussed its litigation strategy would section 105(1)(d) have been properly asserted.

Lastly, the Freedom of Information Law is similar in structure to the Open Meetings Law, for it requires that all records be made available, except those records or portions thereof that fall within the scope of the grounds for denial appearing in section 87(2) of that statute. In this regard, it is emphasized that the grounds for entry into an executive session appearing in section 105(1) of the Open Meetings Law are not necessarily consistent with the grounds for denial of access to records appearing in section 87(2) of the Freedom of Information Law. In some instances, although the discussion of a particular topic might justifiably be conducted during an executive session, records related to that topic would not necessarily fall within any ground for denial in the Freedom of Information Law, and vice versa. For instance, if a public body discusses the possible appointment of a particular individual to a position, an executive session would likely be proper, for section 105(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Since such a discussion would involve matters "leading to the appointment...of a particular person", and an executive session would in my view be appropriate. Nevertheless, if a public body chooses to appoint an individual to a position, records reflective of the appointment would be made available as minutes required to be prepared under section 106 of the Open Meetings Law. Moreover, section 87(3)(b) of the Freedom of Information Law requires each agency to maintain and make available as a payroll record indicating the name, public office address, title and salary of all officers or employees of the agency. As such, even though a discussion resulting in the appointment of an individual to a position might be closed under the Open Meetings Law, records relating to the appointment of the individual might be accessible under the Freedom of Information Law. Similarly, while I believe that a memorandum recommending a change in policy or local law transmitted by a legislator to the members of a legislative body could be withheld under section 87(2)(g) of the Freedom of Information Law, it is unlikely that any of the grounds for entry into an executive session would be applicable when the body considers the issue at a meeting. In that situation, a record might properly be withheld, but a discussion of its contents must occur during an open meeting.

With respect to the facts that you presented, 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). 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.

While the Court of Appeals has found that consultants' reports constitute intra-agency materials, the Court 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" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents. Moreover, as indicated earlier, the grounds for entry into executive session are not always consistent with the grounds for withholding records. In short, the Open Meetings Law pertains to meetings; the Freedom of Information Law pertains to records. Despite the possibility that a record that is the subject of a discussion may be withheld under the Freedom of Information Law, if none of the grounds for entry into executive session specified in section 105(1) of the Open Meetings Law apply, I believe that a meeting of a public body must be conducted in public.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to Cortland 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: Solid Waste Disposal Committee
William Ames, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6776

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 4, 1991

Mr. John Amante
90-A-9399
Clinton Correctional Facility
P.O. Box 2001
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. Amante:

As you are aware, I have received your letter of August 5. You have sought assistance in obtaining records from the New York City Police Department.

According to your letter, you requested criminal complaints made against you from the Department and indicated the complaint numbers and the precincts in which the complaints were made. Nevertheless, you were informed that the request cannot be honored unless you provide "the exact date of each complaint number". You added that you are unable to supply an exact date, because you do not known when an investigation was begun.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office is not empowered to enforce the Law or to compel an agency to grant or deny access to records.

Second, it appears that the main issue involves the specificity of your request and the Department's ability to locate the records in question. I point out that the Freedom of Information 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 and identify 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, I must admit to being unfamiliar with the Department's record-keeping system. If, for example, the records are maintained in a manner that would permit staff to retrieve them based upon the information you provided, I believe that the request would have reasonably described the records. However, if the records requested are not maintained in a manner that enables staff to locate and retrieve them and if the records "could not be identified by retracing a path already trodden", the request would not likely have met the requirement that it reasonably describe the records 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. 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), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies a confidential source, a witness or persons other than yourself.

Perhaps the most relevant provision concerning access to 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). For instance, although records might properly be withheld when disclosure would interfere with an investigation under section 87(2)(e)(i), when the investigation has ended, that provision could not likely serve as an appropriate basis for a denial. Further, although I am not an expert with respect to the Penal Law or the Criminal Procedure Law, if the statute of limitations concerning a criminal act has expired, the capacity to withhold records under section 87(2)(e) would, in my opinion, diminish.

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 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:jm
cc: Sgt. Louis J. Capasso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6777

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 4, 1991

Mr. Charles Semowich
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Semowich:

As you are aware, I have received your letter of August 6.

Attached to your letter is a memorandum sent to an employee of the Department of Social Services by its Office of Human Resources Management indicating that a request was made for certain records pertaining to that employee. The person to whom the memorandum was sent requested anonymity, and that person's name was deleted. You have asked whether "the practice of notifying the subject of a Freedom of Information request is proper procedure". You also asked "what action is taken on this matter".

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office is not empowered to compel an agency to grant or deny access to records.

Second, there is no requirement in the Freedom of Information Law that a person be notified when a request has been made for records pertaining to that person. Similarly, however, in my view, there is nothing in the Law that would preclude an agency from informing an individual that a request has been made for records pertaining to him or her.

Third, in my opinion, a request by an applicant for records that his or her identity be kept confidential is irrelevant in terms of rights of access conferred by the Freedom of Information Law. In a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference concerning the agency's disclosure of the incident to

the news media, the Appellate Division found that, as a matter of law, the agency could not withhold the record based upon the "preference" of the person who reported an offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

> "There is no question that the 'releasable copies' of reports of offenses prepared and maintained by the Genesee County Sheriff's office on the forms currently in use are governmental records under the provisions of the Freedom of Information Law (Public Officers Law art 6) subject,however, to the provisions establishing exemptions (see, Public Officers Law section 87[2]). We reject the contrary contention of respondents and declare that disclosure of a 'releasable copy' of an offense report may not be denied, as a matter of law, pursuant to Public Officers Law section 87(2)(b) as constituting an 'unwarranted invasion of personal privacy' solely because the person reporting the offense initials a box on the form indicating his preference that 'the incident not be released to the media, except for police investigative purposes or following arrest'."

Moreover, although the issue did not involve law enforcement, the Court of Appeals has held that a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557. 567 (1984)].

Lastly, it has generally been advised that requests made under the Freedom of Information Law are accessible. The only instances in which they may be withheld in whole or in part in my view would involve situations in which requests, by their nature, would if disclosed constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be withheld on the ground that disclosure would result in an unwarranted invasion of

personal privacy. If, however, a person seeks records reflective of a public employee's salary, for example, the request would not likely indicate anything of a personal nature concerning the applicant for the records, and there would likely be no basis for withholding the request or the name 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:jm

cc: Sharon Goebel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6778

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 4, 1991

Mr. John Webster
86-C-365
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Webster:

As you are aware, I have received your letter of August 5.

Your inquiry concerns requests for documentation pertaining to a police investigation of your phone calls while you were incarcerated in the Onondaga County Jail between February and May of 1986. In response to the requests, Susan Finkelstein, Senior Assistant Corporation Counsel for the City of Syracuse, indicated that no such reports are maintained under certain indictment numbers pertaining to you. It is your view that her search has not been sufficiently diligent, for it may not have included files other than those under indictment numbers.

You have requested assistance in the matter. In this regard, I offer the following comments.

First, it appears that the issue may involve the agency's ability to locate the records in question. Under section 89(3) of the 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 and identify 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, I must admit to being unfamiliar with the agency's record-keeping system. If, for example, the records you are seeking are maintained in a manner that would permit staff to retrieve them based upon the information you provided, I believe that the request would have reasonably described the records. However, if the records requested are not maintained in a manner that enables staff to locate and retrieve them or if they are filed under indictment numbers, and if the records "could not be identified by retracing a path already trodden", the request would not likely have met the requirement that it reasonably describe the records sought.

Second, if your letter of August 5 to Ms. Finkelstein results in the same response as that offered earlier, it would appear that the records sought do not exist or cannot be found. In such an event, you may seek a certification to that effect pursuant to section 89(3) of the Freedom of Information Law. That provision states in part that, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

Lastly, I point out that the Freedom of Information Law pertains to existing records. Since the events that are the subject of your request occurred several years ago, it is questionable whether any such records exist. If the agency no longer maintains them or if no such records ever existed, in my view, the Freedom of Information Law would not apply.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Finkelstein, Senior Assistant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6779

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 6, 1991

Mr. Ronald Bunting
83-A-2134
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. Bunting:

As you are aware, I have received your letter of August 12 in which you requested assistance.

According to your letter, on January 5 you directed a request to the New York City Police Department for "an updated NYSIS report" concerning a named individual who was a witness at your trial several years ago. As of the date of your letter, you had not receive a response.

In this regard, I offer the following comments.

First, 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)].

For your information, the person designated to determine appeals for the Department is Susan R. Rosenberg, Assistant Commissioner.

Second, the primary repository for criminal history records is the Division of Criminal Justice Services (DCJS). However, I point out that 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.

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-6780

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 6, 1991

Mr. K. Felock
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Felock:

As you are aware, Albert Singer of the Department of Law has forwarded your correspondence of August 10 to the Committee on Open Government. The Committee is authorized to advise with respect to the Freedom of Information Law.

As I understand the documentation, on January 5, you made a request to the Town of Pittstown Zoning Board of Appeals for a copy of an application and related materials submitted by a particular individual. The request was received on January 8 by Ms. Durkee, Secretary to the Board. You received no response, and a second request was made on April 30, and you were informed by the Town Clerk, Ms. Squires, that no such application had been filed. However, at a meeting of the Zoning Board of Appeals on July 23, copies of an environmental assessment form prepared in conjunction with the application were distributed. Soon thereafter, you requested the materials again, and the Town Clerk informed you that you could obtain copies, which include an application dated January 8. It is your view that "it appears that the ZBA had the application in their possession since January 8, 1991 and did not provide information as was requested in writing on two occasions". Upon obtaining the records, you asked the Clerk if you were given "all the town had", and she stated that "its all Ms. Durkee gave her and that she had been reluctant to release to Ms. Squires what [you were} given".

You have asked whether "a violation" occurred. 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."

As such, in my opinion, as soon as the application came into the possession of the Town, it constituted a "record" subject to rights of access conferred by the Freedom of Information Law.

Second, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate 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 pro- vides 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 requester to copy those records..."

In view of the foregoing, the records access officer has the "duty of coordinating an 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.

Third, section 30 of the Town Law, which deals with the powers and duties of town clerks, states in part that a town clerk "[s]hall have the custody of all records, books and papers of the town". In view of that authority, the town clerk is the records access officer in most towns. Further, even when records are in the physical possession of various town officials, on the basis of section 30, I believe that they are nonetheless in the legal custody of the town clerk.

In this instance, assuming that the secretary to the Zoning Board is not designated as records access officer, I believe that she should have conferred with or forwarded your requests to the records access officer in order that that person could have coordinated the response to the requests.

Lastly, while I am not suggesting that it would necessarily apply, 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."

In an effort to enhance compliance with and understanding of 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: Ms. Squires, Town Clerk
Ms. Durkee, Secretary to the Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6781

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 6, 1991

Ms. Kathleen J. Cochran
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Cochran:

As you are aware, I have received your letter of August 13 and the materials attached to it.

You have sought an advisory opinion concerning a request directed to the Niagara County Industrial Development Agency (the "Agency") and its response. Specifically, you requested an "up-date of information made available in 1990". That information, as I understand it, identifies firms that have used bonds as a means of engaging in industrial development and indicates the number of persons hired or employed by those firms. In response to the request, you were informed that the Agency's Board adopted a resolution stating that:

> "Employment information for Industrial Revenue Bonds and Revolving Loan Funds be considered confidential and proprietary if disclosed would create an unfair competitive advantage in that such information be exempt pursuant to Section 87, Subdivision 2, c and d of the Public Information Law."

In this regard, I offer the following comments.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Paragraphs (c) and (d) of section 87(2) represent two of the grounds for denial.

Section 87(2)(c) permits an agency to withhold records or portions thereof when disclosure would "impair present or imminent contract awards or collective bargaining negotiations". In my view, that provision is applicable in situations in which disclosure would impair the ability of a governmental entity, such as the Agency, to engage in optimal or appropriate contractual agreements or collective bargaining negotiations. It appears that there are no present or imminent contract awards between the Agency and the firms identified on the list that you enclosed. If that is so, section 87(2)(c), in my opinion, would not serve as a basis for denial.

The other ground for denial cited by the Agency, section 87(2)(d), authorizes an agency to withhold records 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..."

While there is little decisional law involving section 87(2)(d), it has been advised that the nature of the records and the degree of competition within an industry or area of commerce in which a commercial entity functions are some of the factors relevant to the assertion of that provision.

Further, 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.).

The question in my opinion is whether disclosure of the employment figures regarding the firms identified would in each instance cause substantial injury to their competitive positions. In some cases, firms may be involved in highly competitive industries or areas of commerce; in other instances, there may be lesser degrees of competition. As such, demonstrating that the harm sought to be avoided by means of section 87(2)(d) would likely involve separate consideration of the data with respect to each firm listed. While I am not familiar with the firms in question, I would conjecture that a blanket denial was inappropriate, particularly in view of the disclosure of equivalent data in 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: Elizabeth J. Green

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6782

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 6, 1991

Mr. Michael Paulk
90-A-1277
Box 500
Elmira, NY 14902

Dear Mr. Paulk:

I have received your recent letter in which it appears that you appealed denials of access to records to this office.

In this regard, 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 it is empowered to determine appeals.

The provision concerning the right to appeal is section 89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

As such, appeals are made to the agencies that initially denied your requests, not the Committee on Open Government.

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-6783

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 6, 1991

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.

Dear Ms. _____:

I have received your letter of August 12. Having been out of the office, I apologize for the delay in response.

Your letter pertains to requests that have been the subject of previous correspondence. Nevertheless, you have contended that the Office of Mental Health has failed to respond appropriately. As such, you asked that I "order" the Office of Mental Health to provide copies of the records sought.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the statutes within its jurisdiction. This office has no power to order an agency to grant or deny access to records.

Second, the Freedom of Information Law pertains to existing records. It is unclear whether all of the records sought exist. To the extent that they od not exist, the Freedom of Information Law would be inapplicable.

Third, 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)].

If you believe that a request has been denied, it is suggested that you appeal pursuant to section 89(4)(a).

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Pat Johnson
Marc Madia

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6784

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 12, 1991

Mr. Roderick Van Huse
89-A-5609
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. Van Huse:

I have received your letter of August 8, which reached this office on August 20.

According to your letter and the materials attached to it, your request to the New York City Police Department for "scratch notes" and scientific evidence reports has been denied on the basis of section 87(2)(e)(iv) of the Freedom of Information Law. Consequently, you requested that the "investigative techniques or procedures be deleted from the copy of the record". Nevertheless, that request was also denied. You asked that I "look into this matter and send the portions that [you] may have".

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office cannot obtain records on behalf of an applicant, nor is it empowered to compel an agency to grant or deny access to records. Further, since your request was denied pursuant to an appeal, it appears that your recourse would involve a challenge to the denial via the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

It is noted that the provision upon which the denial is based 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..."

The leading decision concerning that section 87(2)(e)(iv) is Fink v. Lefkowitz, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information (see Frankl v Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v Brennan, 476 F2d 699, 702; Hawkes v Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive, of whether investigative techniques are 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 would if disclosed enable people to evade law enforcement activities, for example, they could in my view be withheld. Conversely, insofar as the harmful effects of disclosure described in section 87(2)(e)(iv) would not arise, it is likely that the records should be available.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Rosenberg

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

September 12, 1991

Mr. Anthony Logallo
90-B-1210
Box 2000
Pine City, NY 14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Logallo:

I have received your letter of August 19, which pertains to a request for mental health records and the fees that may be assessed for copies of those records.

In this regard, I believe that the provisions of the Mental Hygiene Law, rather than the Freedom of Information Law, would govern with respect to the issues that you raised. By way of background, section 33.13 of the Mental Hygiene Law requires that clinical records maintained by a mental health facility be confidential. However, section 33.16 of the Mental Hygiene Law generally requires that those records be disclosed to a "qualified person", such as the subject of the records.

With respect to fees, section 33.16(b)(5) states that:

> "The facility may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person shall not be denied access to the clinical record solely because of inability to pay."

It is suggested that you describe the problem you have encountered to Robert M. Spoor, Director of Public Information, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Mr. Spoor may be able to ensure that an appropriate response is provided.

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-6786

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 12, 1991

Mr. Bernard Zabusky
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zabusky:

I have received your letter of August 13 which pertains to a denial of a request for various records of the New York City Police Department. You have asked that this office "intervene" on your behalf.

In this regard, first, the Committee on Open Government has no authority to compel an agency to grant or deny access to records. Assuming that your appeal is denied, certainly you may inform an administrative law judge that you could not obtain certain records. Since I do not know the result of your appeal, I will not do so on your behalf.

Second, your request involved some 16 categories of information. With respect to certain categories, I have no knowledge of the content of the records. With respect to others, the Department contended that the request did not "reasonably describe" the records sought as required by section 89(3) of the Freedom of Information Law. As such, the Department is apparently unable to locate and identify certain of the records requested.

Several aspects of your request involve records pertaining to the police officer who found that you engaged in a traffic violation, including records concerning his work location on a certain date, date of appointment, overtime and complaints made against him. In this regard, 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." One such statute is section 50-a of the Civil Rights Law. Specifically, 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 be mandated by lawful court order."

Notwithstanding the foregoing, the Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has 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 by 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)].

Based upon the foregoing, I believe that records involving dates of employment, work location, overtime and the like must generally be disclosed. However, complaints and similar documents could in my view be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis J. Capasso
Susan Rosenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6787

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 12, 1991

Ms. Linda A. Mangano
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Mangano:

I have received your letter of August 8 which concerns "the procedure to follow if you know something's missing from a file you've requested and you want to see it".

In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Freedom of Information Law states that an agency need not create a record in response to a request.

Second, in a situation in which a record sought cannot be found, you may seek a written certification to that effect. Section 89(3) of the Law also provides 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".

Third, the same provision 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 and identify 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, I must admit to being unfamiliar with the agency's record-keeping system. If, for example, the records you are seeking are maintained in a manner that would permit staff to retrieve them based upon the information you provided, I believe that the request would have reasonably described the records. However, if the records requested are not maintained in a manner that enables staff to locate and retrieve them, and if the records "could not be identified by retracing a path already trodden", the request would not likely have met the requirement that it reasonably describe the records sought.

Lastly, when an appeal is made following a denial of a request, section 89(4)(a) of the Freedom of Information Law provides that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of

> the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

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-6788

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 13, 1991

Mr. Rodayo Casiano
83-B-2494
Southport Correctional Facility
Box 2000
Pine City, NY 14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Casiano:

I have received your letter of August 9, which reached this office on August 19.

You have requested assistance concerning a denial of access to records by the Office of the Kings County District Attorney. In this regard, I offer the following comments.

First, since you referred to decisions involving discovery in criminal cases, I point out that those decisions may be unrelated to disclosures under the Freedom of Information Law. The ability to obtain records as a defendant under the Criminal Procedure Law is based upon a person's status as a defendant; rights of access conferred by the Freedom of Information Law are not dependent upon one's status in a judicial proceeding; rather, they are conferred upon the public generally.

Second, the Freedom of Information Law pertains to existing agency records. If an agency does not maintain records sought, the Freedom of Information Law would not be applicable.

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.

In a 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, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

Lastly, since your request has been denied following an appeal made pursuant to section 89(4)(a) of the Freedom of Information Law, it appears that your recourse, under the circumstances, would involve the initiation of a proceeding 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 6789

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 13, 1991

Mr. Steven C. Precour
91-A-5042 I1-20
P.O. Box 10
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Precour:

I have received your letter of August 16 in which you asked that "intervene" in a matter on your behalf.

According to your letter, for several months you have attempted unsuccessfully to obtain records concerning yourself under the federal Freedom of Information Act and section 240 of the Criminal Procedure Law from the Office of the Public Defender of Dutchess County.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. While this office cannot enforce the law or compel an agency to disclose records, a copy of this opinion will be forwarded to the Office of the Public Defender in an effort to assist you.

Second, the federal Freedom of Information Act, 5 USC section 552, applies to records maintained by federal agencies. As such, it does not apply in this situation. However, I believe that the New York Freedom of Information Law would be applicable, for it pertains generally to records maintained by entities of state and local government in New York. Based on section 716 of the County Law, I believe that an office of public defender is subject to the Freedom of Information Law.

Third, 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)].

Lastly, although you referred in your letter to a copy of a response, no such attachment was included. While I am unaware of the nature 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Nancy Swanson, Supervising Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6790

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 13, 1991

Mr. Frank Perrella
86-A-7876 E 3 30
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. Perrella:

I have received your letter of August 19. You have asked whether it is "possible to obtain a printout of one's rap sheet 'as it stood on a specific date'."

In this regard, I am unaware of whether the Division of Criminal Justice Services (DCJS) has the ability to prepare such a printout of a criminal history as it would have existed on a particular date. Further, while that agency's regulations authorize the subject of a criminal history record to obtain such a record pertaining to himself, I point out that 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.

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-6791

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 23, 1991

Mr. Louis Mortillaro
84-A-2781
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. Mortillaro:

I have received your letter of August 22 and the materials attached to it.

Your inquiry pertains to an appeal directed to Ronald Bogard, General Counsel to the New York City Health Department. As I understand the matter, your original request was made to the Office of the Chief Medical Examiner, who denied access in accordance with provisions pertaining to autopsy reports. Although the Police Department asked that a serology examination be made, a request was made for "sneaker print comparisons". As such, you contend that the test involving sneaker prints would be separate from any serology or autopsy report, and that the records involving sneaker print comparisons should be disclosed to you.

You have asked for "feedback" concerning the matter. In this regard, I offer the following comments.

First, it would appear that sneaker print comparisons would not be part of or specifically related to an autopsy report. If that is so, the basis for denial offered in response to your request would in my view be inapplicable.

Second, it is unclear from my perspective whether the Office of the Chief Medical Examiner or the Health Department would conduct examinations involving sneaker print comparisons. It is suggested that you attempt to ascertain whether those agencies indeed prepared or possess the sneaker print records.

Third, assuming that the Freedom of Information Law governs rights of access to the records in question, I point out as a general matter that that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Perhaps most important in consideration of rights of access would be 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."

Further, it would appear that section 87(2)(e)(iv) would be most relevant to the issue. The leading decision concerning that section 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 would if disclosed enable people to evade law enforcement activities, for example, they could in my view be withheld. Conversely, insofar as the harmful effects of disclosure described in section 87(2)(e)(iv) would not arise, it appears that the records should be available, unless a different basis for denial could appropriately be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Ronald Bogard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6792

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 23, 1991

Mr. Thomas Prevost
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Prevost:

I have received your letter of August 24, as well as the correspondence attached to it.

According to the materials, having requested records of building and fire code inspections and related records from the Town of Trenton, you were told that you would need a court order to obtain them. It is your understanding that "this Federal law" confers the right to obtain the records in question.

You have asked that this office "intercede" on your behalf, obtain the information for you, or request that it be sent 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. Although this office is not empowered to enforce the Law or compel an agency to disclose records, in an effort to enhance compliance, a copy of this letter will be forwarded to the Town.

Second, since you referred to "Federal law", I point out that the governing statute is the New York Freedom of Information Law, which applies generally to records maintained by units of state and local government in New York.

Third, I do not believe that a court order should be needed to obtain most of the material in which you are interested, for the Freedom of Information Law provides broad 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.

Although several grounds for denial might relate to the records sought, I believe that the records should, in great measure, be disclosed.

With respect to building code inspection records, it has been claimed in the past that those kind of records could be withheld on the ground that they were compiled for law enforcement purposes [see Freedom of Information Law, section 87(2)(e)]. Nevertheless, in one of the first decisions rendered under the Freedom of Information Law, which at the time was not as expansive in terms of rights of access as the current law, the files of a building code enforcement agency, including records indicating code violations, were found to be accessible [see Young v. Town of Huntington, 388 NYS 2d 978 (1976)]. Further, one of the grounds for denial, due to its structure, often requires the disclosure of 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. In my view, building or fire code inspection records would constitute "intra-agency materials. However,

insofar as those records include factual information regarding the premises inspected or are reflective of agency determinations (i.e., findings of violations, approvals from a state agency), I believe that they would be available under the Freedom of Information Law.

Other categories of records that you requested, such as copies of local laws or building permits would in my opinion be available, for none of the grounds for denial would apply.

Certain aspects of your requests involve the training of public employees. Here I point out that 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. 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].

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 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. Therefore, in my opinion, to the extent that the records sought contain information pertaining to the requirements that must have been met to hold to the position, they should be disclosed, for I believe that disclosure of those aspects of the records 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 a position has met the requisite criteria for serving in that position.

Since you requested the "legal" addresses of certain persons, it is also noted that section 89(7) of the Freedom of Information Law states that nothing in that statute requires the disclosure of home addresses of present or former public employees.

Lastly, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, section 87(1) requires the governing body of a public corporation, i.e., a town board, to adopt uniform rules for all agencies with the public corporation that are consistent with the Law and the Committee's regulations.

Relevant to your inquiry is section 1401.2 of the regulations, which 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..."

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 request. The records access officer for a town is usually the town clerk, for the clerk is the legal custodian of all town records.

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)].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Barbara Cale
Glen Haskell
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6793

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 23, 1991

Mr. Daniel Karpen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Karpen:

I have received your letter of August 21 in which you asked that I ask the Power Authority to "hurry things up a little bit" with respect to requests made on August 5.

In this regard, 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)].

The foregoing should not be construed to suggest that the records sought are necessarily available under the Freedom of Information Law [see section 87(2)(g)].

In an effort to assist you, a copy of this letter will be forwarded to Power Authority officials.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Flynn
Anne Wagner-Findeisen, Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6794

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 23, 1991

Mr. George Shebitz
1370 Avenue of the Americas
New York, NY 10019

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Shebitz:

I have received your letter of August 23, as well as the correspondence attached to it.

You wrote that you represent SYRIT Computer Systems, which is the subject of an audit being conducted by the Department of Audit and Control. Although the audit has not yet been completed, preliminary findings have been disclosed and widely distributed, to the detriment, in your view, of SYRIT. In conjunction with the foregoing, you have sought an advisory opinion concerning two requests made under the Freedom of Information Law, both of which have been denied.

One request pertains to "audit workpapers of an audit-in-progress". While it was conceded by the Department's records access officer that certain aspects of the workpapers are likely accessible under the Freedom of Information Law, he wrote that "where the workpapers are in active use by auditors, a request for photocopies of all audit workpapers (approximately 1500 in number) must be delayed temporarily since the Freedom of Information Law does not require an agency to suspend active use of working records by its staff to undertake the necessarily lengthy process of evaluating the accessibility of a mass of records presently required for auditing work". He added that he could not "predict with certainty when active use of the entire block of workpapers will be completed so your request for photocopies may be processed". It was also stated that:

> "since your request for photocopies of all workpapers cannot presently be processed, we suggest you may wish to modify your request to receive photocopies of portions of the work-

> papers as their active use is completed and they become available for photocopying after evaluation for accessibility. To assist you in this matter, we are enclosing a copy of the master index of folders for the audit (presently through 'III. L.') and ask that you provide us with your priority of interest in the index which we will make every effort to accommodate in evaluating and photocopying records when their active use of auditing work is completed. Please let us know whether you wish to proceed with this suggested alternative course."

The second denial involved a request for copies of records reflective of the policy and procedures associated with audits, including audit guidelines and procedures pertaining to audits of private schools. In the denial of the appeal, it was specified that the records sought did not fall within any of the classes of accessible information required to be disclosed by section 87(2)(g). The determination indicates that "[t]hese policies and procedures, which are internal instructions to staff, are not final agency policy or determinations. Rather, any such final agency policy or determinations can only be embodied in the final audit report".

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 initial request pertaining to audit workpapers, as you may be aware, those documents could be characterized as intra-agency materials that fall within the scope of section 87(2)(g) of the Freedom of Information Law. That provision authorizes 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, insofar as the workpapers consist of statistical or factual data, they would be accessible under section 87(2)(g)(i) [see Polansky v. Regan, 81 AD 2d 102 (1981)].

Third, the key issue concerning that request in my opinion involves the delay in granting or denying access to the records sought. Here I point out that 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

Based on the correspondence attached to your letter, although the records access officer acknowledged the receipt of the request, he did not provide an estimate of the date when the records would be made available or denied. As such, it appears that you may appeal on the ground that the request has been constructively denied. Further, while his suggestion that you modify your request so as to receive portions of the workpapers "as their active use is completed" may have some merit, in view of the volume of the material, there may be a more expeditious means of making records available. I agree with the contention that a determination to grant or deny access may be temporarily delayed because records are being actively used. However, since the records consist of some 1,500 pages and they are apparently categorized in some manner, it may be possible to review and determine rights of access to many of the records before they become actively used. For example, it may be that auditors have used and reviewed the first 300 pages and that those records can be reviewed to ascertain the extent to which they must be disclosed. If it is unknown that the next 300 pages will be in use during the coming month, perhaps the remaining 900 pages could be reviewed for the purpose of granting or denying access before they are in active use. If that can be done, some of the records sought might be disclosed prior to the completion of the process rather than after their use in the process.

With respect to the second request, the issue involves the application of section 87(2)(g), which was cited earlier, and whether the procedures and guidelines constitute "instructions to staff that affect the public" and/or "final agency policy or determinations" accessible under subparagraphs (ii) and/or (iii) of section 87(2)(g).

There is little decisional law that deals directly with those provisions. However, in a letter addressed to me dated July 21, 1977 by the lead sponsor of the revised Freedom of Information Law, former Assemblyman Mark Siegel indicated that section 87(2)(g) is intended to insure that "any so-called 'secret law' of an agency be made available", such as the policy

"upon which an agency relies" in carrying out its duties. Typically, agency guidelines, procedures, staff manuals and the like provide direction to an agency's employees regarding the means by which they perform their duties. Some may be "internal", in that they deal solely with the relationship between an agency and its staff. Others may provide direction in terms of the manner in which staff performs its duties in relation to the public. In this instance, it appears that the records in question involve the steps that are taken and the parameters considered by staff in conducting audits with respect to a class of the public, specifically, private educational institutions. If the foregoing analysis is accurate, the records would in my view constitute instructions to staff that affect the public and/or would reflect the policies implemented by an agency in carrying out a particular aspect of its duties.

Further, I disagree with the final aspect of the analysis offered by the appeals officer. As indicated earlier, he wrote that "[t]hese policies and procedures, which are internal instructions to staff, are not final agency policy or determinations" and that "any such final agency policy or determination can only be embodied in the final audit". While a final audit may represent a final determination, the audit itself could not in my opinion be characterized as "final agency policy". Rather, the audit is the result of the effect given to and the implementation of an agency's policy and procedures.

Lastly, I am unaware of the purpose for or context in which the audit was prepared. Nevertheless, I point out that the Court of Appeals rendered a decision several years ago concerning rights of access to an audit manual prepared by a special prosecutor who investigated nursing homes. In that context, the Court considered section 87(2)(e)(iv), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would... reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In Fink v. Lefkowitz, 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 the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use

agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by those so inclined. Disclosing to unscrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the

> possibility 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)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed"(id. at 573).

Since I am unfamiliar with the contents of the records sought or their function or purpose in the audit process, I could not conjecture as to the possible relevance of section 87(2)(e)(iv).

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Hinckley
Jeffrey Pohl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1974
FOIL-AO-6795

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 30, 1991

Mr. Robert R. Cole
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cole:

I have received your letter of September 18. As requested, enclosed are materials concerning the Freedom of Information Law, the Open Meetings Law and the Personal Privacy Protection Law.

You asked whether the "rules, regulations, codes or laws established by the local board of trustees and mayor supersede those established by state agencies". In this regard, I offer the following comments.

First, I point out that the Personal Privacy Protection Law does not apply to local governments. That statutes pertains to state agencies only.

Second, it has been held that an enactment of a local government, such as a local law, ordinance or charter provision cannot restrict rights of access conferred by the Freedom of Information Law, which is an act of the State Legislature [see e.g., Morris v. Martin, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. It has also been held that an agency cannot establish fees for copies of records above those permitted by the Freedom of Information Law, absent statutory authority (i.e., an enactment of the State Legislature) to do so [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Similarly, section 110 of the Open Meetings Law, entitled "Construction with other laws", states that:

> "1. 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.

2. Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby.

3. Notwithstanding any provision of this article to the contrary, a public body may adopt provisions less restrictive with respect to public access than this article."

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert T. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6796

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 2, 1991

Mr. Raymond Palmer
84-A-2398
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. Palmer:

I have received your letter of August 23, as well as the correspondence attached to it.

You have sought an advisory opinion concerning a denial of a request made under the Freedom of Information Law for certain records pertaining to your son that are maintained by the Children's Village.

In this regard, it is noted at the outset that the Freedom of Information Law applies to agency records. Section 86(3) of the Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local government. By means of its name, I would conjecture that the Children's Village is not a government agency, but rather a private not-for-profit facility. If that is so, the Freedom of Information Law would not be applicable.

Further, as I understand the situation, it appears that the records sought would be confidential under section 372 of the Social Services Law, absent consent to disclose by the appropriate social services department or a 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-6797

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 2, 1991

Ms. June Maxam
The North Country Gazette
Box 408
Chestertown, NY 12817

Dear Ms. Maxam:

I have received your letter of August 26 in which you described a situation in which a request was sent to a state agency on August 1 that had not been answered as of the date of your letter to this office.

According to correspondence attached to your letter, the request involved records reflective of an action and a fine imposed against a town by the Department of Labor. You also asked that your newspaper be added to a mailing list in order to receive releases concerning "fines/penalties assessed to various entities for violations of labor law, employment regulations, etc.".

In this regard, I offer the following comments.

First, a request for records should generally 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. Since your letter was addressed to the Department of Labor, it might have taken time to route it to the appropriate office.

Second, 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)].

Lastly, I am unaware of whether the Department prepares news releases concerning the kinds of actions that you described. If it does not, while Department officials could inform you of those actions as a matter of routine, I do not believe that they would be obliged to do so. In a technical sense, an agency can neither grant nor deny access to records that do not yet exist. While an agency must respond to requests for existing records, I do not believe that it would be required to supply certain kinds of records, on an ongoing or routine basis, without having received requests for those records.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6798

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 2, 1991

Mr. Mike Gallagher
Gannett Suburban 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, unless otherwise indicated.

Dear Mr. Gallagher:

I have received your letter of August 26, as well as the materials attached to it. You have sought an advisory opinion concerning the propriety of a denial of access to records by the New York State Division of State Police.

In a letter addressed to Lt. Theodore A. Cook, you requested:

> "Records, documents, computer-generated data, etc., of all disciplinary actions filed with, processed and reviewed by your office from New York State Police personnel for the time period January 1, 1987 to current. This data should contain a chronological listing of complaints, the alleged offense, date of alleged offense, and final disposition of each filing, adjudicated or not."

You added that "[t]he FOI law may prevent disclosure of the identity of the individual filing the action, please redact the filer's name and identify him or her by sex and race, i.e., Black male trooper or Hispanic female sergeant." For purposes of clarification, you explained to me the "filer" is the person who is the subject of a charge or complaint and that you do not want any identifying details concerning either complainants or the employees who are the subjects of complaints or disciplinary

proceedings. You also expressed the belief that the "requested data is now computerized". As such, it is my understanding that the request essentially involves a list of complaints, the nature and dates of alleged offenses and the final disposition of the complaints, including certain characteristics of the subjects of the complaints, without any identifying details.

The request was denied by Lt. Col. Raymond G. Dutcher, Jr., who wrote that:

> "Records of this nature are inter-agency materials which are exempt from disclosure. In addition, as noted, complaints against personnel are a part of the personnel history of the employee concerned. As such the records are specifically exempted from disclosure in accordance with the provisions of existing statute."

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, several of the grounds for denial are relevant to the issue.

Since Lt. Col. Dutcher indicated that the records are part of the "personnel history" of an employee and the records are "specifically exempted from disclosure" by statute, it appears that he is referring to section 50-a of the Civil Rights Law. 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." One such statute is section 50-a, which pertains to police officers and certain other classes of public employees and states in relevant part that:

> "All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof... shall be considered confidential and not subject to inspection or review without the express written consent of such police officer...except as may be mandated by lawful court order."

Notwithstanding the foregoing, the Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has 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 by 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 dealing with complaints made against correction officers, 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-a of the Civil Rights Law.

Those circumstances, however, are not present in my opinion in the context of your request, for you are not seeking the names of the employees who are the subjects of complaints or disciplinary proceedings. Absent the names of the employees, the

harm sought to be avoided by section 50-a would be avoided. Without the names, it is difficult to envision how the records could be used to harass or embarrass any particular person. If the foregoing is accurate, I do not believe that section 50-a of the Civil Rights Law would serve as a basis for denial.

Also relevant 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 under the provisions of subdivision two of section eighty-nine of this article". Section 89(2)(a) states that an agency may delete identifying details to protect against unwarranted invasions of personal privacy when it makes records available. Further, section 89(2)(c)(i) states that disclosure shall not be construed to constitute an unwarranted invasion of personal privacy "when identifying details are deleted". Again, since you have requested records without names of either complainants or the public employees involved, the provisions of the Freedom of Information Law concerning privacy would not appear to be relevant.

The remaining 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..."

In view of the language quoted above, although section 87(2)(g) represents a potential basis for withholding records, it may also require disclosure of certain information. For example, assuming that no other grounds for denial applies, statistical or factual data found withing inter-agency or intra-agency materials would be available pursuant to section 87(2)(g)(i).

If indeed the information sought is computerized and is or can be produced as a list, a log or other kind of tabulation, such a record would constitute intra-agency materials, but, depending upon its format, might consist of statistical data available under section 87(2)(g)(i). In an early decision, rendered

under the Freedom of Information Law as originally enacted involving statistical or factual information that was later affirmed by the Court of Appeals, the Appellate Division stated that:

> "It 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" [Dunlea v. Goldmark, 54 AD 2d 446, 448; aff'd 43 NY 2d 754 (1977)].

The Court was also aware of the fact that the records were used in the deliberative process, stating that:

> "The mere fact that the document is a part of the 'deliberative' process is irrelevant in New York State because section 88 clearly makes the back-up factual or statistical information to a final decision available to the public. This necessarily means that the deliberative process is to be a subject of examination although limited to tabulations. In particular, there is no statutory requirements that such data be limited to 'objective' information and there is no apparent necessity for such a limitation" (id. at 449).

In addition, in Miracle Mile Associates v. Yudelson, in a discussion of section 87(2)(g), it was found that:

> "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)].

Disclosure of a list or tabulation of the information sought, particularly absent identifying details, would seemingly result in no "injury" to the deliberative process or the "consultative functions" of the government.

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)].

In my view, some if not all of the data requested, assuming that it exists or can be produced in the form of a list or tabulation, 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:jm

cc: Lt. Col. Dutcher
Committee on Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6799

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1991

Ms. Laura D'Angelo
Staten Island Advance
950 Fingerboard Road
Staten Island, NY 10305

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. D'Angelo:

As you are aware, I have received your letter of August 29 and the materials attached to it. You have sought an advisory opinion concerning a denial of access to records by the New York City Board of Education.

By way of background, you wrote that:

> "In July, New York City Schools Chancellor Joseph Fernandez publicly charged Murray Brenner, the 21-year principal of PS 5 on Staten Island, with inflating scores on standardized reading and math tests. He based this charge, he said, on a Board of Education investigation. The nature of the probe had been reported by the Staten Island Advance prior to the chancellor's announcement.
>
> "Brenner retired last month, severing his relationship with the board. He has never faced formal censure for his alleged misconduct.
>
> "At the same time, the Advance has repeatedly requested that the Board of Education release the details of its investigation.

> "Fernandez, however, has sealed the records associated with the investigation, and his office legal affairs has denied a Freedom of Information request.
>
> "The Board of Education refused to indicate a possible motive and refused to say what evidence linked the inflated scores to Brenner. Also, it is not known how many other school officials knew about the tampering or were directly involved in changing scores. It is not known how the investigation was conducted, who conducted the investigation, and what evidence was garnered."

According to a response to your request by the Deputy Records Access Officer for the Board of Education, the records were withheld pursuant to section 87(2)(b) and (g) of the Freedom of Information Law. The former enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". The latter pertains to "inter-agency and intra-agency materials".

In my opinion, although both of those provisions are relevant to the matter, the extent to which they would justify a blanket denial of all of the records is questionable.

If the investigation was incomplete, if Mr. Brenner remained employed and if the Chancellor had not publicly described Brenner as a test tamperer, I would agree that disclosure would result in an unwarranted invasion of personal privacy with respect to virtually all of the records sought. Nevertheless, the investigation appears to have been completed and the Chancellor appears to have determined that Brenner engaged in tampering. Since the Chancellor identified Brenner as having tampered tests, the question in terms of privacy involves how or whether additional disclosures would result in a more significant or "unwarranted invasion of personal privacy".

While 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. However, 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.

In this instance, although no disciplinary proceeding was conducted due to Brenner's retirement, the Chancellor's statement suggests that some sort of finding or conclusion was reached concerning Brenner's activities. If that is so, I believe that any such findings or conclusions should be disclosed.

It is emphasized that I know none of the details regarding the investigation and there may be various aspects of the records that could be withheld as an unwarranted invasion of personal privacy. Some of the documentation might involve other aspects of Brenner's life or allegations that were found to have been without merit. Further, the records might identify a variety of other people. In those instances, it is possible if not likely that disclosure would constitute an unwarranted invasion of personal privacy.

The other ground for denial, 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 basis for denial applies [i.e., section 87(2)(b) concerning unwarranted invasions of privacy]. 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), 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)].

Records prepared in conjunction with an investigation by the Board would in my view constitute either inter-agency or intra-agency materials, depending upon the parties involved in the communications. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. For instance, I believe that recommendations concerning the course of an investigation or opinions offered by witnesses or employees interviewed could be withheld. However, factual information would in my view be available, except to the extent that disclosure would result in an unwarranted invasion of personal privacy. Further, findings and conclusions may be available when they constitute final agency determinations.

It is emphasized that the state's highest court has broadly construed the Freedom of Information Law. In a statement concerning the intent and utility of the Law, the Court of Appeals has 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 & 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 govern-

> mental 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... 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..." [Capital Newspapers v. Burns, 67 NY 2d 562, 564-566 (1986)].

Lastly, in the same decision, the Court specified that the exceptions in the Freedom of Information Law are permissive, stating that:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains 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" (id., 567).

Therefore, even though the Board may have the authority to withhold records or portions of records, it may choose to disclose.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ruth Bernstein, Deputy Records Access Officer
Bruce Gelbard, Secretary to the Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6800

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1991

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 received your letter of August 30 concerning a denial of a request by Dr. Donald S. Lomanto, Superintendent of the Gloversville Enlarged School District.

The request involved a "signed complaint by a construction worker concerning sexual molestation of a student [by an employee] at 1991". Although you apparently specified that identifying details could be deleted, Dr. Lomanto indicated that, due to the size of the District and the terms of your request, the deletion of identifying details would not serve to ensure that any student named in the record could not be identified. Further, he contended an unsubstantiated allegation relating to an employee could properly be withheld due to considerations of personal privacy.

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 this instance, there may be issues involving the privacy of three or more persons, a complainant, the person who is the subject of the complaint or allegation, and a student or students.

With respect to complaints made to an agency, 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.

The substance of the complaint, however, appears to identify an employee and one or more students. Here I point out that although it has been found in a variety of circumstances that public employees enjoy a lesser degree of privacy than others, for they are required to be more accountable than others, it has been advised that when allegations have been made 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 would in most circumstances result in an unwarranted invasion of personal privacy [see e.g., Herald Co. v. School District of City of Syracuse, 430 NYS 2d 460 (1989)]. Further, to the extent that allegations are found to be without merit or charges are dismissed, I believe that they may be withheld. Therefore, I believe that records or information indicating an employee's identity could be withheld.

With regard to students' privacy, of relevance to the inquiry is the first ground for denial, section 87(2)(a), which 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 1232g), which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any

"education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under the Buckley Amendment define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

As such, assuming that the record in question includes information personally identifiable to a student, it would be confidential, unless the parents of students waive their right to confidentiality.

In sum, based upon the preceding considerations, it appears that the denial was proper.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Donald S. Lomanto, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6801

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1991

Mr. Eugene McNair
88-T-1847
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. McNair:

I have received your letter of August 30.

You wrote that you requested certain records from St. Luke's Hospital in New York City. In response to the request, you were informed that St. Luke's is a private facility and that its records are not subject to the Freedom of Information Law. As such, your question involves "what type of agencies" fall within the coverage of the Freedom of Information Law.

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 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, in general, the Freedom of Information Law includes within its scope entities of state and local government. It does not include entities that are not part of government. Consequently, as private hospital, for example, would not be subject to the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6802

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1991

Mr. James Fisher
88-C-195
Collins Correctional Facility
Helmuth, NY 14079-0200

Dear Mr. Fisher:

I have received your letter of August 28.

You wrote that you are interested in obtaining copies of policies and procedures concerning urinalysis testing by the State Health Department in Niagara Falls. You added that that office will not inform you of the name of the urinalysis testing machine or the firm with which it contracts to perform or analyze the tests. You have asked where you may write to seek those records.

In this regard, I offer the following comments.

First, a request should generally be directed to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests. The records access officer for the NYS Health Department is Mr. Donald Macdonald, whose office is located at the Corning Tower, Empire State Plaza, Albany, NY 12237.

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 in which you are interested.

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-6803

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1991

Mr. Darius Gittens
85-A-3315
SHU - S - 1
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. Gittens:

I have received your letter of August 24 in which you claimed that various requests and appeals made to the Department of Correctional Services have been "ignored".

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 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.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6804

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1991

Mr. John P. Curry
Representative
The Equitable
Suite 1200
500 South Salina Street
Syracuse, NY 13202

<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. Curry:

I have received your letter of August 30 in which you requested an advisory opinion concerning a denial of a request for a list of Rome City Hospital 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.

Second, I point out that one of the few situations in which a record must be prepared and maintained 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, a payroll record that identifies all agency officers or employees by name, public office address, title and salary must be prepared by an agency to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, I believe that records reflective of the names and salaries of public officers and employees must be disclosed.

Third, in general, the reasons for which a request is made or an applicant's potential use of records are 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, section 89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal

privacy. Due to the language of that provision, 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).

Nevertheless, 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 to any party to records."

As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since payroll information in question was found to be available prior to the enactment of the Freedom of Information Law, I believe that it must be disclosed, irrespective of the intended use of 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: Andrew Lalonde, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6805

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1991

Mr. O. Shelly
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Shelly:

I have received your letter of August 27 in which you raised a question concerning the Freedom of Information Law.

According to your letter, you wrote to the public information officer at the Office of General Services for the purpose of confirming or denying "the existence of an April 6, 1990 phone call purportedly placed approximately 3:35 PM between Albany, New York (probably from (518) 457-5501 or an adjacent instrument using the Long-range Intercity Network Communication System (Linc) to a New York City, to a 312 exchange in the (212) area code (probably 312-7741, or 312-9000), as well as the duration of the aforementioned call". After a lengthy period, Mr. Neil Davidoff responded, "converting [your] inquiry into a FOIL request", stating that "The Freedom of Information Law provides access to records, but does not provide for assignment of State Resources to research and compile the telephone calling information you have requested". Based upon the response, you have contended that "it would appear that since some search is mandatory for any FOIL request, nothing could ever be obtained under the FOIL, which [you] believe is contrary to the letter, spirit and intent of the law". In conjunction with the foregoing, you raised the following issue: "According to the usage guideline in OGS's own statewide telephone directory 'audits will be made of telephone statements.' Accordingly, is there any basis either in the statute or case law that would place these factual and statistical tabulations of telephone calls in a unique class and exempt them from access under the FOIL?"

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Similarly, the Freedom of Information Law does not require that agency officials answer questions or provide "information" in response to questions.

Second, the same provision 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 and identify 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 inquiry, I must admit to being unfamiliar with the agency's record-keeping system. If, for example, the record you are seeking is maintained in a manner that would permit staff to retrieve it based upon the information you provided, I believe that such a request would have reasonably described the record. However, if the record requested is not maintained in a manner that enables staff to locate and retrieve it, or if the record "could not be identified by retracing a path already trodden", the request would not likely have met the requirement that it reasonably describe the records sought.

Third, assuming that a record containing the information sought exists and can be found, I believe that it would constitute factual information accessible under section 87(2)(g)(i), unless there is an independent basis for denial.

One such ground for denial might be section 87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." 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 employee of an agency uses a telephone in the course of his official duties, bills or other records involving the use of the telephone would, in my opinion, be relevant to the performance of those duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to the employee acting as a government official.

Since phone bills often 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 em- ployee 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 that 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,

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 for 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 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: Neil Davidoff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6806

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1991

Mr. Harold Rubenfeld
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rubenfeld:

I have received your letter of August 30 and the materials attached to it.

Having requested payroll records concerning a certain employee of the Great Neck Park Commission, certain aspects of those records were deleted. Having reviewed the records, it appears that various items, particularly those involving deductions, were withheld.

You have asked that I address 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, it appears that the deletions were made in accordance with section 87(2)(b), which enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". As indicated in the opinion addressed to you last year, the courts have found in various contexts that public employees enjoy a lesser degree of privacy than others, reasoning that public employees are to be held more accountable than others. In many contexts, 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, 45 NY 2d 954 (1978); Montes v. State, 406 NYS

2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986); 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]. On the other hand, if records or portions of records are irrelevant to the performance of one's official duties, it has been found that those records may be withheld as an unwarranted invasion of personal privacy [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 87(3)(b) of the Freedom of Information Law requires that each agency maintain a payroll list, "a record setting forth the name, public office address, title and salary of every officer or employee of the agency". As such, records indicating salaries or gross wages of public employees are, in my view, clearly available. Nevertheless, there may be items on payroll or related records that could in my opinion be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. For example, in Minerva, the request included the back side of a check made out to a village attorney. The court found that the back side of the check could be withheld, stating that the public may have the right to know of the receipt of monies by a public employee, "but not how he disposes of his lawful salary or fees". How that person spends his paycheck is irrelevant to the performance of his official duties. Similarly, portions of records indicating the number of deductions claimed, contributions to charity and the like could in my view be withheld in conjunction with section 87(2)(b), for those kinds of information are irrelevant to the performance of one's official duties.

In sum, if the deletions from the record are analogous to those described in the preceding paragraph, I believe that they were appropriately 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:jm

cc: Gloria Brady, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6807

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 3, 1991

Mr. Daniel Lynch
82-A-6183
Sullivan Correctional Facility
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. Lynch:

I have received your letter of August 25.

You asked whether the Kings County Hospital Center is required to disclose to you genealogical information concerning your grandfather and great grandfather. You also asked that I provide the name and address of the person to whom an appeal could be made in the event of a denial by that entity.

In this regard, it is questionable in my view whether a hospital would maintain what may be characterized as "genealogical" information. While it may possess information containing the dates of birth and death of patients, the information would likely be contained in medical records.

Second, while I am unaware of the kinds of records that might exist which contain the information sought, there are provisions in the Public Health Law that require the confidentiality of medical records. To obtain additional information concerning access to medical records, it is suggested that you write to the:

Access to Patient Information Coordinator
Division of Public Health Protection
NYS Department of Health
Corning Tower, Room 2517
Empire State Plaza
Albany, NY 12237

Lastly, the Kings County Hospital Center falls within the jurisdiction of the New York City Health and Hospitals Corporation. While I am unaware of the identity of the person who determines appeals for the Corporation, it is suggested that an appeal be directed to Counsel to the Corporation, with a request that it be forwarded to the appropriate person if necessary. The address of the Health and Hospitals Corporation is 125 Worth Street, New York, NY 10013.

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-6808

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 4, 1991

Mr. James F. Seelandt
83-A-0262
Sullivan Correctional Facility
Box A-G
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. Seelandt:

I have received your letter of September 3 in which you sought my comments concerning a request for records directed to the New York City Police Department.

First, as you may aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unfamiliar with the content of the records sought or the effects of their disclosure, I cannot offer specific guidance concerning the extent to which they may be available or deniable.

Second, one aspect of your request involves a "master index". The phrase "master index" is used in the regulations promulgated by the Department of Correctional Services under 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, 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. Rather than seeking a "master index" from the New York City Police Department, it is suggested that you request the subject matter list maintained pursuant to section 87(3)(c) of the Freedom of Information Law.

Third, you requested a variety of records relating to eleven police officers pertaining to certain time periods dating as far back as 1981. It is questionable in my view whether all of the records to which you referred remain in existence. Further, section 89(3) of the Freedom of Information Law requires 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 and identify 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, I must admit to being unfamiliar with the agency's record-keeping system. If, for example, the records you are seeking are maintained in a manner that would permit staff to retrieve them based upon the information you provided, the request might have reasonably described the records. However, insofar as the records requested are not maintained in a manner that enables staff to locate and retrieve them, or if the records "could not be identified by retracing a path already trodden", the request would not likely have met the requirement that it reasonably describe the records sought.

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-1978
FOIL-AO-6809

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 4, 1991

Ms. Kathy Kellogg
Board of Directors
Concerned Citizens of
Cattaraugus County
P.O. Box 23
Franklinville, NY 14737

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kellogg:

I have received your letter of September 3 and the materials attached to it. You have described a series of issues involving the Freedom of Information Law and the Open Meetings Law as those statutes have been implemented by the Town of Farmersville, particularly in relation to your efforts in gaining the enactment of a "landfill ban law".

In consideration of the matters that you presented, I offer the following comments.

With respect to access to records, it is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

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 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)].

You referred to "contract agreement" as a "secret document". If a contract exists between the Town and a firm, I believe that it must be disclosed, for none of the grounds for denial would be applicable. If the contract is still in the process of being negotiated, I point out that section 87(2)(c) of the Freedom of Information Law enables an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards". Therefore, the issue in that instance would involve whether premature disclosure would impair the Town's ability to engage in an optimal contractual agreement on behalf of the taxpayers.

You wrote that you were charged a dollar per page for copies of records. In this regard, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches. A higher fee may be charged only when a statute other than the Freedom of Information Law authorizes such a fee. A "statute" is

an act of the State Legislature, and a fee of greater than twenty-five cents per photocopy cannot be established by policy or by a local law ordinance, for example [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

With respect to Open Meetings Law, like the Freedom of Information Law, that statute is based on a presumption of openness. Meetings Law public bodies must be conducted open to the public, except to the extent the subject matter under consideration may justifiably be discussed during an executive session. An executive session is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Further, a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may properly be discussed in executive sessions.

Since you referred to Board members going into a "huddle" at a meeting, I direct your attention to section 100 of the Open Meetings Law, its legislative declaration. That provision states that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of and able to observe" and "listen to the deliberative process". Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view situate itself and

conduct its meetings in order that those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to o comply with a basic requirement of the Open Meetings Law.

I point out, too, that there is a distinction between meetings and hearings. A meeting generally involves a gathering of a public body for the purpose of discussion, deliberation and perhaps the taking of action. A hearing, on the other hand, generally involves a situation in which the public is given an opportunity to speak in conjunction with a particular issue.

As indicated earlier, although the Open Meetings Law provides the public with the right to attend open meetings and listen to the deliberative process, the Law is silent with regard to public participation. Therefore, while many public bodies do so, a public body is not required to permit the public to speak or otherwise participate at meetings. Certainly a public body may choose to permit public participation, and when it does so, it has been advised that the body may permit the public to speak in accordance with reasonable rules or policies that treat the members of the public equally.

With respect to the records of meetings, section 106 of the Open Meetings Law pertains to minutes of meetings 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
>
> 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, 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.

I point out 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 one week or two weeks, as the case may be, and that if the minutes have been 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.

Further, 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 school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

Finally, in order to maintain a complete record of meetings, although no statute deals with the matter, the courts have consistently held since 1979 that any person may use a portable tape recorder at an open meeting of a public body [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985); People v. Ystueta, 418 NYS 2d 508 (1979)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law and the Open Meetings Law, a copy of this opinion will be forwarded to the Farmersville Town Board. Enclosed are copies of those statutes, and an explanatory brochure that may be useful to you.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6810

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 4, 1991

Ms. Amy Scuteri
[redacted]

The staff of the Committee 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. Scuteri:

I have received your letter of September 9 in which you sought assistance concerning a request made under the Freedom of Information Law.

According to your letter, on August 21 and August 28, you requested the following records from Greene County:

> "1. 1989 and 1990 audits by the outside CPA firm and their recommendations.
>
> 2. The bid and all bills paid for and/or received for services rendered by the outside CPA firm for 1989, 1990, 1991.
>
> 3. Communications from cognitive agency regarding non-compliance of preparation of 1989 audit.
>
> 4. Total payments to Greene County for lease of Hospital.
>
> 5. Agreement with Columbia County regarding lease of hospital."

Having discussed the status of your request with you, you indicated that the audits had not yet been "filed" with the Department of Audit and Control, and that some audit papers were maintained by the County Attorney. Similarly, although records indicating payments to the County for lease of the Hospital were

disclosed, the lease agreement is also maintained by the County Attorney. Although you were informed that the agreement could be obtained by the County Attorney, it has not yet been made available. Further, while you received bills concerning the CPA firm relating to its functions pertaining to audits, you indicated that other bills paid to the CPA firm have not been disclosed.

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law is applicable to 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."

Based on the foregoing, the Freedom of Information Law includes not only those documents kept in County offices, but also those that are "produced...for" an agency. Therefore, even though certain documents may be kept by the County Attorney or other office at a location other than County offices, I believe that they would constitute "records" subject to rights conferred by the Freedom of Information Law.

Second, it is unclear whether the audits are incomplete, or whether they have been completed but not yet filed with the Department of Audit and Control. In either case, I believe that they would fall within the requirements 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.

Relevant with respect to the audits is section 87(2)(g). Although that provision represents a possible basis for denial, due to its structure, it often requires disclosure. 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. If an audit has been completed, I believe it they would be available under section 87(2)(g)(iv), which requires the disclosuse of "external audits". Further, it has been held that "audit work papers" are available insofar as they consist of "statistical or factual tabulations or data" [Polansky v. Regan, 81 AD 2d 102 (1981)].

With regard to the remaining records that are the subject of your inquiry, a lease agreement and records indicating payments to the CPA firm other than those involving payments relating to audits, I believe that those records must be disclosed. In short, none of the grounds for denial could in my view be justifiably asserted to withhold those records.

With respect to the County's obligations, 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 designation of one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests. In my view, the records access officer is responsible for either obtaining records sought from the locations where they are kept or ensuring that agency employees disclose records in a timely manner to the extent required by the Freedom of Information Law.

Lastly, I point out that 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."

It is also emphasized that the acknowledgement of the receipt of a request must include a "statement of the approximate date when such records will be granted or denied". Based upon the responses to you by Mr. Armstrong, that was not done.

In addition, it has been held that 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: Edmund Armstrong, County Treasurer
George Pulver, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1979
FOIL-AO-6811

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 8, 1991

Mr. Roger Helbig
Zoning Officer
Town of Milo
158 East Lake Road
Penn Yan, NY 14527

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Helbig:

I have received your letter of September 3 in which you raised two issues relating to the Yates County Planning Board.

According to your letter, having met with the Planning Board's Executive Committee, you were informed that its by-laws state that the Board's membership "shall not exceed 20 members". It was contended, in your words, that "a nebulous size of not less than 13 nor more than 20 and therefore would have a varying quorum and majority vote". You asked whether the Board may indeed "have a flexible membership".

In this regard, since the issue deals tangentially with the Open Meetings law, I contacted James Coon of the Department of State, who is an expert on the subject of municipal law, particularly in the area of planning and zoning. He suggested that under section 239-b of the General Municipal Law, a county board of supervisors is authorized to establish a county planning board and that such board, generally by means of resolution, specifies the number of persons who serve on a planning board. While the statute is not specific, Mr. Coon indicated that he did not believe that the membership, within a given period, could be flexible. He also stated that the county board of supervisors could not in his opinion delegate the authority to determine the number of members on a planning board to that board or to its executive committee.

The other issue involves section 239-m of the General Municipal Law, which requires that certain appeals of zoning actions be referred to the County Planning Board for recommendations. You wrote that it is the Planning Board's practice "to return their recommendations without showing the Board's vote, by member, on the issue".

Here I point out that 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 rational 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 listen 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

cc: Yates County Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6812

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 8, 1991

Mr. Donald R. Rychnowski
Executive Director
Southern Tier West Regional Planning
& Development Board
465 Broad Street
Salamanca, NY 14779-1493

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rychnowski:

I have received your lengthy and thoughtful letter of September 4 in which you requested an advisory opinion concerning the applicability of the Freedom of Information Law.

In your capacity as Executive Director of the Southern Tier West Regional Planning and Development Board ("STW"), you indicated that STW is a regional planning board created pursuant to Article 12-b of the General Municipal Law. STW contracts with the Southern Tier Enterprise Development Organization, Inc. ("STEDO"), a not-for-profit corporation, "to provide administrative support" services to STEDO. STEDO, a nine member board with no staff and limited administrative resources, engages in the administration of a revolving loan fund which makes loans to businesses that are "undertaking job creating or retaining projects".

As part of its administrative services, STW rents space to STEDO and several persons on its staff are assigned to provide services to STEDO. One staff member, Mr. Thomas Barnes, "keeps several dedicated file cabinets, full of information relating to STEDO's activities, in his STW office". You specified that STEDO has no offices of its own, that STW "stores and maintains these files for STEDO", that the files "are the legal property of STEDO", and that STW has legal custody of them per administrative contract between STW and STEDO". STEDO does not store or maintain any files for STW.

In 1987, STEDO closed a loan to a company whose president is a Cattaraugus County Legislator and is currently running for reelection. On September 3 of this year, his opponent approached STW and asked to see the files pertaining to the STEDO loan to the legislator's company. You noted that "STEDO's policy is all program inquiries, application materials submitted to it, and loan documents are submitted confidentially by the inquiring/ borrowing business", and that such a policy is "standard". The incumbent's opponent apparently is interested in obtaining the records in conjunction with enforcement of the Hatch Act.

In this regard, I offer the following comments.

First, any issue involving the Hatch Act lies beyond the jurisdiction or expertise of this office. As such, the reason for which the request has been made will not be considered here.

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 governmental 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 and a review of Article 12-B of the General Municipal Law pertaining to metropolitan, regional and county boards, I believe that STW is an "agency" required to comply with the Freedom of Information Law. However, STEDO in my view, as a private not-for-profit corporation, would not be subject to the Freedom of Information Law.

I point out that the 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."

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 analogous to those presented in this situation. The problem in my view involves the unusual relationship between STW and STEDO. On one hand, STW maintains physical custody of certain of STEDO's records; on the other, those records are apparently maintained pursuant to a contractual agreement and are largely irrelevant to STW's functions. In view of the nature of the agreement, I am inclined to advise that the materials in question are not agency records.

Third, even if the documents could be characterized as agency records maintained by STW, I point out that section 87(2)(d) of the Freedom of Information Law permits an agency to withhold records 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..."

As such, notwithstanding a claim or finding that the materials are subject to the Freedom of Information Law, there would appear to be a basis for a denial of access, at least with respect to various portions of 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6813

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 8, 1991

Mr. Howard R. Schneider
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schneider:

I have received your letter of September 8 in which you requested advice concerning the Freedom of Information Law.

As I understand the correspondence attached to your letter, you requested records indicating the number of students attending the Amagansett School District who do not reside in the District. In response to that request, you were apparently informed by the attorney for the District that you should contact the District Clerk for the purpose of inspecting the records. However, you did not seek to inspect to the records; rather, you requested copies and indicated a willingness to pay the appropriate fees for copies. As of the date of your letter to this office, you had not yet received any further response.

In this regard, I offer the following comments.

First, when records are accessible under the Freedom of Information Law, section 87(2) provides that they are available for inspection and copying. Further, under section 89(3) of the Law, an agency is required to make copies of records upon payment of the appropriate fees. Therefore, if you are unable or unwilling to inspect the records in question, I believe that the District would be obliged to copy and send them to you.

Second, under the circumstances, since the request was made long ago and you have not yet gained access to them, you might consider the request to have been constructively denied. In such a case, 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 records the reasons for further denial, or provide access to the record sought."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Courtney, School District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-6814

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 8, 1991

Mr. Curtis White
91-A-3833
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. White:

I have received your letter of September 9.

You asked initially whether the Albany Medical Center is subject to the Freedom of Information Law. In this regard, 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."

Based on the foregoing, the Freedom of Information Law generally applies to records of state and local governmental entities. Since the Albany Medical Center is a private hospital, it would not be subject to the Freedom of Information Law.

If you are interested in obtaining medical records pertaining to yourself, I point out that section 18 of the Public Health Law generally requires the disclosure of medical records by physicians and hospitals to the subjects of those records.

You also requested the name of the appeals officer for the Albany Police Department. I believe that the appeals officer for the City of Albany, including the Police Department, is Harold Greenstein and that an appeal may be sent to him at City Hall.

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-6815

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 8, 1991

Mr. Richard Becker
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Becker:

I have received your letter of September 19, which reached this office on September 30.

The first issue involves a complaint that was apparently made concerning an attorney. In this regard, it is suggested that you contact the grievance committee in receipt of the complaint. I point out that section 90(10) of the Judiciary Law pertains to records concerning the discipline of attorneys and 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 or 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 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. Further, under the circumstances, this office has no jurisdiction in the matter, and it is suggested that you exercise patience.

The second issue involves the status of Nassau County under the Freedom of Information Law. I had indicated in the past that a statute applicable to certain Nassau County agencies exempted certain records from disclosure. That statute has been repealed. Therefore, I believe that those agencies must comply with the Freedom of Information Law.

Lastly, you asked which legislative committees might have dealt with matters relating to "Operation Desert Storm". I am unaware of which committees might have considered that issue. It is suggested that you contact your state senator or assemblyman.

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-6816

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 8, 1991

Mr. David M. White
Wormser, Kiely, Galef & Jacobs
709 Westchester Avenue
Box 290, Gedney Station
White Plains, NY 10605-0290

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. White:

I have received your letter of September 4 in which you raised a question concerning the sealing of records pursuant to section 160.50 of the Criminal Procedure Law (CPL).

By way of background, you wrote that you represent a client who filed a complaint with a town building inspector concerning a neighbor's zoning violation. The town prosecuted the violation in justice court, where the court dismissed the charges "in the interests of justice". On behalf of your client, you sought, under the Freedom of Information Law, "copies of any appearance ticket, summons information, transcript, correspondence or any other documents relating to that case". Nevertheless, the clerk informed you that the records were sealed pursuant to section 160.50 of the CPL. Your question is whether "the prosecution of a violation of a local zoning code falls within the ambit of a 'criminal action or proceeding' as set out in the CPL Section 160.50."

In this regard, although your inquiry is somewhat tangential to the Freedom of Information Law, 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, the Freedom of Information Law does not apply to the courts or court records.

Second, the foregoing is not intended to suggest that court records are uniformly beyond rights of public access, for other statutes deal with access to those records. For instance, the introductory language of section 2019-a of the Uniform Justice Court Act, which is entitled "Justices' criminal records and docket", 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...".

Third, having contacted the Office of Court Administration to obtain guidance on the matter, I was informed that violations are filed as accusatory instruments and that the proceedings are treated as criminal cases. It is noted that section 135 of the Town Law states that:

> "1. A violation of any ordinance, rule or regulation adopted by the town board pursuant to this chapter is hereby declared to be a misdemeanor except as otherwise provided by law and except that any such violation of a provision of a town building code or zoning ordinance shall be deemed an offense against such code or ordinance, and the town board may provide for the punishment thereof by fine or imprisonment or both; provided, however, that for the purpose of conferring jurisdiction upon courts and judicial officers generally, violations of a town building code or zoning ordinance shall be deemed misdemeanors and for such purpose only all provisions of law relating to misdemeanors shall apply to such violations. It is also empowered to provide civil penalties for such violation. The town board may also maintain an action or proceeding in the name of the town in

> a court of competent jurisdiction to compel compliance with or to restrain by injunction the violation of any such ordinance, rule or regulation, notwithstanding that the ordinance, rule or regulation may provide a penalty or other punishment for such violation.
>
> 2. Notwithstanding the provisions of subdivision one hereof the town board of any town may designate that the violation of any ordinance, rule or regulation adopted by such board or any specific provision or provisions thereof shall be deemed an offense against such ordinance, rule, regulation, or provision thereof, and the town board may provide for the punishment thereof by fine or imprisonment or both; provided, however, that for the purpose of conferring jurisdiction upon courts and judicial officers generally, such violation shall be deemed misdemeanors and for such purpose only all provisions of law relating to misdemeanors shall apply to such violations."

From my perspective, the clear implication of section 135 is that a zoning code violation resulting in a judicial proceeding is treated as a criminal proceeding. If that is so, it appears that section 160.50 of the CPL would be applicable as a basis for sealing the records in question.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6817

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 8, 1991

Mr. Anthony Papa
85-A-2837 F50
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Papa:

I have received your letter of September 9. You asked that I "evaluate" the "validity" of a request for records, a copy of which you enclosed.

You referred to a proceeding in which you were assigned counsel pursuant to Article 18-B of the County Law. The request involves "activity forms" submitted to the court by the attorney assigned to represent you, as well as records concerning the number of cases that were assigned to that attorney under Article 18-B during a specific time period. The request was made to the Westchester County Attorney.

In this regard, I offer the following comments.

First, it is noted that the County Attorney serves as the Freedom of Information Law appeals officer for Westchester County, and that requests generally 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 the agency's response to requests. I do not know which agency within Westchester County maintains the records in question or whether the County has designated an assigned counsel administrator. However, if the County Attorney cannot respond directly to your request, I believe that she should have forwarded it to the appropriate person.

Second, section 722(1) of the County Law provides in part that: "The governing body of each county...shall place in operation throughout the county a plan for providing counsel..." to certain persons under particular circumstances. Consequently, I believe that records maintained by a county agency concerning the implementation of the 18-B program would be 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.

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 and other details are in my view accessible under the Freedom of Information Law. Identifying details that might justifiably be deleted might involve the names of clients involved in family court proceedings, juveniles, or youthful offenders whose names would not otherwise be available to the public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marilyn J. Slaatten, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6818

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 9, 1991

Mr. William B. Corley
90-T-3141 G-1-26
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Corley:

I have received your letter of September 9 and the correspondence attached to it. You have raised a number of issues concerning requests for records of the Department of Correctional Services and the Division of Parole.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office has no power to compel an agency to grant or deny access to records.

Second, the federal Freedom of Information Act, 5 U.S.C. section 552, pertains only to records maintained by federal agencies. As such, it is inapplicable in the context of your requests.

Third, the Freedom of Information Law pertains to rights of access and an agency's authority to withhold records. That statute does not include any provision concerning the correction or expungement of records. It is noted, however, that there are provisions in the regulations promulgated by the Department of Correctional Services that enable inmates to challenge the accuracy of information contained in their personal history or correction supervision history portions of their files (see 7 NYCRR section 5.50 et seq.).

Fourth, those regulations also indicate that requests for records kept at a correctional facility should be made to the facility superintendent or his designee, and that requests for records kept at the Department's central offices in Albany may be directed to the Deputy Commissioner for Administration.

Fifth, since I am unfamiliar with the nature of the records sought or the effects of their disclosure, I cannot provide specific guidance concerning the extent to which they must be disclosed. I point out, 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.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6819

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 9, 1991

Mr. George W. Hill
[redacted]

Dear Mr. Hill:

I have received your letter of September 7 and the materials attached to it.

According to the correspondence, you requested from the Village of Hempstead summonses issued "to unregistered motor vehicles on private premises in violation of" a provision of the Village fire code. Although you did not include a copy of any denial, you wrote that the "request has not been honored".

Since making the request, you received a ticket for failing to wear a seat belt, and it is your belief that you and another driver were "singled out" because of your race. As such, you asked that this office "investigate whether minorities are receiving equal treatment under the law in the Village of Hempstead".

In this regard, the Committee on Open Government is authorized to advise with respect to public access to government records and meetings. This office has neither the jurisdiction nor the resources to engage in the kind of investigation that you requested.

Nevertheless, assuming that the records to which you referred could have been identified and retrieved by Village officials, I believe that the denial of your request was inappropriate.

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". While an allegation concerning an individual's conduct could in my view and under appropriate circumstances be withheld as an unwarranted invasion of personal privacy, a finding of a violation which indicates that an individual has failed to comply with law would in my opinion result in a permissible invasion of one's privacy.

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 or summonses indicates that a code violation has been found. I believe that such a finding would consist of "factual" information accessible under section 87(2)(g)(i) or a final agency determination accessible under section 87(2)(g)(iii).

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. 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 appropriately be asserted to withhold those records, and it is suggested that you renew your request.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the Village of Hempstead.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Phillip Steckler, Code Enforcement Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6826

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 9, 1991

Mr. James F. Mulvena
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mulvena:

I have received your letter of September 3.

In brief, in response to a request for records of the New York City Department of Finance on August 26, the receipt of the request was acknowledged, you were informed that you would be contacted "as soon as a decision has been made".

In my view, the acknowledgement of the receipt of your request should have included an estimate of the date when the request would be granted or denied. By way of background, 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.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerald S. Koszer, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6821

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 9, 1991

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 received your letter of September 11 in which you sought an advisory opinion relating to a response to a request made under the Freedom of Information Law.

The request, which was made on August 8, involved "the name, public office address, title and salary of every officer or employee of the Gloversville School District". The records access officer for the District acknowledged the receipt of the request on August 14 and wrote that "[y]our request is granted to the extent that such records exist...This process should take approximately three weeks".

In this regard, I offer the following comments.

First, in terms of rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, with certain exceptions, the Freedom of Information Law is does not require an agency 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 information in question is included among the records required to be created pursuant to "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, a payroll record that identifies all Authority officers or employees by name, public office address, title and salary must be prepared and maintained by an agency, presumably on an ongoing basis, to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, I believe that the information sought must be "maintained" pursuant to section 87(3)(b) of the Freedom of Information Law and that it must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Donald J. Lomanto, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6822

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 9, 1991

Mr. Kirkland E. Smith
83-A-4548
Clinton Correctional Facility
P.O. Box 2001 (MAIN)
Dannemora, NY 12929-2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Smith:

I have received your letter of September 8 in which you requested an advisory opinion concerning the Freedom of Information Law.

As I understand the situation, you requested certain records from the Department of Correctional Services and specifically asked to inspect those records. Nevertheless, in response to the request you were informed that copies would be made upon payment of a fee. You asked whether you may "inspect files contained in the facility before copying is done".

In this regard, section 87(2) of the Freedom of Information Law provides that accessible records must be made available for inspection and copying. If an applicant seeks photocopies of accessible records, section 89(3) requires that photocopies be made upon payment of the requisite fee.

Assuming that the records sought are accessible under the Law in their entirety, I believe that you may inspect them, at no charge, "before copying is done".

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Rodney Moody
Anthony Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 6823

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 9, 1991

Mr. Christoper Byrne
Records Access Officer
Financial Information Services
Agency
111-8th Avenue
New York, NY 10011-5254

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Byrne:

I have received your letter of September 10 in which you raised a variety of questions concerning the Freedom of Information Law.

It appears that your inquiry may have been precipitated by a request that you excerpted as follows:

> "On behalf of a client, I am seeking information as to warrants issued by the City and not deposited by payees. I will furnish you with the numbers and dates of issue of the warrants as to wish we seek the names of the payees and, if available, their addresses."

You added that, in a telephone conversation with the requester, you were informed that the information would be used "to charge the payee a fee for informing them that the City owed them money and for collecting it for them".

You asked initially whether the request could be denied under either paragraphs (b) or (g) of section 87(2) of the Freedom of Information Law. In my view, section 87(2)(g) would not serve as a basis for denial. Although that provision authorizes the withholding of inter-agency or intra-agency materials, the ability to do so under that provision is dependent on the content of the materials. 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 [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. While the records in question constitute intra-agency materials, it appears that they would consist solely of factual data. If that is so, they would be available under section 87(2)(g)(i), unless some other basis for denial may be asserted.

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.

Nevertheless, I believe 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 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 another 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 sum, assuming that the records in question identify entities, commercial or otherwise, or perhaps persons acting in a business capacity, I do not believe that the provisions in the Freedom of Information Law concerning personal privacy would be relevant to a determination of rights of access.

While the Freedom of Information Law is clearly intended to ensure government accountability and to enable the public to be informed of the processes of government, I know of no judicial determination or provisions, other than those involving section 89(2)(b)(iii), that have resulted in restrictions upon the use of accessible records. It is clear in my view that the Freedom of Information Law is often used with a commercial or profit-making motive as the basis for a request. That motive alone, however, is in my opinion largely irrelevant to rights of access.

It is noted that legislation has been introduced to enable agencies to establish fees in certain circumstances, i.e., when records are unrelated to government accountability, based upon the commercial utility of the records (S.5968; A.7581).

You also raised the following unrelated question:

> "When the records sought are on our data base, but are not accessible in the normal course of our business, do we have to comply with the request? Particularly when we would have to write one or two special (one time only) computer programs to extract the requested information? Is it considered too onerous?"

In this regard, 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 a request exist, an agency would not be obliged to prepare records in response to the request.

It is emphasized, however, 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 [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

Your remaining question involves whether there are "sections in the law or cases where access is denied due to violations of internal accounting controls". In all honesty, I do not understand the question. If you would like to discuss it, I would be pleased 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6824

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 9, 1991

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 letter of September 9 and the correspondence attached to it.

Your inquiry relates to a response to a request by Rodney J. Jewett, Chief of Police of the Village of Johnson City. Chief Jewett indicated that you have had an opportunity to review various files, that you are not the subject of any investigation and that he has made every effort to accommodate you. He added, however, that "[t]he portions of the file that you were unable to view are unavailable under the guidelines of the FOI article 6 section 87; as you have been previously informed". You asked that I comment with respect to the statement quoted above.

In this regard, I offer the following remarks.

First, section 87 is the focal point of the Freedom of Information Law. In brief, that section deals with the responsibilities imposed upon agencies to grant access to records, and their ability to withhold records. The provision that deals directly with access is section 87(2), which requires that all records be disclosed, except those records or portions thereof that fall within the grounds for denial appearing in paragraphs (a) through (h) of section 87(2).

Second, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the Freedom of Information Law. Section 1401.2(b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor". Similarly, section 1401.7(b) of the regulations provides in relevant part that:

> "Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number."

Although the Chief denied access to certain records in writing, in my opinion, a citation of section 87 of the Freedom of Information Law, without more, does not represent an adequately stated reason for the denial. In addition, you were not informed of the right to appeal the denial.

Lastly, with respect to the right to appeal, section 89(4)(a) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Jewett
Hon. Donald Dutter, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6825

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 15, 1991

Mr. Jeffrey S. Laing
C.B.S., Inc.
524 W. 57th Street
New York, NY 10019

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Laing:

I have received your letter of September 12 and the materials attached to it.

You asked that this office review a determination rendered by the New York City Department of Investigation to withhold various portions of a closing memorandum concerning an investigation involving the Taxi and Limousine Commission. You enclosed copies of the determination of your appeal and the record that was made available, which includes a number of deletions.

In justifying the redaction of several paragraphs of the memorandum and certain other details, General Counsel to the Department wrote that:

> "The paragraphs of the closing memorandum which you are seeking are exempt from disclosure, pursuant to [section] 87(2)(e) of the Public Officers Law, as they were compiled for law enforcement purposes and, 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 and (iii) identify a confidential source or disclose confidential information relating to a criminal investigation.

> "In addition, the paragraphs of the closing memorandum which have been redacted are exempt from disclosure pursuant to Public Officers Law [section] 87(2)(g)(iii) since these paragraphs are inter-agency or intra-agency materials which are not final agency police or determinations.
>
> "Finally, the redacted paragraphs you seek are exempt from disclosure, pursuant to [section] 87(2)(b) of the Public Officers Law, since disclosure 'would constitute an unwarranted invasion of personal privacy'."

Since I am unaware of the content of the portions of the memorandum that were deleted, I cannot offer specific guidance. Nevertheless, 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.

The initial basis for withholding cited in the determination of your appeal, section 87(2)(e), permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The Department relied upon subparagraphs (i), (ii) and (iii). The end of the closing memorandum indicates that the Department would take "no further action" and it was recommended that the case be closed. It was also stated that "it is unlikely that any criminal allegation of forgery or the submission of a fraudulent document can be proved in court". Assuming that the case has

indeed been closed, it is doubtful in my view that subpargraphs (i) or (ii) of section 87(2)(e) would serve as appropriate bases for denial. At this juncture, presumably disclosure would neither interfere with an investigation, for the investigation has ended, nor deprive a person of a right to a fair trial, for there would appear to be no upcoming trial or other adjudication. With respect to reliance upon section 87(2)(e)(iii), it is unclear whether any "confidential sources" might have been given promises of confidentiality. In a case involving records maintained by the New York City Police Department relating to a sexual assault, it was held that:

> "NYPD has failed to meet its burden to establish that the material sought is exempt from disclosure. While NYPD has invoked a number of exemptions which might justify its failure to supply the requested information, it has failed to specify with particularity the basis for its refusal...
>
> "As to the concern for the privacy of the witnesses to the assault, NYPD has not alleged that anyone was promised confidentiality in exchange for his cooperation in the investigation so as to qualify as a 'confidential source' within the meaning of the statute (Public Officers Law [section] 87[2][e][iii]" [Cornell University v. City of New York Police Department, 153 AD 2d 515, 517 (1989); motion for leave to appeal denied, 72 NY 2d 707 (1990)].

As such, the extent to which that provision might properly have been asserted is uncertain.

The determination also cited section 87(2)(g) and states that that provision exempts from disclosure records which are "inter-agency or intra-agency materials which are not final agency policy or determinations". That description of section 87(2)(g) is incomplete, for there may be aspects of inter-agency or intra-agency materials that must be disclosed, even though they do not consist of final agency policies or determinations.

Specifically, 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, unless a different ground for denial could 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.

Further, the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, 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)].

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

The remaining ground for denial offered in the determination, section 87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". While I cannot offer specific guidance without knowledge of the nature of the deletions, it appears that several of the deletions pertain to a person who was struck by a taxi cab and who later initiated a lawsuit. Although the Freedom of Information Law does not apply to the courts and court records, those records are often available to the public under other statutes (see e.g., Judiciary Law, section 255). Assuming that court records identifying the plaintiff are public records, I do not believe that disclosure of the identity of that person in the memorandum would result in an unwarranted invasion of personal privacy. In short, if the identifying details are available in court records pertaining to the same event that is described in the memorandum, I do not believe that a denial of those details would be justifiable under 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

Robert J. Freeman
Executive Director

RJF:jm
cc: Steven M. Gold, General Counsel
John J. Kennedy, Assistant Commissioner and
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6826

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 15, 1991

Mr. Charles Jackson
87-A-8754 P-625
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Jackson:

I have received your letter of September 11 in which you sought assistance concerning the Freedom of Information Law.

You wrote that you submitted a request to the New York City Police Department. In response, the request was given a coded number, and you were informed that a determination would be made on or about August 27. You are concerned over the possibility that you will receive no further response.

In this regard, 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)].

For your information, the person designated to determine appeals by the Department is Susan R. Rosenberg, Assistant Commissioner.

You also asked for information concerning how to litigate under the Freedom of Information Law. It is suggested that you review the provisions of Article 78 of the Civil Practice Law and Rules and that you discuss the matter with your attorney.

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-6827

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 15, 1991

Mr. Lawrence E. McAllister
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McAllister:

I have received your postcard of September 18 in which you indicated that you have unsuccessfully attempted to obtain information concerning the "financial affairs" of the Town of North Hempstead.

You asked how you may "compel the Supervisor to share these facts" with you. In this regard, I offer the following comments.

First, the nature or scope of the information in which you are interested is, on the basis of your remarks, unclear. However, I point out that the Freedom of Information Law pertains to existing agency records. Section 89(3) of that statute states in part that an agency is not required to create or prepare a record in response to a request.

Second, section 89(3) of the Freedom of Information Law also 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 in which you are interested. Further, a request should 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.

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 appear-

ing in section 87(2)(a) through (i) of the Law. As a general matter, books of account, bills, vouchers, contracts and similar records concerning revenues and expenditures should be made public.

Lastly, 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)].

Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law in detail and may be useful to you.

I hope that I have been of some assistance. Should any 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-6828

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 15, 1991

Ms. Evelyn Armistead
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Armistead:

I have received your letter of September 12 in which you requested assistance.

You wrote that you are attempting to obtain birth records concerning relations who were born in New York City in 1952.

In this regard, section 4173(2) of the Public Health Law provides in part that birth records "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."

With respect to births occurring in New York City, birth records are maintained by the New York City Department of Health, Bureau of Vital Records, 125 Worth Street, New York, NY 10013. To obtain additional information on the subject, including information concerning the fee for copies, it is suggested that you call (212) 619-4530.

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-6829

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 15, 1991

Mr. Andrew Barretta
President and Chief Operating
Officer
Barretta Research Service Corp.
12 Richard Street
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. Barretta:

I have received your letter of September 10 in which you complained with respect to the "astronomical" fees assessed by certain municipalities for the search and copying of certain records, particularly certificates of occupancy.

The materials attached to your letter indicate that you are familiar with several opinions rendered by this office in the past. Nevertheless, I offer the following comments.

First, as you are aware, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy up to nine by fourteen inches, unless a statute other than the Freedom of Information Law authorizes the assessment of a different fee. A "statute" is an enactment of the State Legislature. Therefore, a fee inconsistent with the Freedom of Information Law that is established by policy, ordinance or local law, for example, would be void insofar as there is an inconsistency. I point out that it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so in conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Second, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be 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."

The regulations promulgated by the Committee state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute.

Further, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Lastly, it is emphasized that the preceding comments pertain to existing records maintained by agencies. Insofar as your comments involve situations in which agencies create or prepare records, the Freedom of Information Law would not be applicable.

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-6830

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 15, 1991

Mr. Zell Boyd
(1-W)
Albany County Jail
840 Albany-Shaker Road
Albany, NY 12211

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Boyd:

I have received your letter of September 18 in which you wrote that requests made under the Freedom of Information Law for records of a court clerk have not been answered. You have sought assistance in the matter.

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."

As such, the Freedom of Information Law does not apply to the courts and court records.

The foregoing is noted intended to suggest that court records are confidential, for other provisions of law (see e.g., Judiciary Law, section 255) may grant substantial rights of access to court records. It is suggested that you resubmit your request under an appropriate provision of law pertaining to court records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6831

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 15, 1991

Mr. Maurice Ingram
89-T-1705
Attica Correctional Facility
Attica, NY 14011-0149

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ingram:

I have received your letter of September 16 in which you sought assistance.

Having requested records from the Office of the New York County District Attorney, you apparently had previously received certain records, and in an appeal, you requested an additional record. The appeals officer, Mr. Irving B. Hirsch, wrote that the request for that record would be treated as a new request. As of the date of your letter to this office, you had received no further response. The record sought is a "corroborating affidavit".

In this regard, I offer the following comments.

First, since that affidavit was apparently not sought in your initial request, I believe that Mr. Hirsch acted appropriately in considering that aspect of your appeal as a new request.

Second, 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 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)].

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 record in question or the effects of its disclosure, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of the record.

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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Irving B. Hirsch, Assistant District Attorney
and Appeals Officer
Ms. O'Connor, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1986
FOIL-AO-6832

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 16, 1991

Ms. Gloria Quinones
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Quinones:

I have received your letter of September 17, which reached this office on September 23.

In your capacity as a member of the Copiague Union Free School District Board of Education, you raised a series of questions concerning minutes of executive sessions and "personal note taking". Specifically, you wrote that:

> "Althrough [sic] Executive Session, and up until the conclusion, our Director of Personnel takes verbatim personal notes. Meanwhile, our District Clerk (who has been appointed by the Board to document the official proceedings of the meetings by recording the minutes), has been specifically directed by the Superintendent, not to take minutes during Executive Session, unless mandated by legal requirements."

You asked whether, in my view, the Board should prepare "official" minutes of its executive sessions, whether the verbatim notes prepared by the director of personnel become the official Board minutes, whether the notes must be made available under the Freedom of Information Law, and how you and other members can "stop this irksome practice".

In this regard, I offer the following comments.

First, section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies and 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.

Since I am not familiar with each of the provisions of the Education Law and other statutes that relate to the functions of a school board, I cannot specify each situation in which a school board may vote during an executive session. However, the following situations are, in my opinion, most common. One involves a so-called 3020-a proceeding in which a board must vote in executive session to determine whether charges should be filed with respect to a tenured employee. The other generally pertains to situations involving particular students, for certain federal Acts prohibit the disclosure of information identifiable to students without the consent of the parents [see e.g., the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g]. Therefore, if, for instance, disciplinary action is taken concerning a particular student, I believe that a vote may be taken behind closed doors. Similarly, in situations in which the vote may identify a handicapped student, I believe that, due to requirements of federal law, a vote should occur in private. While there may be other situations in which a vote may be taken in an executive session of which I am not aware, those described above are in my opinion the situations that arise most frequently in which a board of education may vote during a closed session.

Based upon the foregoing, the Board in my opinion would be required to prepare minutes of executive sessions only in rare situations. Further, I do not believe that the notes taken by the director of personnel could be characterized as the Board's official minutes.

Second, the Freedom of Information Law pertains to all 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."

As such, I believe that notes taken by a school district official, presumably in the performance of his or her official duties, would constitute "records" subject to rights conferred by the Freedom of Information Law. This is not intended to suggest that the notes would necessarily be public, for the Freedom of Information Law includes several grounds for withholding records that may be relevant here.

In brief, the Freedom of Information Law Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Again, there may be several grounds for denial that could be asserted to withhold the notes or portions of the notes. 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 notes 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 that kind of situation, the notes would be specifically exempted from disclosure by statute and deniable under section 87(2)(a) of the Freedom of Information Law. In other situations, although disclosure of notes 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, as in a case where disclosure of a board's strategy in collective bargaining negotiations would place a board at a disadvantage in ensuing negotiations. In that case, notes could likely be withheld under section 87(2)(c) of the Freedom of Information Law. A disclosure of the placement of security devices might enable evasion of law enforcement [see Freedom of Information Law, section 87(2)(e)] or endanger life or safety [see section 87(2)(f)]. 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 that situation, records might justifiably be withheld as an unwarranted invasion of personal privacy under section 87(2)(b) or as intra-agency materials under section 87(2)(g). In short, I believe that there may be a variety of valid reasons for denying access to notes of executive sessions. Nevertheless, but perhaps more importantly, even though notes might properly be withheld if requested under the Freedom of Information Law, they may be subject to disclosure in a litigation context by means of discovery proceedings or subpoena.

Lastly, section 1709 of the Education Law authorizes a board of education to adopt reasonable rules to govern its proceedings. In conjunction with your final question, the Board could likely adopt a rule limiting or specifying the capacity to take notes during executive sessions.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6833

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 17, 1991

Mr. Dayle Wheelock
89-C-1224 B-1-01
Collins Correctional Facility
Helmuth, NY 14079

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wheelock:

I have received your letter in which you sought assistance in obtaining records from Department of Social Services' child abuse and maltreatment registry.

In this regard, although your correspondence indicates that you requested certain records under the Freedom of Information Law, that statute in my opinion would not be applicable, nor would it serve as the basis for which the records sought might be disclosed 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.

Relevant in this instance is section 87(2)(a) of the Law, which 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 in 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 record 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 data that would identify the person who made the report or who cooperated in a subsequent investigation, which he reasonably finds will be detrimental to the safety or interests of such person."

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.

It is suggested that you continue to contact the Department of Social Services, perhaps citing the appropriate provisions of the Social Services Law in your request.

I regret that I cannot be of more significant 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-6834

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 17, 1991

Mr. Scott W. Grady
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Grady:

I have received your letter of September 21, as well as the correspondence attached to it.

According to your letter, you attended a public hearing in the Town of Wilmington during which it was stated that certain documents that you had previously requested "do in fact exist although they may not be filed with the town". It is your view that "it is the Town's responsibility to ensure the documents are on file and make them available".

You have sought my opinion on the matter. In this regard, I offer the following comments.

First, whether a document has been officially "filed" with an agency may not be relevant with respect to rights of access to the document. 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 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, the Freedom of Information Law includes within its scope not only those records that are "filed" with an agency, but also those that are "produced or reproduced by, with or for an agency". Therefore, if a record is prepared for an agency, I believe that it would fall within the requirements of the Freedom of Information Law, even though it may not be in the physical possession of the Town or its clerk. For example, if an agency retains a consultant to prepare a report that is main- tained by the consultant or if the Town has entered into a contract kept at the private office of its attorney, those documents would in my view constitute agency records subject to rights conferred by the Freedom of Information Law despite their physical location, and an agency would be required to obtain and/or disclose them to the extent required by law. It is also noted that section 30(1) of the Town Law states in part that the town clerk is the legal custodian of all town 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.

As you requested, enclosed is a brochure that describes the Freedom of Information Law in detail.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Judy A. Bowen, Town Clerk

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6835

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 17, 1991

Mr. Daniel Lynch
82-A-6183
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Lynch:

I have received your letter of September 8. Please accept my apologies for the delay in response.

You have complained that neither a request nor an appeal made under the Freedom of Information Law for records of the Office of the New York County District Attorney has been answered.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in 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)].

In an effort to assist you, a copy of this letter will be forwarded to Mr. Hirsch, the agency's appeals officer.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Irving Hirsch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6836

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 18, 1991

Don B. Winship, Chairman
Cattaraugus County Legislature
303 Court Street
Little Valley, NY 14755

The staff of the Committee on 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 Winship:

I have received and appreciate your letter of September 25 and the materials attached to it, which consist of copies of appeals and your determination of those appeals.

In one of the appeals, you affirmed a request for records indicating "taxable mileage income for employees who are assigned county vehicles (records maintained by Personnel Department) 1989 & 1990 tax years". In the affirmance, you wrote that:

> "The information which you are requesting consists of inter-agency or intra-agency materials which are neither statistical or factual tabulations or data, nor instructions to staff that affect the public, as described in Section 87 of the Public Officers Law. In addition, release of that information would constitute an invasion of personal privacy under Section 89 of the Public Officers Law."

For the following reasons, I respectfully disagree with the denial.

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 ground 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." Additionally, section 89(2) includes a series of examples of unwarranted invasions 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, for example, the information sought is maintained on W-2 forms or similar records, portions of those records could justifiably be withheld as an unwarranted invasion of personal privacy (i.e., social security numbers, home addresses). However, those portions identifying a public employee and that person's gross pay, would, in my opinion, be accessible, for those items are clearly relevant to the performance of one's officials duties.

Further, records related to those in question are in my view clearly available. One of the few instances in the Freedom of Information Law in which an agency is required to prepare 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..."

Further, even prior to the enactment of the Freedom of Information Law, payroll records were found to be available, for it was held that those records:

> "...represent important fiscal as well as operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

While the records in question are not salary records per se, I believe that they are related to them and that records reflective of payments made to public employees are accessible.

Second, while the records may be characterized as "intra-agency materials", I believe that they would consist of factual information available under section 87(2)(g)(i), for they indicate the amounts of monies paid to certain public employees.

Lastly, in a decision cited earlier that was rendered by the Court of Appeals, the State's highest court, it was 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]" [Capital Newspapers, supra, 67 NY 2d 565-566].

In short, I believe that insofar as records maintained by the County indicate payments to County employees, they must be disclosed.

If you would like to discuss the matter, please feel free to contact me. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Larry Mack

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1989
FOIL-AO-6837

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 18, 1991

Mr. Kevin T. Dowd
Drake, Sommers, Loeb, Tarshis
& Catania, P.C.
One Corwin Court
P.O. Box 1479
Newburgh, NY 12550

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dowd:

I have received your letter of September 23 in which you requested an advisory opinion concerning "the voting procedures for a Town Board of Assessment Review".

Specifically, the issue is "whether the Board of Assessment Review is subject to the provisions of the Freedom of Information (Section 87(3)(a)) and the Open Meetings Law (Section 106) with regard to publicly recording the vote of the Board and each of its members thereof on all matters decided by it."

In this regard, I offer the following comments.

First, I believe that a board of assessment review clearly constitutes a "public body" as defined by section 102(2) of the Open Meetings Law and an "agency" as defined by section 86(3) of the Freedom of Information Law.

Second, while meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to section 108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409, 418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

Third, as you suggested, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, section 106(1) of the Open Meetings Law states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Further, since its enactment, the Freedom of Information Law has contained a related requirement in section 87(3). The provision states in part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

In my opinion, because an assessment board of review is a "public body" and an "agency", it is required to prepare minutes in accordance with section 106 of the Open Meetings Law, including a record of votes in conjunction with section 87(3)(a) of the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6838

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 21, 1991

Mr. Louis T. Oster
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Oster:

I have received your letter and the materials attached to it.

As I understand the situation, you requested bids and related correspondence submitted by bidders to the City of Syracuse. The bid opening, according to your letter, occurred on July 9. In response to the request, you were informed that you could review the bids, but that "letters received by the City during a bid process" would be withheld.

You have sought my opinion concerning the propriety of the denial of your request for those letters. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and section 86(4) of the Law defines the term "record" broadly to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the foregoing, bids as well as any letters or other documentation submitted to the City by bidders would in my view 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.

In my view, two of the grounds for denial are relevant to the issue of rights of access. One of those in my opinion could not be justified; the other may be applicable to portions of the records, depending upon their contents.

Specifically, section 87(2)(c) of the Freedom of Information Law 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 the context of the facts that you presented, if, for example, an agency seeking bids receives a number of bids and related records, but the deadline for their submission has not been reached, premature disclosure of the records 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 other records 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)]. In this instance, the dead-

line for submission of bids occurred several months ago, and the bids have been made available. From my perspective, the same principles would apply to letters or other documentation submitted by bidders, i.e., that section 87(2)(c) would not at this juncture serve as a justifiable basis for withholding those records.

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 records pertain 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 records could be used to ascertain the value of an entity's property or involves significant financial information, it might be contended that certain aspects of the records 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 opinion, 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 hope that I have 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 Finkelstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6839

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 21, 1991

Mr. Anthony Cisco
81-A-0128
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cisco:

I have received your letter of October 1 in which you raised questions concerning records maintained by the Suffolk County Clerk's office.

According to your letter, the Clerk maintains a file on all court cases and has in the past been cooperative in disclosing records. However, apparently a new policy has been initiated that has resulted in "a denial of selected documents/records in the file, with the reply 'Obtain from your attorney'." Your question is whether the Clerk's files are subject to requests made under the Freedom of Information Law. You also asked whether records "sent from the Court file and now a part of the County Clerk's File [are] subject to FOIL".

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to records of an agency, and the term "agency" is defined in section 86(3) of that statute to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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.

Second, county clerks perform functions as clerks of courts (see Civil Practice Law and Rules, section 8020) and "other than as clerks of court" (see Civil Practice Law and Rules, section 8021). Therefore, I believe that some records of county clerks may be considered court records, while others are not. Both of the cited provisions pertain to services performed and the fees that may be charged for carrying out those activities. For example, the introductory language of section 8020 states that:

> "Whenever a county clerk renders a service in his capacity as clerk of the supreme or a county court, in an action pending in such court, he is entitled to fees specified in this section, payable in advance..."

Similarly, section 8021 states in its introduction that:

> "Whenever a county clerk renders a service other than in his capacity as a clerk of the supreme court or a county clerk, or other than in an action pending in a court of which he is clerk, he is entitled to the fees specified in this section, payable in advance."

As such, in some instances, clerks' records may be maintained in a capacity as clerk of a court; in others, they would not be maintained in that capacity and, therefore, would appear to be subject to the Freedom of Information Law. I point out that in either case, the fees for copies would be governed by sections 8020 and 8021 of the Civil Practice Law and Rules, rather than the Freedom of Information Law. Under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute".

Second, as a general matter, I believe that agency officials or county clerks must disclose accessible records when an applicant pays the appropriate fees. I point out, however, that it has been held that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee (see, Public Officers Law [section] 87; Sheehan v City of Syracuse, 137 Misc 2d 438), unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions [Moore v. Santucci, 151 AD 2d 677, 678 (1989)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6840

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 22, 1991

Mr. Lawrence Pelky
[redacted]

The staff of the Committee 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. Pelky:

I have received your letter of September 25, as well as the correspondence attached to it.

You wrote that the East Greenbush School District "has not been able to comply with [your] request for a copy of the new contract between the East Greenbush board and the teachers". In response to your request for the contract, the District's records access officer wrote that the document in question "does not exist at this time", and that "[t]he date when it will exist is not yet known". You have sought advice concerning the course of action to be followed to obtain the contract.

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Law states in part that an agency is not required to create or prepare a record in response to a request. In the context of your inquiry, if the contract does not yet exist, there is no contract that can be disclosed. When the parties enter into a contractual agreement, I believe that it will clearly be accessible.

Under the circumstances, it is suggested that you contact the records access officer periodically in an effort to ascertain whether a contractual agreement has been consummated.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donn F. Dykstra, Public Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6841

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 22, 1991

Mr. William Schroeder
[redacted]

The staff of the Committee 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. Schroeder:

As you are aware, I have received your letters of September 26 and October 16, as well as related materials.

Your initial area of inquiry involves a request made on August 1 to Anna Marie Mascolo, Counsel to Nassau Community College, for the "dollar value for each...recipients of sabbaticals". Ms. Mascolo responded on August 8 and wrote that "the college does not keep the information in the form as requested". You then appealed to Sean A. Fanelli, President of the College. In his response, Dr. Fanelli wrote that the College neither maintains nor is required to maintain the information sought in the form in which you requested it. Nevertheless, he decided that the information would be compiled on your behalf and indicated that it would likely be available some time after the start of the new semester.

It is your view that the responses by officials of the College are "in perfect keeping with its established penchant for secrecy", and you contend that the information should have been made available on a more timely basis.

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Further, section 89(3) states in part that "[n]othing 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...". As such, an agency, such as Nassau Community College, is not required to create a record in response to a request. On the basis of Dr. Fanelli's statement, it appears that the information sought does not exist in the form of a record or records, and that, in order to prepare the information in

question, new records must be compiled from various sources to satisfy your request. If that is so, the act of preparing records or information on your behalf would in my view represent steps that are not required to be taken, and the College officials are acting above and beyond the requirements of the Freedom of Information Law. While the Freedom of Information Law imposes certain time constraints with respect to determining to grant or deny access to existing records, those constraints, in my opinion, do not apply when an agency agrees to prepare records. Again, in such a case, the agency would be performing duties in excess of those required by the Freedom of Information Law. In short, while you may believe that the information sought is not being provided in a timely manner, as I understand the situation, your request involves the preparation of material that is not maintained by the College. Therefore, the provisions in the Freedom of Information Law concerning time limits for responding to requests and appeals are, in my view, inapplicable.

The second issue involves a request to the College to inspect a tentative agreement between the Nassau Community College Federation of Teachers and the College. Ms. Mascolo denied the request under section 87(2)(c) of the Freedom of Information Law and wrote that "[a]n agency may deny access to those documents when such access would have the effect of impairing the progress of the deliberations of the collective negotiations process".

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records when disclosure would "impair present or imminent contract awards or collective bargaining negotiations". As I understand your comments, it is your view that once a tentative agreement has been reached, the negotiations have ended and, therefore, the record should be disclosed.

I would agree with your contention in many circumstances, for when the parties reach a tentative accord, the negotiation process may indeed have ended. However, in this instance, I believe that the process of reaching an agreement involves several steps, and that the final step goes beyond the College and the collective bargaining unit, for the tentative agreement must be reviewed and finally approved by the County Board of Supervisors. It is assumed that the Board of Supervisors has the authority to reject the tentative agreement. If that is so, presumably it could return the tentative agreement to the negotiating parties for the purpose of engaging in further negotiations and modifying the contents of that document. Due to the additional steps that might be necessary, I do not believe that the reaching of a tentative agreement by the College and the Federation of Teachers necessarily signifies the end of the negotiating

process. If disclosure would "impair" the collective negotiation process, the tentative agreement could justifiably be withheld. On the other hand, if disclosure would have no adverse impact upon the process of reaching an agreement, I would agree that the tentative agreement should be disclosed.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Sean Fanelli
Anna Maria Mascolo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6842

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 22, 1991

Mr. Terence J. Murphy
88-A-2495
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. Murphy:

I have received your letter of September 29, as well as the correspondence attached to it.

According to your letter, you sought records from the Westchester County District Attorney's office which were denied on the ground that they constitute "court records". A copy the determination of your appeal, which was received by this office, states that: "[t]he Office of the District Attorney is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession because these transcripts are court records, not agency records". The denial cited several decisions, including Moore v. Santucci, which contains language essentially the same as that quoted above [151 AD 2d 677, 680 (1989)]. Nevertheless, you wrote that the transcripts in question are not on file with the County Clerk. You added that the records are not minutes of a suppression hearing or trial but rather of a "pre-indictment plea negotiation conference".

You have requested an advisory opinion 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 that statute defines the term "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

> including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

As such, if the documentation in question is kept by the Office of the District Attorney, it would appear to constitute an agency record.

Second, based upon your description of the documentation, it did not involve statements made during a suppression hearing or a trial. Rather, it appears to pertain to statements made between you and/or your attorney and the prosecution. If that is so, it is unlikely in my view that it could be characterized as a court record.

Third, if the documentation is not maintained by a court, but rather by the Office of the District Attorney, I believe that it would be subject to rights conferred by the Freedom of Information Law. I point out that in Moore v. Santucci, it was also stated that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee (see, Public Officers Law [section] 87; Sheehan v City of Syracuse, 137 Misc 2d 438), unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions [Moore v. Santucci, 151 AD 2d 677, 678 (1989)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marilyn J. Slaatten

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6843

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 22, 1991

Mr. Wayne M. Hudson
90-B-3185
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hudson:

I have received your letter of October 2 in which you requested assistance.

According to the correspondence attached to your letter, you submitted requests for various records to the Buffalo Police Department and the Office of the Erie County District Attorney. As of the date of your letter to this office, the records sought had apparently been neither granted nor denied.

In this regard, I offer the following comments.

First, 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)].

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 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.

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 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, 151 AD 2d 677, 679 (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.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Ralph V. Degenhart, Commissioner
Hon. Kevin Dillon, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6844

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 23, 1991

Mr. Jeremy Weir Alderson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Alderson:

I have received your letter of October 3 in which you requested a "judgment" concerning a partial denial of a request for records of the Division for Youth (DFY).

One aspect of your request, according to a response to the request by Counsel to the Division, involved "...any complaints filed against Schuyler County for its handling of DFY cases during the period from 1986 through the present". The request was denied pursuant to section 89(2) of the Freedom of Information Law. Following your appeal, the Director of DFY, cited sections 87(2) and 89(2), stating that "this request is denied as it would violate personal privacy and confidentiality". He also suggested that the record "may pertain to Schuyler County's handling of a particular youth's case".

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office cannot render a "judgment" that could be considered binding.

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 may contain accessible and deniable information, and that an agency is obliged to review records sought in their entirety to determine the extent, if any, to which records may justifiably be withheld.

Third, if the records sought pertain to or identify particular youths, section 87(2)(a) of the Freedom of Information Law, the initial ground for denial, may be relevant. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute 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 was advised some time ago that references to the "department" have been construed to include 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. Further, if section 372 is applicable, I believe that the records would be exempted from disclosure in their entirety, for it has been held that in a situation in which a statute exempts a class of records, an agency has neither the duty not the authority to delete identifying details and disclose the remainder of the records [see Short v. Board of Managers of Nassau County Medical Center, 57 NY 2d 399 (1982)].

If section 372 of the Social Services Law is inapplicable and the records are not exempted from disclosure by statute, I believe that the remaining provisions of the Freedom of Information Law would apply. Relevant is section 87(2)(b), 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 of this article". Section 89(2) includes examples of unwarranted invasions of personal privacy and authorizes agencies to delete identifying details to protect against an unwarranted invasion of personal privacy. Moreover, section 89(2)(c)(i) states that, unless a different ground for denial applies, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted. Assuming that neither section 372 nor any other statute would serve to exempt the records from disclosure, I believe that the records would be available following the deletion of identifying details to protect against privacy.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Leonard G. Dunston
William F. Pelgrin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6845

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 23, 1991

Mr. T. Walter Murphy
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Murphy:

I have received your letter of September 16, which did not reach this office until October 7.

Since the request to which you referred was also made on September 16, I contacted the Department of Correctional Services to attempt to ascertain its status and was informed that the Department never received the request. In accordance with the ensuing comments, it is suggested that you resubmit your request to:

Mark Shepard, Records Access Officer
NYS Department of Correctional Services
Correctional Services Building
State Campus
Albany, New York 12226

Your request involves "Facility Change Notices" and "Superior Court Information Sentence and Commitment papers for certain former and present inmates". Having discussed those terms with an attorney for the Department, I was informed that the Department does not maintain records characterized as "facilty change notices". It does, however, maintain facility change sheets, which indicate movements of inmates, i.e., to different facilities, to hospitals, etc. I was also informed that those records are accessible. Similarly, the Department does not maintain "Superior Court Information Sentence and Commitment papers". There is no entity characterized as "superior court" in New York. While records indicating inmates' sentences are maintained and made available, the precise nature

of the records in which you are interested is unclear, and it is suggested that any further request more clearly describe the nature of the records in which you are interested.

Lastly, section 89(3) of the Freedom of Information Law requires 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 and identify 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, if, for example, facility change sheets are maintained chronologically and by facility, it appears that the request would reasonably describe the records. On the other hand, if they are maintained in some other manner, i.e., by inmate name, the agency might be unable to locate or retrieve the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6846

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 23, 1991

Mr. Carlo Huston
91-A-1506
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Huston:

I have received your letter of October 4 in which you wrote that you "have a problem, dealing with the Freedom of Information Law."

You indicated that you retained an attorney for your trial, but that you can no longer retain him. Having contacted the attorney several times in an effort to obtain his files concerning your case, you have received none of the materials.

In this regard, 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."

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government. It would not apply to records maintained by a private attorney or law firm.

It is suggested that you discuss the matter with a representative of Prisoners' Legal Services or legal aid group.

I regret that I cannot be of more significant assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6847

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 23, 1991

Mr. Nathan Baxter
90-C-1099
Wende Correctional Facility
3622 Wende Road
P.O. Box 1187
Alden, NY 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. Baxter:

I have received your letter of September 27, which reached this office on October 9.

Having requested medical records pertaining to yourself from the Medical Department of the Onondaga County Sheriff's Department, you were informed by the medical record administrator that those records are "confidential" and are exempted from disclosure under the Freedom of Information Law. Further, you were not given the name of the person to whom an appeal could be addressed.

You have requested assistance concerning the matter. In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to all agency records, including those maintained by a sheriff's department and its medical unit. 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 regard 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 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. On the other hand, insofar as those records pertain to you and consist of "statistical or factual tabulations or data", I believe that they would be available to you under section 87(2)(g)(i) the Freedom of Information Law.

Second, in 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. Therefore, to the extent that the records sought consist of medical records pertaining to you, section 18 of the Public Health Law would likely provide rights of access in excess of those conferred by the Freedom of Information Law.

Third, with respect to the right to appeal a denial, section 89(4)(a) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state 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" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch 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 the proceeding that the 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" [74 NY 2d 907, 909 (1989)].

In sum, an agency's records access officer has the duty individually or in that person's role of coordinating the response to a request of informing a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

Since I am unaware of the identity of the person to whom an appeal may be made, it is suggested that you appeal to the Sheriff. In the appeal, it is recommended that you ask that the appeal be forwarded to the appropriate person if the Sheriff does not determine appeals.

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.

In an effort to assist you, a copy of this letter will be forwarded to the medical record administrator.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Denise A. Harrington, RRA

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6848

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 23, 1991

Ms. Georgianna B. Ellett
Records Access Officer
Cohoes City School District
21 Page Avenue
Cohoes, NY 12047

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Ellett:

I have received your letter of October 8, as well as the correspondence attached to it.

In your capacity as records access officer for the Cohoes City School District, you asked that I review the correspondence and offer an opinion concerning the propriety of the procedure that you have implemented and to ensure that you are complying with law. Your interest in compliance is much appreciated.

The correspondence indicates that you received a request under the Freedom of Information Law on September 30. You acknowledged receipt of the request on October 3, stating that you would contact the applicant for the records when the records were copied, which "probably will not be until the later part of next week". On October 7, you responded by letter and enclosed a variety of records. In response to a different request made on September 29, you acknowledged the receipt of the request and stated that the record sought did not exist.

In this regard, I believe that the procedure reflected in the correspondence indicates that you acted in compliance with applicable provisions of law.

By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, section 87(1) requires the governing body of a public corporation, i.e., a board of education, to adopt rules and regulations consistent with the Law and the Committee's regulations.

Relevant to your inquiry is section 1401.2 of the regulations, which 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..."

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 request. In this instance, coordination in my opinion would have involved the steps that you took.

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..."

Once again, based upon a review of the correspondence, I believe that you acted appropriately in response to the request.

Lastly, as you may be 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 a record in response to a request, unless specific direction to the contrary is provided. Therefore, if, for example, a request is made for a list that does not exist, agency officials would not be obliged to create a list on behalf 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6849

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 24, 1991

Mr. Kenneth Boykin
90-A-3645
Bare Hill Correctional Facility
Cady Road
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. Boykin:

I have received your letter of October 4, which reached this office on October 15.

You complained that you have unsuccessfully attempted to obtain records, such as your correctional supervision history folder, an employee rule book, and records concerning your transfer, from the Department of Correctional Services. You also wrote that you are "trying to get access to court on a lawsuit...".

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 do not believe that assistance can be offered concerning gaining "access to a court".

Second, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law provide that requests for records kept at a facility should be made to the facility superintendent or his designee. If records are kept at the Department's central offices, requests may be made to the Deputy Commission for Administration.

Third, 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)].

For your information, the person designated to determine appeals at the Department 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. I point out that the Department's regulations specify that "personal history data" concerning an inmate is available to the inmate.

Of possible relevance to records relating to transfers 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 might have dealt with the kinds of records concerning transfers 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; 152 AD 2d 570 (1989)].

Insofar as the records sought are 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6850

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 24, 1991

Mr. Raphael Perez
89-A-0579 U-H-10-8
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Perez:

I have received your letter of October 1, which reached this office on October 10.

In response to a request for copies of your pre-sentence reports, you were informed by Rodney Moody, the inmate records coordinator at your facility, that the records are confidential. You have sought assistance in the matter.

In this regard, 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 of federal statute..." Relevant under the circumstances, is section 390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically

> required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of section 390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in section 390.50 of the Criminal Procedure Law. Further, Matter of Thomas, 131 AD 2d 488 (1987), in my view confirms that a pre-sentence report may be made available only by a court or pursuant to an order of the court.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Rodney Moody

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6851

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 24, 1991

Mr. Matthew Lee
Coordinator
Inner City Press Community on
the Move
P.O. Box 416
HUB Station
Bronx, NY 10455

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lee:

I have received your letter of October 8 as well as the materials attached to it.

Much of the documentation consists of requests and appeals made under the Freedom of Information Law to the New York City Department of Housing, Preservation and Development (HPD). You wrote that some of the outstanding requests were made as long ago as April, but that "HPD has just stopped responding...". You have asked that I write to HPD in an effort to enhance compliance with the Freedom of Information Law, and I will do so by forwarding copies of this letter to the records access and appeals officers.

It is noted at the outset that the Freedom of Information Law imposes certain responsibilities upon agencies. As stated by the Court of Appeals more than a decade ago: "Meeting the public's legitimate rights of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES. 48 NY 2d (1979)]. In another decision rendered by the State's highest court describing the intent and utility of the Law, it was stated 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]" [Capital Newspapers v. Burns, 67 NY 2d 562, 565-566 (1986)].

Further, the Freedom of Information Law provides direction concerning the time and manner in 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)].

Having reviewed the requests and appeals that you enclosed, I offer the following comments in an effort to clarify your understanding of the Freedom of Information Law.

First, in several instances, requests were made for "lists" or "listings" of certain information; similarly, in one request, you sought an "evaluation" of the status of a certain program. In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, if, for example, no list or evaluation exists, HPD would not be required to prepare new records on your behalf.

Second, several of the requests involve "any and all records" concerning certain of HPD's activities. Here I point out that section 89(3) 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. A request for "any and all records" may be so broad or vague that it does not meet the standard of reasonably describing the records.

Third, some of the records sought might justifiably be withheld. Although the Freedom of Information Law provides broad rights of access, there are various grounds for denial. Perhaps most relevant in the context of certain of the requests is section 87(2)(g). That provision enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that the foregoing will serve to enhance understanding of and compliance with the Freedom of Information Law.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Fiocca, Appeals Officer
Alfred Schmidt, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1992
FOIL-AO- 6852

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 24, 1991

Ms. Barbara J. Prinz
City Paralegal
City of Gloversville
City Hall
Gloversville, NY 12078

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Prinz:

I have received your letter of October 16 in which you requested an advisory opinion.

According to your letter, a member of the Gloversville City Council has requested "notes taken at an Executive Session which was called concerning a personnel matter". Due to the subject matter, you wrote that you are "reluctant to give those notes out, especially if they are going to be revealed to the public". You also expressed the belief that the Councilwoman is seeking the notes as an individual, rather than on behalf of or at the direction of the Council as a whole.

In this regard, I offer the following comments.

First, section 106 of the Open Meetings Law pertains to minutes of meetings. Subdivision (2) of that provision concerns minutes of executive sessions and states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

Based on the foregoing, it is clear that minutes need not consist of a verbatim or expansive account of what was said during or an executive session. If action is taken during an executive session, minutes reflective of the action, the date and the vote of the members must be prepared and made available to the extent required by the Freedom of Information Law. If no action is taken, there is no requirement that minutes of an executive session be prepared. Further, notes in my view could not be characterized as minutes. The notes in question would likely be more detailed or expansive than minutes would have to have been if action was taken.

Second, the Freedom of Information Law pertains to all 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."

As such, I believe that notes taken by a public official, presumably in the performance of his or her official duties, would constitute "records" subject to rights conferred by the Freedom of Information Law. This is not intended to suggest that the notes would necessarily be public, for the Freedom of Information Law includes several grounds for withholding records that may be relevant here.

In brief, the Freedom of Information Law Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 may be several grounds for denial that could be asserted to withhold the notes or portions of the notes. 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, and the notes might justifiably be withheld as an unwarranted invasion of personal privacy under section 87(2)(b) or as intra-agency materials under section 87(2)(g). In short, I believe that there may be valid reasons for denying access to notes of executive sessions under the Freedom of Information Law.

Third, neither the Freedom of Information Law nor any other statute of which I am aware deals specifically with the situation that you described in which a public officer, presumably acting alone, seeks records that might ordinarily be withheld from the public. In general, I believe that the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Viewing the matter from a technical perspective, one of the functions of a public body involves acting collectively, as an entity. The City Council, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of the total membership. In my view, in most instances, a Council member acting unilaterally, without the consent or approval of a majority of the total membership of the Council, has the same rights as those accorded to a member of the public, unless there is some additional right conferred upon a council member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1993
FOIL-AO-6853

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 28, 1991

Mr. Earl Van Wormer, III
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Van Wormer:

I have received your letter of October 15, which reached this office on October 15, as well as materials concerning activities of the Town of Esperance.

Several of the issues that your raised involved the "real truth" relating to the Town Board and the Supervisor, and you referred to an advisory opinion that I prepared at the request of the Supervisor on July 18. In this regard, and as indicated at the beginning of opinions drafted by this office, opinions are based upon information provided in conjunction with requests for opinions. My comments are prepared based upon an assumption of good faith and the accuracy of commentary on the part of those who seek opinions.

The first issue involves a situation in which letters were addressed to the Town Board, but in which you allege that the Supervisor chose that they not be distributed to some Board members. It is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. While the issue does not directly relate to those statutes, it is my view that correspondence addressed to the Town Board should be equally available to each member, unless the Board has adopted a rule or policy to the contrary.

A second issue involves insurance proposals that were initially presented to the Board at a meeting held on March 28. The minutes of that meeting state that the Board "will meet at a later date to decide which proposal will be fit (sic) the town needs". You wrote that no other regular meeting was held until April 25, "except the one at the Supervisor's home on April 15, 1991 which was neither publicized by advertising or posting and there are no minutes on record". The minutes of the meeting of

April 25 state that a bid from one of the insurance companies was accepted, and it is your view that action was taken "somewhere in between" the meetings of March 28 and April 25. You have asked whether the meeting of April 15 was "a legal meeting".

In this regard, the Open Meetings Law applies to meetings of public bodies, and it is emphasized that the courts have interpreted the term "meeting" expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to vote or take actions, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Court affirmed a decision rendered by the Appellate which dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also referred specifically to what might be described as preliminary gatherings, stating that:

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crys-

> tallization of secret decisions to a point just short of ceremonial acceptance'" (id. at 416).

In addition, in its consideration of the characterization of meetings as "informal," the court found that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id. at 415).

Based upon the foregoing, if a quorum of the Board met to discuss public business on April 15 or at another time, such a gathering in my view would have been subject to the Open Meetings Law.

Assuming that there was a meeting, I point out 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 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.

As an aside, although the Open Meetings Law does not specify where a public body must conduct its meetings. The Law does, however, provide direction concerning the site of meetings, for section 103(b) 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."

Whether the Supervisor's home or other location permits barrier-free access is unknown to me.

With respect to the other meetings to which you referred, again, any such meetings should have been preceded by notice. Further, with regard 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, minutes need not consist of a verbatim account of what was said at a meeting. Further, although minutes more expansive than those required by the Open Meetings Law may be prepared, 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 no action is taken, there is no requirement that minutes of an executive session be prepared. It is also noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement or whether the board member should submit the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181).

Responses to several of your questions are dependent upon the truth of the matters asserted. Since there appear to be conflicting versions of the facts, I could not advise with certainty as to the "legality" of meetings. For that reason, the preceding comments dealt largely with the requirements of the Open Meetings Law that apply generally to meetings of public bodies.

Lastly, you wrote that the Supervisor destroyed twelve letters addressed to the Town Board. In this regard, although tangential to the issue, the Freedom of Information Law pertains to all agency records. Section 86(4) of that statute 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, I believe that the letters constituted Town records.

Further, section 57.25(a) of the Arts and Cultural Affairs Law 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 within 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 am not familiar with the retention period applicable to the letters. However, I believe that a retention schedule applicable to town records may be obtained from the State Education Department, State Archives and Records Administration, Cultural Education center, Albany, NY 12230.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6854

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1991

Mr. Clive Thompson
77-A-3264
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Thompson:

I have received your letter of October 24 in which you requested from this office a "master index of all mail correspondence, which [was] addressed to [you] within the United States of America since ninety sixty six December until ninety ninety-one", copies "of correspondence addressed to you..." and "the master index of all mail correspondence addressed to [you] within the United States."

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. In short, the Committee cannot supply the information sought because it does not possess the information.

Second, there is no law of which I am aware that would require any agency, state or federal, to maintain the kinds of records that you described. Further, the phrase "master index" is used in the regulations promulgated by the Department of Correctional Services under 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. Moreover, a subject matter list is not prepared with respect to records pertaining to a

single individual; rather such a list is intended to be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested.

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-6855

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1991

Mr. Andrew Curro
91-A-0522
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Curro:

I have received your letters of October 5 and October 21 which respectively reached this office on October 15 and October 24.

Your correspondence pertains to requests for records directed to the New York City Police Department and the Office of the District Attorney of Kings County. Your request for Police Department records was made on July 13. Its receipt was acknowledged by letter on July 23 and it was indicated that a determination concerning the request would be made on or about September 3. As of the date of your letters to this office, you had received no further response, and you sought assistance in the matter.

By way of background, you wrote that your estranged brother testified against you as the main prosecution witness at your trial. At the time, he was in the care of the federal government, living under as assumed name in the federal witness protection program. You added that the prosecutor stated that your brother's rap sheet included all arrests, except those that occurred when he was a juvenile, and that he "did not get any deals". You were not provided with any federal cooperation agreement. Further, "[w]hen the prosecutor could not produce anyone to tell the same story" as your brother, he produced an inmate who had been housed in the same facility as you who "told a completely different story of how [you] allegedly committed the murder". That witness "maintained he told his story to FBI agents in 1982 and that he 'saw them writing things down'." It is your belief that the prosecutor possessed that witness's prior statements but "failed to turn them over to you or to your de-

fense counsel". You also wrote that two years after your trial, your brother testified in another trial, during which federal prosecutors revealed that he "had been arrested for sexual abuse of a fifteen year old girl and that they wrote a letter requesting leniency for him in regards to his sexual abuse arrest". Nevertheless, having read his testimony, neither you nor your counsel can ascertain when he was arrested. You indicated, however, that the arrest "occurred prior to his testimony in [your] trial as he testified in your trial on October 30, 1985."

You wrote that your problem is that you "have no way of obtaining this information from the Federal Government or the Brooklyn District Attorney's Office". Attached to your letter of October 21 is a response from the Office of the Kings County District Attorney indicating that the testimony of the witness reference earlier (the inmate) had been located, but that no federal cooperation agreement pertaining to your brother or any record of an arrest for sexual abuse could be found by that office. In addition to the records sought from the Police Department, you asked whether you would be entitled under the Freedom of Information Law to the "request for leniency and the cooperation agreements, along with the date of the arrest for the sexual abuse charge". You also asked that I intercede on your behalf, as those records must be inspected by a neutral party...".

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 to grant or deny access to records, nor is it empowered to obtain or review records for the purpose of making a determination.

Second, as you may be aware, the Freedom of Information Law pertains to existing records maintained by an agency. Therefore, insofar as records sought from the Office of the District Attorney do not exist or are not maintained by that agency, the Freedom of Information Law would not be applicable. Further, section 89(3) of the statute states in part that an agency need not create or prepare a record in response to a request.

Third, with respect to the Police Department's delay in responding to your request, 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)].

In what may have been a similar matter, a court provided guidance in 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

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.

With respect to the record of the arrest and related documentation, it is assumed that if there was such an arrest, it did not result in a conviction. If my assumption is accurate and if charges were dismissed, section 160.50 of the Criminal Procedure Law would likely be relevant. Under that provision, which

has been in effect in substance since 1977, when a criminal charge or proceeding has been dismissed in favor of an accused, an order is generally entered 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..." [Criminal Procedure Law, section 160.50(1)(c)].

When records are sealed pursuant to the provision quoted above, the Freedom of Information Law is inapplicable, for the first ground for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". Therefore, insofar as section 160.50 applies, the records would likely be sealed.

Since I am unfamiliar with the contents of the records in which you are 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 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. I point out that section 86(3) of the Freedom of Information Law defines the term "agency" to include entities of state and local government in New York. The FBI would not in my view constitute an "agency" for the purposes of the Freedom of Information Law.

Lastly, in a 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, 151 AD 2d 677, 679 (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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis J. Capasso, Records Access Officer
Margaret E. Mainusch, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6856

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1991

Mr. Mark A. Hall
90-A-5252
P.O. Box 2001
Dannemora, NY 12929-2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hall:

I have received your letter of October 7, which reached this office on October 16.

You have requested assistance concerning a request for records pertaining to your arrest from the Town of Guilderland Police Department. Although the request was made some time ago, as of the date of your letter to this office, you had received no response.

In this regard, I offer the following comments.

First, I have contacted the Town's records access officer, Ms. Jane Springer, who serves as Town Clerk. Ms. Springer indicated that she was unfamiliar with your request. It is suggested that you resubmit the request and that you send it directly to Ms. Springer, who assured me that an appropriate response would be given.

Second, for future reference, 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Jane Springer, Town Clerk
Chief James R. Murley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6857

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1991

Mr. Joseph J. Cerbone
Attorney at Law
84 Smith Avenue
P.O. Box 499
Mount Kisco, NY 10549

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cerbone:

I have received your letter of October 15 in which you raised questions concerning the Freedom of Information Law.

You wrote that, having reviewed the Freedom of Information Law, "it has come to [your] attention that waiting thirty (30) days to review files is reasonable". Since you have been waiting to see a file since June 12, you asked whether "this is considered reasonable".

In this regard, I point out that the only reference to thirty days in the Freedom of Information Law appears in section 89(4)(a), which provides that a person denied access to a record has thirty days in which to appeal. Further, the Freedom of Information Law provides direction concerning the time and manner in 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)].

In the context of your question, when the receipt of a request is acknowledged, the acknowledgement must include an estimate of the date when the request will be granted or denied, and that date, must in my view, be reasonable. If records sought can be readily located and if they are not voluminous, taking thirty days or longer to grant or deny the request would, in my opinion, be excessive and unreasonable.

You also asked whether you are entitled to see an "entire file" or whether a municipality is "entitled to remove certain items from the file without [your] knowledge".

With respect to the first part of the question, the content of the file determines the extent to which the file must be disclosed. 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. As such, I cannot effectively respond without knowledge of the nature and content of a "file". However, if any aspect of a file is "removed", the removal would constitute a denial of access of

which you must be informed. Under the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law, upon locating records, agency personnel must:

> "(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" [21 NYCRR 1401.2(b)].

Similarly, section 1401.7(b) of the regulations states in relevant part that:

> "Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number."

As you requested, enclosed is a copy of "Your Right to Know".

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-6858

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1991

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 October 15 and the correspondence attached to it.

Your inquiry concerns a request for computerized information maintained by the Suffolk County Health Department under its "toxic and hazardous materials storage and handling controls" program. There appears to be no question as to the public nature of the information, for the Department is willing to provide it, by means of printouts, for twenty-five cents per page. You indicated in your initial request of this year, which was made on February 27, that you would prefer to be provided with the data in "unlabeled ASCII format". However, you wrote that if the agency "is unwilling or unable to utilize that specific format", you would be "willing to accept the information in any format [the] agency may choose to use, so long as it is computerized" (emphasis yours).

In my view, if indeed the Department has the ability to provide the information in a format usable to you (i.e., digital), without special programming, it would be obliged to do so.

By way of background, 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, 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."

The Court of Appeals has construed the definition quoted above 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. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986)], and the definition specifically includes computer tapes and discs within its scope. Further, it was held more than a decade ago that "[i]nformation 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); Brownstone Publishers, Inc. v. New York City Department of Buildings, 560 NYS 2d 642, ___ AD 2d ___ (1990)].

As a general matter, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states that an agency need not create a record in response to a request. 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 or extracted 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 or transferring it to 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, be 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 or print out information that would otherwise be available.

It is noted that a recent decision cited earlier, Brownstone, supra, dealt with an agency's obligation to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division, First Department:

> "The files are maintained in a computer format that Brownstone can employ Brownstone can employ directly

into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1][b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.

"POL [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" (id. 642-643).

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 Sandstrom, Freedom of Information Officer
F. Thomas Boyle, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6859

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 29, 1991

Mr. G. Dupree
88-A-9843
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, 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. Dupree:

I have received your letter of October 16 in which you wrote that requests for records of the New York City Police Department were made on July 24 and August 1. As of the date of your letter to this office, however, the requests had neither been granted nor denied. You have requested assistance in the matter.

In this regard, 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)].

For your information, the person designated by the Department to determine appeals under the Freedom of Information Law is Susan R. Rosenberg, Assistant Commissioner.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis J. Capasso, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1996
FOIL-AO-6860

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 30, 1991

Mrs. Shirleymarie Sullivan Sheldon
[redacted]

The staff of the Committee on 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. Sheldon:

I have received your recent letter, which reached this office on October 21.

You have questioned whether the Open Meetings Law is applicable to "planning and environmental boards" in the same manner as that statute would apply to a town board. In addition, you sought clarification concerning access to minutes and tape recordings of meetings.

In this regard, I offer the following comments.

First, the Open Meetings Law pertains 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 opinion, in view of the authority conferred upon planning boards pursuant to Article 16 of the Town Law, it is clear that those boards are public bodies required to comply with the Open Meetings Law. I am unfamiliar with entities characterized as "environmental boards". However, section 239-y of the General Municipal Law authorizes a local legislative body, such as a town

board, to designate a "conservation board". Conservation boards perform a variety of functions pertaining to "open area" planning, conservation and development. If the environmental board to which you referred is a conservation board as described in section 239-y of the General Municipal Law, I believe that it would constitute a public body subject to the Open Meetings Law.

Second, section 106 of the Open Meetings Law pertains to minutes of meetings 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
>
> 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, 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.

I point out 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 one week or two weeks, as the case may be, and that if the minutes have been 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, although there is no requirement that meetings of public bodies be recorded, many public bodies do so, and the courts have held that any person may use a portable tape recorder at an open meeting of a public body [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1983)]. Further, 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."

Therefore, if tape recordings of open meetings are prepared by an agency, 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 would be 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].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: M. Calhoun, Supervisor
M. Warren, Chairman, Planning Board
G. Pietraszek, Chairman, Environmental Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6861

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 30, 1991

Mrs. Sondra Bauernfeind
[redacted]

The staff of the Committee 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 Mrs. Bauernfeind:

I have received your letter of October 13, which reached this office on October 21.

You enclosed a sample of a request under the Freedom of Information Law that is being sent to various local government officials. One of the items sought is a "data card - Residential, Farm and Vacant Land Property Record Card". You wrote that "this card shows all the pertinent information about the taxpayers' property such as number of rooms in a house, size of structure, type of heat, condition of basement, number of bathrooms, number of acres or lot size...". The others are a "Mass Appraisal Module R/F/V Cost Sheet showing the total value rounded (Land & Residence = & Structure)" and the "S-B-L site info sheet showing comparable properties."

You have asked for a "ruling...as to whether this information should be available to the property owner upon their request for information on their own property". 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 can neither compel an agency to grant or deny access to records, nor is it empowered to issue what could be characterized as a "ruling".

Second, with respect to "data cards", 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 year, 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]. Consequently, I believe that the data cards are available.

Third, I am unfamiliar with the other records to which you referred, the "Mass Appraisal Module R/F/V Cost Sheet" and the "S.B.L. site info sheet". Further, having contacted the Office of Counsel at the State Division of Equalization and Assessment, I was informed that staff is unfamiliar with records so characterized. As such, the kinds of records that you described may or may not exist and likely would not be maintained by every assessing agency. I point out, too, 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, insofar as records are not maintained by or for an agency, there would be no obligation to prepare records on behalf of an applicant.

It was suggested, however, that those records might be prepared or used independently by municipalities or perhaps by contractors retained by municipalities to engage in valuations of real property. In either of those circumstances, it appears that the records would constitute "intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law.

Of potential relevance concerning rights of access to any such records 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.

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).

Consequently, a record prepared by a consultant for an agency or by agency staff would constitute intra-agency material that would be accessible or deniable, in whole or in part, depending on its contents.

Without additional information concerning the nature of the latter two categories of records that are the subject of your inquiry, clear advice cannot be offered.

Lastly, you referred to a request for the information in question that had not been answered. In this regard, 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Town of Cochecton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6862

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1991

Mr. John J. Sheehan
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sheehan:

I have received your letter of October 15. In brief, you described a situation in which more than a month passed from the submission of a request for records of the City of Binghamton until you could anticipate receiving the records.

You asked whether I could provide assistance in an effort to "accelerate" the process by which records are made available. In this regard, I offer the following comments.

First, as you are aware, each agency must, according to regulations promulgated by the Committee on Open Government, designate 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.

Second, 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)].

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: City Clerk
David Dutko

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6863

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1991

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 19 in which you asked whether a request made under the Freedom of Information Law was validly denied.

According to your letter, the record requested was sent by an attorney at the request of the Chairman of the Town of Ticonderoga Zoning Board of Appeals to assist the Board in making a decision on a variance application. The Board used the recommendation to arrive at its decision. The records access officer denied the request and wrote that it is "confidential - attorney client privileged communication".

In this regard, 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.

From my perspective, two of the grounds for denial may be relevant to rights of access to the record in question.

The initial ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is section 4503 of the Civil Practice Law and Rules, which concerns communications made pursuant to an attorney-client relationship and confers confidentiality with respect to those communications under certain circumstances.

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 the record involves a request for legal advice from the Board's attorney, I believe that it 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 it has been 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; 131 AD 2d 806 (1988)].

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..."

If the letter from the attorney does not consist of any of the categories of information described in subparagraphs (i) through (iv) of section 87(2)(g), it appears that it could be withheld on the basis of section 87(2)(g) as well.

Lastly, you asked "what can be done other than an Article 78 to get the Town to respond to denials of FOI requests", and whether any legislation has been proposed to "force municipal governments" to comply with the Freedom of Information and Open Meetings Laws "that will relieve a citizen of the expense of filing Article 78...".

In this regard, an alternative to initiating Article 78 proceedings, one that you have used many times, involves seeking advice of the Committee on Open Government. While I am unaware of your experience, advisory opinions have been used many times to resolve disputes and enhance compliance with law. Further, the Committee will be recommending legislation to strengthen the enforcement provisions of the Open Meetings Law and to provide courts with broader discretion to award attorney's fees under both statutes. It is hoped that the enactment of the legislation will encourage compliance with the two laws.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Paula A. Buckman, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6864

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1991

Mr. Thomas Hoyer
85-B-1909
Great Meadow Correctional Facility
P.O. Box 51 F-1-15
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. Hoyer:

I have received your letter of October 21 in which you requested assistance in obtaining psychiatric records.

In this regard, the initial ground for denial 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 is section 33.13 of the Mental Hygiene Law. In brief, that provision exempts from public disclosure clinical records maintained by mental health facilities. Consequently, the Freedom of Information Law does not apply to those records.

However, section 33.16 of the Mental Hygiene Law grants rights of access, with certain exceptions, to mental health records maintained by mental health facilities to the subjects of those records. Further, with respect to fees, section 33.16(b)(5) states that:

> "The facility may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person shall not be denied access to the clinical record solely because of inability to pay."

You also asked for assistance concerning executive clemency. That is a subject beyond the jurisdiction or expertise of this office.

Enclosed as requested are copies of "Your Right to Know" and "You Should Know".

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1998
FOIL-AO-6865

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1991

Ms. Victoria E. Jones
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Jones:

I have received your letter of October 18 in which you raised a series of questions concerning tape recordings and minutes of meetings of public bodies.

You wrote that meetings of certain public bodies had been recorded, but that they are no longer recorded. In this regard, although there is no requirement that meetings of public bodies be recorded, many public bodies do so, and the courts have held that any person may use a portable tape recorder at an open meeting of a public body [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1983)]. As such, a member of the public or a public body may in my view tape record open meetings in whole or in part.

With respect to the contents of 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
>
> 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, 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.

I point out 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 one week or two weeks, as the case may be, and that if the minutes have been 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.

You also asked whether there are any requirements concerning "archiving the tapes". In this regard, although the Freedom of Information Law does not deal directly with the issue, that statute 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."

Therefore, if tape recordings of open meetings are prepared by an agency, I believe that they would constitute "records" subject to rights of access.

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 and 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 (3) 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. I believe that the schedule as it pertains to tape recordings of open meetings requires that those records must be retained for four months. Following the expiration of that period, I believe that they may be destroyed or erased and reused.

I hope that I have 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, Village of Dobbs Ferry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6866

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 31, 1991

Mr. Jim Kramer
[redacted]

Dear Mr. Kramer:

I have received your letter of October 29 in which you requested records and raised questions concerning access to records.

You wrote that the Aquatic Collaboration is conducting a "'pool outreach program' to facilitate compliance with applicable laws," and you asked this office provide "the named document from the agencies required to be 'currently maintained by that agency'."

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office does not maintain records generally, such as those in which you are interested. Further, the Committee is not 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. As a general matter, requests for records should be directed to the agencies that maintain the records sought.

You referred to provisions of federal law that require that certain agencies request information from specific bathing facilities. As such, you contend that if those agencies are complying with federal law, "those documents should be 'currently maintained'" and, "[i]f not, then [this] committee should find out why they are not in compliance."

In my view, if an agency maintains records, the records are subject to rights of access conferred by the Freedom of Information Law or other applicable laws. However, section 89(3) of the Freedom of Information Law states in part that:

> "Nothing in this article [the Freedom Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity..."

Therefore, if an agency does not maintain records, an agency has no obligation under the Freedom of Information Law to create or acquire them. While such an obligation may exist under other provisions of law, there is no such requirement under the Freedom of Information Law.

Lastly, as indicated earlier, the Committee on Open Government has no power to compel compliance with the Freedom of Information Law; clearly it has no authority to compel compliance with or investigate with respect to other laws that fall beyond both its jurisdiction and its expertise.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and 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

FOIL-AO-6867

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 14, 1991

Mr. James B. Pier
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pier:

I have received your letter and various related documentation from Assemblyman James N. Tedisco concerning your request for records of the Office of Mental Retardation and Developmental Disabilities (OMRDD). Assemblyman Tedisco asked whether I could assist you in obtaining the documentation.

By way of background, it is my understanding the Attorney General received a complaint that the Town of Niskayuna Board of Assessment Review reduced the assessed value of certain residences in the vicinity of a community home for developmentally disabled persons. Thereafter, you requested correspondence between OMRDD, the Attorney General's office and other entities. Although some of the records sought were apparently made available, OMRDD denied access to "letters and memoranda written from one state or municipal agency to another or written by and to staff within the same agency". That correspondence was "characterized as discussion and deliberation" and was denied pursuant to section 87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, I point out that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office is not empowered to compel an agency to grant or deny access to records.

Second, the Freedom of Information Law 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 Department of Law (the Attorney General's office), OMRDD, the Town of Niskayuna and its Board of Assessment Review constitute "agencies".

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.

Relevant under the circumstances is the provision cited in the letter of denial, section 87(2)(g), which permits an agency to deny access to records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of the deliberative process, such as opinion, advice, recommendation and the like could in my view be withheld.

While I am unfamiliar with the contents of the records in question, it is clear in my view that they consist of inter-agency and intra-agency materials. Further, I believe that the denial was proper insofar as the records do not consist of the kinds of information described in subparagraphs (i) through (iv) of section 87(2)(g).

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: Hon. James N. Tedisco
Paul R. Kietzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6868

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 20, 1991

Mr. Nathaniel Kelly
86-A-4227
P.O. Box 149
Attica, NY 14011

Dear Mr. Kelly:

I have received your letter of November 7 in which you appealed a denial of access to records to this office.

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. The provisions dealing with 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."

Further, since it appears that your request was made to a private attorney, I point out that the Freedom of Information Law is applicable to agency records. 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, as a general matter, the Freedom of Information Law pertains to records maintained by or for entities of state and local government.

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

FOIL-AO-6869

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 20, 1991

Mr. Daniel S. Klein
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Klein:

Your letter of October 31 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State upon which the Secretary serves, is authorized to provide advice concerning the Freedom of Information Law.

As I understand the matter, repeated requests for copies of certain autopsy reports prepared by the Ulster County Coroner have been ignored. In this regard, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) requires that each agency designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests. As such, it is suggested that a request may be directed to the records access officer at the Ulster County Health Department.

Second, 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)].

Third, although the Freedom of Information Law deals with access to records generally and provides broad rights of access, a different statute pertains to autopsy reports. Subdivision (3)(b) of section 677 states in relevant part that:

> "Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the sup-

> reme 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 or medical examiner pursuant to section 677 of the County Law are essentially confidential re- garding 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.

If you are interested in acquiring the records in conjunction with a legal proceeding, 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.

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-2000
FOIL-AO-6870

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 20, 1991

Ms. Helen N. Petruccione
Village Clerk
43 Third Street
Yorkville, NY 13495

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Petruccione:

I have received your letter of October 22 in which you asked that I confirm our conversation of the preceding day.

In brief, your inquiry pertains to your obligations as Clerk of the Village of Yorkville concerning the disclosure of records, as opposed to information, and the contents of minutes.

It is noted at the outset that the title of the Freedom of Information Law may be somewhat misleading, for that statute is not an access to information law per se; rather it is a statute that pertains to existing records. As such, the Freedom of Information Law is not a vehicle under which public officials must answer questions or supply information in response to questions. They may do so, but if they do, they are acting beyond the scope of the Freedom of Information Law. Further, section 89(3) of the Freedom of Information 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 possessed or maintained by such entity...". Therefore, an agency need not create a record in response to a request.

With respect to minutes, 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 reference or 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. I point out, too, that if a public body discusses an issue or issues during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

I hope that I 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-6871

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 20, 1991

Mr. Mark J. Girasole
Upstate Flood Certification Inc.
473 Third Street
Niagara Falls, NY 14301

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Girasole:

As you are aware, I have received your letter of October 4. You have asked that I contact Eugene J. Corsale, Director of Real Property Tax Services concerning a request under the Freedom of Information Law. I will do so by sending Mr. Corsale a copy of this opinion.

In brief, in a request made on September 5, you sought copies of tax maps "in the smallest version possible", preferably a "silver duplicate copy of the microfilm". It is unclear whether you received a response to the request.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and section 86(4) of that statute defines the term "record" broadly 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, information kept by an agency, whether maintained on traditional paper format or otherwise, as in the case of microfilm, would constitute a "record" subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In my view, tax maps are available, for none of the grounds for denial would be applicable.

Third, as the Law pertains to records other than paper documents that can be photocopied, section 87(1)(b)(iii) authorizes an agency to charge based on the actual cost of duplication when copies are requested.

Lastly, 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)].

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Mr. Corsale. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Eugene J. Corsale, Director, Real Property Tax Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6872

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 20, 1991

Mr. S. Chris DeStephano
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DeStephano:

I have received your letter of October 21 and the correspondence attached to it.

Your inquiry concerns a request for a "subject matter list" and a payroll record from the Orange County Private Industry Council. In an effort to assist you and to clarify, I offer the following comments.

It is noted that the Freedom of Information Law generally pertains to existing records and that agencies need not create records in response to a request. However, the records sought represent two among the few instances in the Freedom of Information Law in which agencies must maintain certain records.

With respect to the subject matter list, section 87(3)(c) of the Freedom of Information Law requires that each agency shall maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

In my view, an agency's subject matter list is not required to identify each and every record of an agency. However, it is required to include reference, by category, to all records maintained by an agency, whether or not the records are available to the public. Further, in my opinion, the purpose of the subject matter list is to enable the public to know of the categories of records maintained by an agency. With that kind of knowledge, requests for record can be made by means of a category of records appearing in the list. As stated in regulations

promulgated by the Committee on Open Government, which have the force of law: "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [see attached regulations, 21 NYCRR Section 1401.6(b)].

With regard to payroll information, section 87(3)(b) 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, a payroll record that identifies all agency officers or employees by name, public office address, title and salary must be prepared by an agency to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, I believe that records reflective of the names and salaries of public officers and employees must be disclosed.

Third, in general, the reasons for which a request is made or an applicant's potential use of records are 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, section 89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, 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).

Nevertheless, 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 to any party to records."

As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since payroll information in question was found to be available prior to the enactment of the Freedom of Information Law, I believe that it must be disclosed, irrespective of the intended use of the records.

In order to assist you, copies of this opinion will be forwarded to the Acting Director of the Privacy Industry Council and the Chief Assistant County Attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Deborah Murnion, Acting Director
Geoffrey E. Chanin, Chief Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6873

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 20, 1991

Mr. Frederick A. Jones
88-A-0439 C-34-18
Attica Correctional Facility
Attica, NY 14011-0149

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jones:

I have received your letter of October 20 in which you wrote that requests made on October 6 for records of the New York City Police Department and the New York County District Attorney had not been answered as of the date of your letter to this office. You also wrote that you do not know to whom you may appeal at those agencies.

In this regard, 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)].

For your information, the person to whom an appeal may be directed at the Police Department is Susan R. Rosenberg, Assistant Commissioner, Civil Matters; at the office of the District Attorney, an appeal may be made to Irving Hirsch, Assistant District 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-6874

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 20, 1991

Ms. Dale Joan Young
Property Tax Savers
117 Grand Boulevard
Scarsdale, NY 10583

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Young:

I have received your letter of October 22 in which you sought an advisory opinion concerning the Freedom of Information Law.

Attached to your letter is a copy of a request made to the assessor for the Village of Scarsdale stating that:

> "I hereby apply to inspect the following records: Copies of recommendations and supporting evidence given to the BAR regarding all cases for which I have a SCAR petition/retained counsel to file an article 7 proceeding-list is enclosed. The comps you consider appropriate for above. Any proof of competitive bids sought for contract awarded to Pat McElvey to provide appraisals for residences seeking tax relief; copies of all appraisals performed on properties for which I am representing their owners; the contract price per parcel awarded to McElvey."

As I understand the foregoing, Mr. McElvey was retained by the Village to prepare appraisals.

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.

With respect to competitive bids, relevant is section 87(2)(c) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that:

> "if disclosed would impair present or imminent contract awards or collective bargaining negotiations."

In 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.

If, for example, an agency seeking bids receives a number of bids and related records, but the deadline for their submission has not been reached, premature disclosure of the records 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 other records 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)].

With regard to the remainder of the records sought, I believe that they fall within the scope of section 87(2)(g). That provision pertains to the authority to withhold "inter-agency or intra-agency materials," depending on their contents. Consequently, it applies to records prepared by Village officials, such as recommendations, comparables and the like. Further, the Court of Appeals, the state's highest court, has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of section 87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

More specifically, section 87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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).

Again, I believe that appraisals and other records, whether prepared by Village staff or consultants, could be characterized as "intra-agency materials" and that perhaps portions may be withheld under section 87(2)(g). However, other aspects of the records may be available. It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, 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)].

In short, even though statistical or factual information may be "intertwined" with opinions or recommendations, the statistical or factual portions, if any, as well as any policy or determinations, may 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: Assessor
John Galloway, III

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6875

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 26, 1991

Hon. Owen H. Johnson
Member of the Senate
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Senator Johnson:

I have received your letter of November 15 in which you seek assistance on behalf of a constituent.

According to your letter and the correspondence attached to it, Mr. Robert Gordon, President of the Republic Airport Pilots Association, appears to have requested records from the Town of Babylon in March. In the only response that he received, the Town Attorney enclosed a request form to be completed and submitted. The records sought include "all invoices, paid bills, contracts, financial agreements & supplements with Toomey, Latham and Shea in connection with Republic Airport". As of the date of your letter to this office, Mr. Gordon received no further response.

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, neither the Law nor the regulations refer to or authorize 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.

Second, and in a related vein, 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)].

Third, as indicated previously, section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. It has been held that an applicant meets the standard when an agency can locate and identify the records based upon the terms of the request [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)].

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. Assuming that the records sought can be located by Town officials, I believe that they would be accessible, for none of the grounds for denial would be applicable.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Gordon
Stephen L. Braslow, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6876

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 26, 1991

John Magnotta, Chairman
Board of Fire Commissioners
North Castle South Fire District No. 1
621 North Broadway
White Plains, NY 10603

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Magnotta:

I have received your letter of October 23 which relates to requests made under the Freedom of Information Law to the North Castle South Fire District. Your questions generally deal with the fees that you can charge under the Freedom of Information Law.

Before dealing with that issue, I offer the following comments.

First, as indicated in my letter addressed to the applicant, Mr. Anthony Futia, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that: "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity...". Consequently, it is clear that an agency need not create records in response to requests.

Second, section 89(3) of the Freedom of Information Law requires 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 and identify 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. However, when records requested are not maintained in a manner that enables staff to locate and retrieve them and if the records "could not be identified by retracing a path already trodden", a request would not likely have met the requirement that it reasonably describe the records sought.

With respect to the fees that may be assessed, section 87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy, unless a statute other than the Freedom of Information Law enacted by the State Legislature prescribes a different fee. Similarly, unless there is statutory authority to do so, an agency cannot charge for search or review time or other administrative costs (see 21 NYCRR section 1401.8). I believe, however, that an agency may require payment prior to preparing or making photocopies 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-6827

Committee Members

William Bookman, Chairman
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Walter W. Grunfeld
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Priscilla A. Wooten
Robert Zimmerman

Executive Director

Robert J. Freeman

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 26, 1991

Mr. David J. Robins
Research Associate
Nassau Suffolk Neighborhood Network
511 Central Avenue
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. Robins:

As you are aware, I have received your correspondence of October 21, which deals with agencies' failures to respond to requests for records in a timely manner. Although we discussed the matter by phone, you sought a written response.

In this regard, 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)].

I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that agencies designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests. It is suggested that, in the future, requests be made to an agency's records access officer.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6878

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

Ms. Linda A. Mangano
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Mangano:

I have received your letter of October 23 concerning a request for information that you directed to the Village of Ossining.

By way of background, the Village prepared a newsletter which included an article pertaining to the "Ratio of Full-Time Employees to Population". In brief, the population of Ossining, the number of full-time employees, and a figure indicating the number of residents per employee were charted in relation to six other municipalities identified only as "A" through "F". You wrote the Village Manager and asked which communities were represented by the alphabetic code. In response, he wrote that the information is based on the 1980 census and "various municipal budgets", and that to answer your inquiry, he "would have to research the information again and due to a shortage of staff...[would be] unable to do so".

You have asked whether, under the Freedom of Information Law, you can ascertain where the information in question was obtained.

In this regard, from my perspective, the issue is whether the information in which you are interested continues to be maintained in a record or records of the Village. As you are likely aware, the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Law states in part that an agency is not required to create or prepare a record in response to a request.

If the Village maintains and can locate records that identify municipalities referenced in the chart, I believe that such records must be disclosed. If, however, that record has been discarded, and if research would have to be conducted to prepare a new record containing the information sought, the Village in my view would not be required to take such steps.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gennaro J. Faiella

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6879

mmittee Members

William Bookman, Chairman
Patrick J. Bulgaro
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Executive Director

Robert J. Freeman

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

Mr. Bertram B. Daiker
Attorney at Law
P.O. Box 831
Port Washington, NY 11050

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Daiker:

I have received your letter of November 1 in which you raised a series of issues concerning the use of the Freedom of Information Law. Specifically, you focused upon a recent request for a payroll list, the absence of any state reason for making such a request, the inability to know whether a recipient of a list of names and addresses uses the list for commercial purposes, and the lack of any penalty when such use has occurred.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, since your comments were precipitated by a request for payroll records, I point out that one of the few situations in which a record must be prepared and maintained 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, a payroll record that identifies all agency officers or employees by name, public office address, title and salary must be prepared by an agency to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed, irrespective of its intended use, for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record 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, 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 generally 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 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 operation 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 favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, I believe that records reflective of the names and salaries of public officers and employees must be maintained and disclosed.

Third, in general, the reasons for which a request is made or an applicant's potential use of records are 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, section 89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold

"lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, 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).

Nevertheless, 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 to any party to records."

As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since payroll information in question was found to be available prior to the enactment of the Freedom of Information Law, I believe that it must be disclosed, regardless of the intended use of the records. I point out, too, that section 87(3)(b) refers to an officer or employee's "public office address", i.e., a business address. Therefore, the record maintained pursuant to that provision pertains to public employees in their business capacities. As such, there is little that could be characterized as intimate or personal in terms of the content of that record. Again, in the case of other lists of names and addresses, I believe that an agency may inquire as to the intended use of the list.

With respect to a situation in which a request purportedly for purposes other than commercial or fund-raising but in which it is later found that a list is used for such purpose, other than rejecting an ensuing request, it is questionable that anything can be done. More often than not, I would conjecture that agencies have no way of knowing or tracking the use of records. While I am not an expert on the subject, a written assertion concerning the use of a list of names and addresses that is knowingly false might fall within the provisions of section 175.30 and 175.35 of the Penal Law involving offering a false instrument.

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-6880

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

Pastor Larry F. Beman
Avon United Methodist Church
130 Genesee Street
Avon, NY 14414

Dear Pastor Beman:

As you are aware, your letter of October 10 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee, which is responsible for advising with respect to the Freedom of Information and Personal Privacy Protection Laws, received your letter on November 7.

You have complained in connection with the receipt of mail from the National Rifle Association (NRA), which you consider to be upsetting due to the content of the material. You enclosed a copy of one of the mailings, which expresses what might be characterized as political points of view and which urges the recipient to join the NRA. It is your contention that the Department of Environmental Conservation provided your name and address to the NRA.

In this regard, I have contacted the records access officer at the Department of Environmental Conservation on your behalf and was informed that the Department has not disclosed or sole any list of licensees to the NRA. As such, the means by which the NRA obtained your name and address is unclear.

It is also noted that section 87(2)(b) of the Freedom of Information Law enables an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". Further, section 89(2)(b) of that statute includes a series of examples of unwarranted invasions of personal privacy. One of those examples pertains to 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)]. It is noted, too, that in a decision rendered by the Court of Appeals, the state's highest court, the issue involved a request by a not-for-profit organization that sought names and addresses of holders of pistol and rifle permits to solicit membership dues to help support its informational, lobbying and other activities. In brief, it was found that the solicitation of membership dues

constituted fund-raising, and the Court accordingly upheld the agency's denial of the request [see Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Department, 73 NY 2d 92 (1989)]. In my opinion, the mailing attached to your letter represents an effort to engage in fund-raising, and a request for a list on that basis could be denied on the ground that disclosure would result in an unwarranted invasion of personal privacy.

In sum, again, based upon information provided by the Department of Environmental Conservation, that agency did not provide the NRA with a list from which your name and address were obtained. Moreover, I believe that a request by NRA for a mailing list could under the circumstances be properly denied.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6881

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

Mr. James Taylor
91-A-2435
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. Taylor:

I have received your letter of October 24 in which you requested assistance.

You wrote that you requested certain records from the New York City Police Department on May 27. On June 10, you received an acknowledgement of the receipt of your request and were informed that a determination would be made on or about July 15. Despite having sent several letters concerning the status of your request, you wrote that you received no further response.

In this regard, 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)].

Further, it is noted that a recent division 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 provi-

> ded 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

For your information, the person designated to determine appeals for the Police Department is Ms. Susan R. Rosenberg, Assistant Commissioner, Civil Matters.

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-6882

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

Mr. Malcolm Richard
360-91-00202
C-95, H.U. #7 Mod.
18-18 Hazen Street
East Elmhurst, NY 11370

Dear Mr. Richard:

I have received your letter of November 13, which reached this office on November 27. You requested copies of "All New York City, and New York State Department of Correction Directives...", except those dealing solely with security matters.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not maintain records generally, and it cannot compel an agency to grant or deny access to records. In short, I cannot provide the records that you requested because this office does not possess them.

It is noted that a request should generally be made 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. Further, the regulations promulgated by the New York State Department of Correctional Services state that a request for records kept at a state correctional facility may be made to the facility superintendent.

I point out, too, that section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records.

I hope that the foregoing serves to clarify the Freedom of Information Law and the role of the Committee.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6883

Committee Members

William Bookman, Chairman
Patrick J. Balgaro
Walter W. Grunfeld
John F. Hudacs
Stan Lundine
Warren Mitofsky
David A. Schulz
Gail S. Shaffer
Gilbert P. Smith
Priscilla A. Wooten
Robert Zimmerman

Executive Director

Robert J. Freeman

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

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 letter of October 23 and the materials attached to it.

As in the case of previous correspondence, which has dealt with the issue exhaustively, your inquiry relates to an incident that occurred more than ten years ago in which you were apparently a suspect in a forgery case. You wrote that the forger, a person other than yourself, has been identified but that the statute of limitations expired, and that the District Attorney has "approved" the release of records dealing with the incident. Nevertheless, in response to your most recent request to gain access to the file concerning the incident, the Mayor of the Village of Johnson City denied access "to a certain portion of this file under section 87(2) sub paragraph E(iii) which states information which identifies a confidential source or discloses confidential information relating to a criminal investigation" may be withheld. The Mayor added that "[t]he information given to the investigating officer at the time was given confidentially and it is this portion of the file that you have been denied access to". He also wrote that you have had several opportunities to review the remainder of the file and that "several letters have been given to you clarifying that you have no record with the Johnson City Police Department".

In this regard, I offer the following comments.

First, as you are aware, section 87(2)(e)(iii) permits an agency to withhold records that "are compiled for law enforcement purposes and which, if disclosed, would...identify a confidential source or disclose confidential information relating to a criminal investigation". If indeed the information in question was

provided pursuant to a promise of confidentiality, it appears that it could justifiably be withheld [see Cornell University v. City of New York Police Department, 153 AD 2d 515, motion for leave to appeal denied, 72 NY 2d 707 (1990)].

Second, it is noted that the Freedom of Information Law is permissive; although an agency may withhold records in accordance with the exceptions appearing in section 87(2) of the Law, it is not required to do so [see Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)]. Therefore, if appropriate, Village officials could choose to disclose the portion of the file that has been withheld, despite its authority to withhold it.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Don Dutter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2004
FOIL-AO-6884

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

Ms. Maryanne Lehrer, Trustee
Oceanside Board of Education
Oceanside Union Free School District
Administration Office
145 Merle Avenue
Oceanside, New York 11572

Mr. Jerome H. Ehrlich
Jaspan, Ginsberg, Ehrlich, Schlesinger,
Silverman & Hoffman
300 Garden City Plaza
Garden City, NY 11530-3324

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Lehrer and Mr. Ehrlich:

As you are aware, I have received correspondence from both of you pertaining to the propriety of disclosure by a member of a public body of information acquired during an executive session. A related issue involves disclosure by a member of a public body of records characterized as "confidential".

More specifically, the initial issue involves an executive session held by the Board of Education of the Oceanside Union Free School District to consider whether the term of the Superintendent's contract should be extended. According to Mr. Ehrlich, although members of the Board expressed opinions concerning the advisability of extending the contract, no vote or action was taken. He also referred to a telephone conversation between Ms. Lehrer, a member of the Board, and myself, during which it was allegedly stated:

> "...that the decision reached during that session to place the matter of extending the Superintendent's contract on the agenda of 10/24/41 [sic] for action by the Board is not confidential or otherwise restricted from immediate public disclosure by any person."

The other issue involves the disclosure of certain intra-agency documents that were marked "confidential".

In this regard, I offer the following comments.

First, I believe that the discussion relating to the possibility of extending the Superintendent's contract could properly have been considered during an executive session. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

In my view, the issue would have focused upon a "particular person" in conjunction with that person's employment history, or possibly upon a matter leading to that person's dismissal or removal.

Second, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of section 105(1), there is no requirement that an executive session be held even though a public body has the right to do so. Further, the introductory language of section 105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the

Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Third, I am unaware of any statute that would prohibit a Board member from disclosing the kinds of information at issue. While information might have been obtained during an executive session properly held or from records marked "confidential", the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you are aware, the Family Educational Rights and Privacy Act (20 USC section 1232g) generally prohibits an agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, section 108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with section 87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your correspondence.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

Lastly, while there may be no prohibition against disclosure of information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created in order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosures made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

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-6885

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 30 1991

Ms. Dale Joan Young
Property Tax Savers
117 Grand Boulevard
Scarsdale, NY 10583

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Young:

I have received your letter of November 5 in which you requested assistance.

Specifically, you wrote that the Village of Scarsdale has denied access to computer tapes of assessment rolls because you are seeking them for commercial purposes. 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, judicial decisions indicate that computer tapes of assessment rolls are public, even if they are requested for commercial purposes. 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:jm

cc: Records Access Officer, Village of Scarsdale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AL-27
FOIL-AO-6886

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 5, 1991

Ms. Nancy G. Groenwegen
Deputy Commissioner and
General Counsel
NYS Department of Civil Service
State Campus
Albany, NY 12239

The staff of the Committee 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. Groenwegen:

I have received your letter of November 14 in which you requested an advisory opinion on behalf of the Department of Civil Service.

By way of background, you wrote that Executive Order No. 6 assigns responsibility to the Department for providing assistance to agencies "in the development of comprehensive statewide affirmative action policies, goals, objectives and implementation strategies". One aspect of the program involves a "discrimination complaint procedure for the internal resolution of employment discrimination complaints". You added that:

> "The procedure provides that the substance of the investigation will remain confidential, and that no party or staff member shall disclose the results of the investigation or parts thereof. Confidentiality is critical in obtaining cooperation and information from employees in the investigation. The affirmative action officer of the agency, upon completion of the investigation, is required to prepare a written report including recommendations for the agency head."

Agencies have sought your assistance concerning their authority to deny access to "investigative reports and/or final report of the affirmative action officer under the Freedom of Information Law", and you have sought my advice on the matter. In addition, having discussed the issue with Patricia Hite of your office, a question was also raised concerning the right of a complainant to obtain the records under the Personal Privacy Protection 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. Further, when records are accessible under the Freedom of Information Law, they are available to any person, without regard to one's 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)].

Second, in my view, the records in question could likely be withheld in accordance with two of the grounds for denial, paragraphs (b) and (g) of section 87(2).

Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy". While 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. However, 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, even though final determinations reflective of disciplinary action are accessible, it has been held that predecisional materials leading to those determinations may generally be withheld (see Sinicropi, Scaccia, supra). Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Under the circumstances, there are likely issues of privacy concerning a number of people, including the complainant, the subject of the complaint, and perhaps others, such as witnesses or other persons who might have been interviewed in the process of investigating. Consequently, from my perspective, the reports to which you referred could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

The other ground for denial of relevance, 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 basis for denial applies [i.e., section 87(2)(b) pertaining to unwarranted invasions of privacy]. 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 both investigative reports and the final reports could be characterized as "intra-agency materials". With respect to the final reports, based upon my discussion with Ms. Hite, they are not actually "final", for the recommendations offered by an affirmative action officer may be accepted, rejected or modified by the ultimate decision-maker, the head of the agency [see McAulay v. City of New York, Board of Education, 61 AD 2d 1048, aff'd 48 NY 2d 659 (1978)]. Therefore, those reports may in my opinion be withheld under section 87(2)(g) in combination with section 87(2)(b) concerning unwarranted invasions of personal privacy.

With regard to requests by complainants under the Personal Privacy Protection Law, it is emphasized that that statute is based upon premises different from the Freedom of Information Law. Section 95 generally confers rights of access upon a "data subject", a "natural person about whom personal information has been collected by an agency" [see section 92(3)]. In brief, a data subject generally has the right to inspect and copy records pertaining to him or her. While records pertaining to a complainant, for example, might ordinarily be available to him or her, if disclosure would constitute an unwarranted invasion of personal privacy with respect to others (i.e., the subject of the complaint, witnesses, etc.), I believe that the records may be withheld to protect the privacy of those persons. I point out, too, that when it is determined that disclosure would result in an unwarranted invasion of personal privacy, the Freedom of Information Law, section 89(2-a), when read in conjunction with the Personal Privacy Protection Law, would preclude disclosure.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6887

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 6, 1991

Ms. Colette Dalia
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Dalia:

I have received your letter of November 6. As I understand its contents, you are seeking assistance in obtaining the "original draft" of a report concerning the uprising that occurred at the Southport Correctional Facility on May 28.

In this regard, I offer the following comments.

First, 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 mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, a draft, even though it may be preliminary or subject to revision, would in my opinion constitute a "record" 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. I point out that the introductory language of section 87(2) refers to the ability 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 accessible and deniable information. 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. Therefore, even though some aspects of a record might properly be withheld, others may be required to be disclosed. Since I am unfamiliar with the contents of the draft in which you are interested, I cannot offer specific guidance. However, the following paragraphs will review the grounds for denial that may be significant in consideration of rights of access.

Of potential relevance is section 87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies a confidential source, a witness, or where a record includes personally identifiable details that may be intimate in nature.

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 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). If, for example, an investigation is ongoing and premature disclosure would interfere with the investigation, records or portions of records might properly be withheld under 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. In this instance, it is likely that the report refers to matters of security concerning the facility and that various portions might justifiably be withheld under that provision.

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 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.

Records prepared by employees of the Department or by persons from other 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6888

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 6, 1991

Mr. Ford Saladin
86-A-8678
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Saladin:

I have received your letter and, as requested, enclosed is a brochure that describes the Freedom of Information Law.

You wrote that you are in the process of challenging disciplinary determinations and that you would like to obtain copies of various records, including misbehavior reports, "all departmental writing [and] verbal exchanges on tape", information gathered by DOCS' employees that "culminated in infraction reports", and information involving the reasons for "being transported throughout the facility with a security sgt, and in mechanical restraints".

In this regard, I offer the following comments.

First, under the regulations promulgated by the Department of Correctional Services, requests for records kept at correctional facilities should be made to the facility superintendent or his designee.

Second, 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 information sought does not exist in the form of records, the Department would not be obliged to create or prepare new records on your behalf.

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 are 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), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies persons other than yourself.

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 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). For instance, although records might properly be withheld when disclosure would interfere with an investigation under section 87(2)(e)(i), when the investigation has ended, that provision could not likely serve as an appropriate basis for a denial.

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 may 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.

Records prepared by Department 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.

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-6889

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 6, 1991

Ms. Jeanne S. Sharp
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Sharp:

I have received your letter of November 8 in which you requested advice concerning the Freedom of Information Law.

You wrote that there have been "unacceptable" delays in response to requests for records maintained by the Town of Argyle Board of Assessors, that one of your requests "has gone unanswered for more than ten working days", and that you were not provided with the information sought.

Attached to your letter is a copy of a request in which you asked for copies of records indicating "the computations for arriving at the assessment" of your property. You also requested a copy of the notification of change in assessment that was sent to you.

In this regard, I offer the following comments.

First, 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)].

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 record reflective of computations used to determine the assessment of your property, if such record exists, would clearly be available, for statistical or factual data found within records prepared by or for agencies are accessible under section 87(2)(g)(i) of the Freedom of Information Law. Further, the notification of change in assessment would be available, for none of the grounds for denial would apply. Moreover, long before the Freedom of Information Law was enacted, 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. Papontas, 32 AD 2d 948 (1969)].

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: Board of Assessors
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6890

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1991

Mr. Philip DeBlasio
90-T-0167
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DeBlasio

I have received your letter of November 11 in which you sought assistance in obtaining various records from the Inspector General of the Department of Correctional Services.

The records relate to an interview of yourself concerning an alleged assault upon you, including photographs of you. You added that you do not want photocopies of the photographs, but "full color prints".

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" 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, photographs, tape recordings and similar materials maintained by the Department of Correctional Services would in my view clearly 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. Since I am unfamiliar with the contents of the records in which you are 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), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies persons other than yourself, 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 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). For instance, although records might properly be withheld when disclosure would interfere with an investigation under section 87(2)(e)(i), when the investigation has ended, that provision could not likely serve as an appropriate basis for a denial.

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 may 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.

Records prepared by Department 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.

Lastly, I believe that photographs of you would be available to you, for you could not invade your own privacy. However, since you referred to the color prints, I point out that, in the case of records other than photocopies, an agency may assess fees based on the actual cost of reproduction [see section 87(1)(b)(iii)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brian Malone, Inspector General

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-128
FOIL-AO-6891

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1991

Mr. James Haryan
[redacted]

Dear Mr. Haryan:

I have received your letter of December 5. As you requested, enclosed are copies of the Personal Privacy Protection Law and an explanatory brochure on the subject.

Since you indicated that you are having difficulty obtaining records pertaining to yourself from a "private agency", I point out that the Personal Privacy Protection Law applies only to records maintained by state agencies. Specifically, 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 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."

Similarly, although the Freedom of Information Law is broadly applicable, it pertains to records maintained by entities of state and local government. That statute applies to agencies, and "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 short, neither the Personal Privacy Protection Law nor the Freedom of Information Law would apply to entities other than governmental agencies.

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-6892

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1991

Mr. Michele R. Mastrangelo
85-C-0476
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. Mastrangelo:

I have received your letter of November 12 in which you sought assistance.

Attached to your letter is a copy of a request made to the Richard J. Katz & Co. for records pertaining to a temporary disability application made through a credit union. In this regard, 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 mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government in New York. It does not apply to records maintained by private companies.

You also referred to "medical reports". If you are referring to medical records pertaining to yourself, such records may be requested under section 17 of the Public Health Law from physicians or hospitals that provided treatment to you as a patient.

Lastly, you asked whether the Freedom of Information Law is applicable to the Social Security Administration. The Social Security Administration is a federal agency. Therefore, it would be subject to the federal Freedom of Information Act rather than the New York 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-6893

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1991

Mr. Joseph J. Raczynski
91-B-167
P.O. 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. Raczynski:

I have received your letter in which you requested an advisory opinion concerning rights of access to pre-sentence reports under the Freedom of Information Law.

In this regard, 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 of federal statute..." Relevant under the circumstances, is section 390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this

> state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of section 390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in section 390.50 of the Criminal Procedure Law. Further, Matter of Thomas, 131 AD 2d 488 (1987), in my view confirms that a pre-sentence report may be made available only by a court or pursuant to an order 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

OML-AO-2007
FOIL-AO-6894

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1991

Mr. Sebastiano P. Occhino
Town Attorney
Town of Rotterdam
Vinewood Avenue
Rotterdam, NY 12306

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Occhino:

I have received your letter of November 15, as well as the materials attached to it.

In your capacity as Town Attorney for the Town of Rotterdam, you asked whether a member of the Town Board violated "any Standards of Ethics and/or Law" by "divulging information obtained from an employee's personnel file". You enclosed a copy of a transcript of an open meeting during which information derived from records obtained by a Board member was disclosed. At various time during the exchange relating to the issue, it was suggested that personnel records are confidential and that discussions concerning personnel must be conducted in private.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. The Committee has no jurisdiction concerning issues involving standards of ethics. Those issues, as they pertain to local governments, are considered by the NYS Temporary State Commission on Local Government Ethics, which is located at 235 Mamaroneck Avenue, White Plains, NY 10605 and can be reached at (914) 683-5375. Nevertheless, for purposes of clarifying the Freedom of Information Law and the Open Meetings Law, I offer the following comments.

First, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of section 105(1), there is no requirement that an executive session be held even though a public body has the right to do so. Further, the

introductory language of section 105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with certain grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Second, I am unaware of any statute that would prohibit a Board member from disclosing the kind of information at issue. Even when information is obtained during an executive session properly held or from records marked "confidential", the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

Moreover, in a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

Third, 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.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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. Based upon the language quoted in the preceding sentence, I believe that a single record may be accessible or deniable in whole or in part. Moreover, that language, in my view, imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In general, two of the grounds for denial relate to personnel records.

Of frequent 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); Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980].

I point out, too, 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)].

The remaining ground for denial 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 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. Presumably an application would consist of factual information that would be available, except to the extent that different basis for denial [i.e., section 87(2)(b) concerning privacy) may be cited.

With respect to access to a resume or application of a public employee, for example, while sections 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 of a person who has been hired, for instance, I do not believe that they could necessarily be cited to withhold those kinds of documents in their entirety.

If, for instance, an individual must have certain types of experience or educational accomplishments as a condition precedent to serving in an particular position, those aspects of a resume or 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 whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of

documents 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.

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)]. However, 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.

Lastly, in a discussion of the intent of the Freedom of Information Law that may be relevant to the matter, the Court of Appeals has held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 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)... 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 of Fink v. Lefkowitz, 47 NY 2d 567, 571..." (Capital Newspapers, supra, 564-566).

I hope that I 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-6895

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 10, 1991

Mr. Maurice Silverstein
89-T-0495
Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Silverstein:

I have received your letter of November 13. You wrote that you have encountered delays in obtain records from the Office of the New York County District Attorney.

In this regard, 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)].

Further, it is noted that a recent division 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Irving B. Hirsch, Assistant District Attorney
Nina Keller, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6896

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 10, 1991

Mr. John E. Mann

[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mann:

I have received your letter of November 15 in which you suggested that the City of New Rochelle is "attempting to block people" from obtaining certain records, specifically, "old Birth Certificates for individuals who were living at Fort Slocum on David's Island, right offshore from New Rochelle."

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". One such statute is section 4173 of the Public Health Law, which states in part that:

> "A certified copy or certified transcript of a birth record shall be issued only upon order of a court of competent jurisdiction or upon a specific request before 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."

Based upon the foregoing, birth records may be disclosed only by means of a court order, unless requested by the subjects of the records or their representative. Further, although the Freedom of Information Law pertains to records generally, access to birth records is governed by a different statute.

Lastly, I point out that records of birth in municipalities other than New York City are maintained by local registrars and by the Bureau of Vital Records at the State Health Department. I believe that the Health Department has adopted rules that permit the disclosure of birth records for historical or genealogical purposes and it is suggested that you contact the NYS Health Department, Bureau of Vital Records, Corning Tower, Empire State Plaza, Albany, NY 12237. That office can be reached by phone at (518) 474-3055.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Dorsey, Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6897

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 10, 1991

Mr. Jeffrey Grune
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Grune:

I have received your letter of November 7. You have sought an opinion concerning an agency's refusal to copy and mail records when the applicant is willing to pay the costs of photocopying and mailing.

In this regard, nothing in the Freedom of Information Law or the Committee's regulations specifically deals with requests made by mail or agencies' obligations to mail records to an applicant. 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, and that they must mail records in response to requests. However,in addition to the fees for photocopying, an agency could in my view also charge for the cost of postage.

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-6898

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 11, 1991

Mr. Terence J. Murphy
88-A-2495
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. Murphy:

I have received your letter of November 15 in which you sought advice and an opinion concerning a request to be made to the Office of Criminal Justice Services in Westchester County.

The request involves material, for each year from 1979 to the present, concerning certain kinds of criminal cases before Westchester County Supreme and County Courts. The request was made under provisions of the Freedom of Information Law, the Executive Law, sections 837(4) and 837-a(5) of the Executive Law, and the federal Freedom of Information Act.

In this regard, I offer the following comments.

First, the federal Freedom of Information Act applies only to records maintained by federal agencies. Therefore, in my opinion, it would be inapplicable with respect to your request.

Second, although the provisions of the Executive Law to which you referred pertain to the preparation of certain statistical data, I am unaware of whether the data you seek is maintained by the County in the manner in which you have requested it.

Third, 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, to the extent that material sought does not exist, the agency would not be required to prepare it on your behalf.

Fourth, section 89(3) also provides 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 and identify 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, I must admit to being unfamiliar with the agency's record-keeping system. To the extent that the records requested are not maintained in a manner that enables staff to locate and retrieve them and if the records "could not be identified by retracing a path already trodden", the request would not likely have met the requirement that it reasonably describe the records sought.

Fifth, some of the records sought involve not merely statistical data, but include reference to docket and index numbers pertaining to specific cases. In this regard, under section 160.50 of the Criminal Procedure Law, when a criminal action is dismissed in favor of the accused, records pertaining to the event are generally sealed. In those situations, the records would be specifically exempted from disclosure by statute and therefore deniable under section 87(2)(a) of the Freedom of Information Law.

Insofar as the material sought exists, can be located in conjunction with the standard that records be reasonably described and have not been sealed under section 160.50 of the Criminal Procedure Law, I believe that they would be accessible. However, the extent to which those conditions may be present is not known to me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Maccarrone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6899

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 11, 1991

Mr. Mark J. Brown
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brown:

I have received your letter of November 12. You wrote that a request for medical records maintained at your facility made on October 31 had not been answered as of the date of your letter to this office. Consequently, you asked that this office "direct" the facility to provide you with copies of your medical records under 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. Therefore, this office cannot "direct" an agency to grant or deny access to records.

Second, 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)].

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

Third, the Freedom of Information Law pertains generally to agency records, including those maintained by the Department of Correctional Services and its facilities. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appear in section 87(2)(a) through (i) of the Law.

With regard 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.

However, a relatively new statute, section 18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. Therefore, it appears that access to medical records is directly governed by the Public Health Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Inmate Record Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1900

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 12, 1991

Leroy Williams
82-A-0202
Drawer B
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Williams:

I have received your letter of November 14. In brief, having requested records from the New York City Police Department concerning your arrest in 1980, you were informed that the records are not in possession of the Department.

In this regard, if an agency does not maintain records, it can neither grant nor deny access to the records. Further, section 89(3) of the Freedom of Information Law states in part that an agency is not required to create a record that is not "possessed or maintained" by that agency. The same provision states 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". If you believe that a certification to that effect would be useful to you, you make seek such a certification from the agency's records access officer.

If indeed the New York City Police Department does not maintain the records, it is suggested that you direct a request to the clerk of the court in which the proceeding was conducted. Although the courts and court records are not subject to the Freedom of Information Law, court records are generally available (see e.g., Judiciary Law, section 255). In addition, if the arrest did not occur in New York City, the records may be maintained by a different law enforcement agency. Finally, it may be worthwhile to confer 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-6901

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 12, 1991

Mr. Ernest Mathis
91-R-5787
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mathis:

I have received your letter of November 18 in which you sought assistance.

Your inquiry concerns requests for medical records pertaining to yourself maintained by the New York City Department of Correction and a "master index list of records" maintained by the Division of Parole. It appears that you received no responses to those requests.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains generally to agency records, including those maintained by the Department of Correction 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 regard 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.

However, a relatively new statute, section 18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. Therefore, it appears that access to medical records is directly governed by the Public Health Law and that a request should be made pursuant to that statute.

Second, the phrase "master index" is used in the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law, which are applicable only to that agency. 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. Rather than seeking a "master index" from the Division of Parole, it is suggested that you request the subject matter list maintained pursuant to section 87(3)(c) of the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Medical Officer/Administrator
William Altschuller, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6902

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 12, 1991

J. Blair Richardson, Jr.
Winston & Strawn
1400 L Street, N.W.
Washington, DC 10005-3502

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Richardson:

I have received your letter of November 20 in which you requested an advisory opinion concerning "the right to use public voter registration data commercially."

In this regard, I offer the following comments.

It is noted at the outset that, as a general matter, the reasons for which a request is made and an applicant's potential use of records are 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, section 89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses may be relevant, and case law indicates that an agency can ask why a list of names and addresses has been requested in order to determine rights of access [see Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980).

Nevertheless, 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 to any party to records."

As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access [see e.g., Szikszay v. Buelow, 436 NYS 2d 558, 563 (1981)]. In this instance, section 5-602 of the Election Law, entitled "Lists of registered voters; publication of", states that voter registration lists are public. Specifically, subdivision (1) of that statute provides in part that a "board of elections shall cause to be published a complete list of names and residence addresses of the registered voters for each election district over which the board has jurisdiction"; subdivision (2) states that "The board of elections shall cause a list to be published for each election district over which it has jurisdiction"; subdivision (3) requires that at least fifty copies of such lists shall be prepared, that at least five copies be kept "for public inspection at each main office or branch of the board", and that "other copies shall be sold at a charge not exceeding the cost of publication". As such, section 5-602 of the Election Law directs that lists of registered voters be prepared, available for inspection, and that copies shall be sold. There is no language in that statute that imposes restrictions upon access in conjunction with the purpose for which a list is sought or its intended use.

Since section 5-602 of the Election Law confers unrestricted public rights of access to voter registration lists, in my opinion, nothing in the Freedom of Information Law could be cited to restrict those rights. Further, as a general matter, I believe that a statute pertaining to a specific subject prevails over a statute pertaining to a general subject. In the context of your inquiry, a statute in the Election Law that pertains to particular records would in my view supersede a statute pertaining to records generally, such as the Freedom of Information Law.

In sum, based upon the foregoing, I believe that voter registration data accessible under the Election Law may be used for any purpose.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Thomas Zolezzi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6903

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 13, 1991

Ms. Karen A. Navin
Village Clerk
Village of Freeport
46 North Ocean Avenue
Freeport, NY 11520

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Navin:

I have received your letter of November 10 in which you raised a question concerning the Freedom of Information Law.

The issue involves the right of the Village of Freeport "to copy [a] copyrighted drawing for building/equipment specifications" in response to a request under the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and section 86(4) of the Law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, drawings and specifications submitted to the Village would 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 opinion, involves the effect of a copyright appearing on a document. In order to offer an appropriate responses concerning similar issues, 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 discussed, and in which reference was made to notes of House Committee on the Judiciary (Report No. 94-1476) referring to the scope and intent of the revised Act. Specifically, it was stated by the court that:

> "The power to provide copyright protection is delegated to the Congress by the United States Constitution. Article 1, section 8, clause 8, of the Constitution grants to Congress the power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'
>
> Copyright did not exist at common law but was created by statute enacted pursuant to this Constitutional authority. See Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460, 98 L.ed. 630 (1954); see also MCA, Inc., v. Wilson, 425 F.Supp. 443, 455

(S.D.N.Y. 1976); Mura v. Columbia Broadcasting System, Inc., 245 F.Supp. 587, 589 (S.D.N.Y. 1965), and cases cited therein.

Prior to January 1, 1978, the effective date of the revised Copyright Act of 1976, there existed a dual system of copyright protection which had been in effect since the first federal copyright statute in 1790. Under this dual system, unpublished works enjoyed perpetual copyright protection under state common law, while published works were copyrightable under the prevailing federal statute. The new Act was intended to accomplish 'a fundamental and significant change in the present law by adopting a single system of Federal statutory copyright...(to replace the) anachronistic, uncertain, impractical, and highly complicated dual system.' H.R. Rep. No. 94-1476; 94th Cong. 2d Sess. 129-130, reprinted in [1976] 5 U.S. Code Cong. & Ad. News 5745. This goal was effectuated through the bed-rock provision of 17 U.S.C. subsection 301, which brought unpublished works within the scope of federal copyright law and preempted state statutory and common law rights equivalent to copyright. Id. at 5745-47. Thus, under subsection 301(a), Congress provided that Title 17 of the United States Code, the Federal Copyright Act, preempts all state and common law rights pertaining to all causes of action which arise subsequent to the effective date of the 1976 Act, i.e., January 1, 1978:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." [Meltzer v. Zoller, 520 F.Supp. 847, 853 (1981)]

Based upon the foregoing, "common law" copyright appears to be a concept that has been rejected and replaced with he current statutory scheme embodied in the revised Federal Copyright Act.

In view of the language of the Copyright Act, case law and discussions with a representative of the Copyright Office, it is clear in my opinion that architectural 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 be characterized as being "specifically exempted from disclosure... by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to section 87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. section 107, which codifies the doctrine of "fair use." Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are maintained for the regulation of commercial interprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under section 107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. section 107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secrets exception "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to the government...Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. [section] 107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information Act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of 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 copied on request.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6904

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 13, 1991

Mr. R.C. 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 Mr. Smith:

I have received your letter of November 19 and the correspondence attached to it.

Once again, the materials involve your efforts to obtain records reflective of litigation expenses incurred by the Henrik Hudson School District in the Rowley case, as well as records of votes by the Board of Education concerning the litigation. Since you requests were made on September 17 and you have received no response, you asked what the next step would be.

In this regard, 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)].

Under the circumstances, I believe that your requests have been constructively denied and that you may appeal on that basis. It is suggested that you appeal to the Board, indicating that if the Board does not determine appeals, the appeal should be forwarded to the appropriate person.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Edmund S. Burchman, School Business Administrator
Raymond Kuntz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-129
FOIL-AO-6905

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 13, 1991

Ms. Ruth M. Porter
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Porter:

I have received your letter of November 19 in which you requested an advisory opinion concerning the Freedom of Information Law and/or the Personal Privacy Protection Law.

By way of background, in your capacity as an officer of a residents committee at a Mitchell-Lama housing project, you wrote that the committee sent a letter of complaint to the Division of Housing and Community Renewal concerning your manager and management company. The committee requested an investigation and audit of the company's management "since there were concerns with the dissipation of assets and reserves". When you learned that management requested copies of "all cooperators' complaint letters", you wrote to the Division and asserted the need for confidentiality. Nevertheless, you wrote that "the Division not only gave the names of the three signatories on the Committee's letter, but faxed their response letter to the manager before it was even received by the Committee through the mail. You added that the letter "was used against the committee in an open meeting", and that you "are now concerned with retaliation".

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.

When a complaint is made to an agency, section 87(2)(b) of the Freedom of Information Law is often 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.

Under the circumstances described in your letter, I believe that disclosure of the identifying details pertaining to the complainants would have constituted an unwarranted invasion of personal privacy.

Second, section 89(2-a) of the Freedom of Information Law states that "Nothing in this article [the Freedom of Information Law] shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Section 96 is a part of the Personal Privacy Protection Law. Therefore, if a state agency cannot disclose records pursuant to section 96 of the Personal Privacy Protection Law, it is precluded from disclosing under the Freedom of Information Law.

Third, the Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law,section 92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [section 92(7)]. For purposes of Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [section 92(9)]. However, that provision also states that "The term 'record' shall not include personal information which is not used to make any determination about the data subject if it is...correspondence files" [section 92(9)(f)].

While, as indicated earlier, I believe that disclosure of the identities of the complainants resulted in an unwarranted invasion of personal privacy, it does not appear that either section 89(2-b) of the Freedom of Information Law or section 96 of the Personal Privacy Protection Law would have applied to prohibit disclosure. The complaints clearly included personal information about natural persons. However, those persons in my view are not "data subjects", because the Division did not "collect" personal information about them; the Division did not seek to obtain information about them, but rather received an unsolicited complaint. If the complainants are not data subjects, the complaint would not have constituted a "record" for purposes of the Personal Privacy Protection Law, for it would not have contained information about data subjects. Further, the complaint would not appear to be used to enable the Division to make determinations about complainants and would be part of "correspondence files". Therefore, the complaint would not be a "record" accorded the protection conferred by section 96 of the Personal Privacy Protection Law.

In sum, although disclosure of complainants' identities in my opinion constituted an unwarranted invasion of personal privacy and that portions of the complaint including their identities could have been withheld, I do not believe that the Division would have been prohibited from disclosing the names.

I hope that I have 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 Viola

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6906

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 13, 1991

Mr. Wayne Jackson
c/o Ed McGuiness, Attorney at Law
351 Larkfield Road, Suite 2
E. Northport, NY 11731

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Jackson:

I have received your letter of November 5, which reached this office on November 21.

According to your letter, you directed a request under the Freedom of Information Law to the Division of the Lottery for records indicating "the address and the time of purchase of certain Lotto tickets" that you bought. Although you wrote that the request was denied, I have received a copy of a response to the request dated November 4 in which the Division provided information including the locations of your purchase of Lotto tickets. However, information reflective of the times of their sale was denied on the ground that it constitutes a "trade secret of the Division of the Lottery which if disclosed would constitute substantial injury to the competitive position of the enterprise", and because the information "could be used to gain access to computerized records of winning lottery tickets and which is, therefore, within the meaning of 'computer access codes'."

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. The denial alluded to two of the grounds for denial, paragraphs (d) and (i) of section 87(2).

Section 87(2)(d) 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 language quoted above is generally asserted with respect to records submitted to agencies. However, there is case law indicating that an agency may under appropriate circumstances assert section 87(2)(d) with respect to records that it prepares (Syracuse & Oswego Motor Lines, Inc. v. Frank, Supreme Court, Onondaga County, October 15, 1985). In this instance, the applicability of that provision is unclear, for there is no description in the response indicating the manner in which disclosure would "cause substantial injury" to the Division's competitive position. Further, I am unaware of any entity with which the Division of the Lottery competes.

Section 87(2)(i) authorizes an agency to withhold "computer access codes". I am unfamiliar with the technology used by the Division in its implementation of Lotto ticket sales. However, records indicating the time of sale of particular tickets coupled with the location of sales appear to represent data that could if disclosed result in claims by individuals that they hold winning tickets, irrespective of the accuracy or veracity of those claims. If that data could be characterized as computer access codes, the denial would likely be proper.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anne McCartin Doyle, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2008
FOIL-AO-6907

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 14, 1991

Mr. Arthur Springer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Springer:

As you are aware, I have received your letter of November 19 in which you raised a series of issues concerning the Freedom of Information and Open Meetings Laws.

The first area of inquiry involves the status of "purely advisory bodies" under the Open Meetings Law. In this regard, it is noted that recent decisions indicate generally that entities consisting of persons other than members of public bodies 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, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Inter-governmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group 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)].

To be distinguished are committees or subcommittees consisting solely of members of a governing body. 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."

Since the last clause of the definition refers to committees, subcommittees and similar bodies of public bodies, I believe that a committee consisting of members of a public body would itself constitute a public body subject to the Open Meetings Law.

It is noted that the Committee has recommended that advisory bodies designated by public bodies should be subject to the Open Meetings Law. The proposal is included in the Committee's annual report, a copy of which will be sent to you shortly.

Second, you referred to requests for records in situations in which "time is a factor", and "in which written requests are unrealistic, or impose an unreasonable time and financial burden, or are used to obfuscate and delay". Although the regulations promulgated by the Committee on Open Government dealing with the procedural aspects of the Freedom of Information Law enable agencies to accept oral requests [21 NYCRR 1401.5(a)], section 89(3) of the Law and same provision of the regulations authorize agencies to require that requests be made in writing. Section 89(3) requires that agencies respond to requests in some manner within five business days of the receipt of requests. While I do not believe that the reference to five business days is intended to permit agencies to delay responding to requests, there is nothing in the Law that requires agencies to respond to requests instantly or in a shorter period of time.

The next issue involves situations in which a records access officer is absent. In my view, the absence of a records access officer should not serve to delay the process of responding to requests. Under section 1401.2 of the regulations, an agency may designate "one or more persons as records access officer", and that provision states that the "designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so". In addition, the regulations state that the records access officer "shall have the duty of coordinating agency response to public requests for access to records". Therefore, I do not believe that a records access officer must deal with or review each and every request; on the contrary, in conjunction with that person's duty to "coordinate" responses to requests, the records access officer has the authority to ensure that other staff act on his or her behalf, whether that person is present or absent.

You asked whether the Committee includes representatives of the "print or TV media". Since the enactment of the Freedom of Information Law in 1974, it has required that at least two members be present or former members of the news media. Currently, four members are or have been associated with the news media, three of whom have been involved with newspapers and the other with television.

Lastly, you asked whether the Committee has "any formal relationship" with the New York City Commission on Public Information and Communication. I have had a number of conversations with one of the members of the Commission and met with its director. However, it is my understanding that, due to fiscal constraints, the Commission has been unable to perform its duties and that it currently has no staff.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6908

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 16, 1991

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, unless otherwise indicated.

Dear Mr. Murtha:

As you are aware, I have received a variety of materials from you concerning the implementation of the Freedom of Information Law by the Village of Island Park.

The focal point of the materials involves the newly revised rules and regulations adopted pursuant to the Freedom of Information Law by the Village Board of Trustees. In my view, several aspects of the rules and regulations are inconsistent with the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401).

I point out that 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) of the Law requires the governing body of a public corporation, i.e., the Village Board of Trustees, to adopt 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" (the Freedom of Information Law). As such, I believe that an agency's regulations must be consistent with the Freedom of Information Law and the regulations adopted by the Committee.

Section 5 of the Village's rules and regulations states that "Inspection of records shall be based upon a written request on forms supplied by the Village." In this regard, the Freedom of Information Law, section 89(3), and the regulations promulgated by the Committee (21 NYCRR 1401.5), require that an agency respond to a request 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)]. Neither the Law nor the regulations refers to or requires 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.

In short, 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.

Section 7 states that a request for copies of records "shall specify the particular record or records with such particularity that they may be identified by the Records Access Officer without resort to a search of general village records". First, I believe that the Freedom of Information Law imposes an obligation upon agencies to search for records. Second, 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 and identify 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)].

Sections 6 and 11 of the Village's rules state respectively that:

> "If inspection is found proper the applicant shall be informed of the date when the records will be available and the times thereof, which shall be during business hours... If inspection and/or copying of records is not completed within the time specified, a new written application must be submitted."

In practice, based upon copies of requests and responses to them that you forwarded, an applicant is informed of the date and time within which he or she may inspect and/or copy records. For example, responses indicate that the "Date and Time for Inspection or Pick-Up" would be "12/11 10AM - 11AM only" or "12/5 3PM - 4PM only". Therefore, if a request involves a number of records and an applicant does not have an opportunity to inspect and/or copy all of them within a period of an hour, he or she is forced to start the process anew by submitting a new application.

In my opinion, the Village's rules and its practice are so restrictive that they subvert the intent of the Freedom of Information Law and fail to comply with the language of the Law and the Committee's regulations. Section 1401.4(a) of those regulations provides that "Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business". Moreover, section 84 of the Freedom of Information Law, its legislative declaration, states in part that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible". In my view, every provision of law, including the Freedom of Information Law, should be implemented in a manner that gives reasonable effect to its intent. If agency staff needs to use records in the course of their duties, I believe that it would be reasonable to limit an applicant's ability to inspect or copy those

records to enable staff to carry out their duties. However, if records are not in use, enabling an applicant to review records for a period of a maximum of one hour, or even a day or a week, depending upon their volume and other factors, is in my opinion unreasonable and results in constructive denials of access. Similarly, forcing an applicant to resubmit a request if the records could not have been fully reviewed within an hour has no basis in law and appears to impose an unnecessary burden upon agency officials who have already located and retrieved the records. I point out that an agency's response has been found judicially to be appropriate and reasonable when an applicant was "informed by letter that the records were available for his inspection and examination...on business days between 8:30 A.M. and 5:00 P.M., upon receipt of his request stating the time and date that he desired an inspection" [Schanbarger v. NYS Commissioner of Social Services, 99 AD 2d 621-622 (1984)]. In short, the phrase "wherever and whenever feasible" appears to require that records be made available when it is possible to do so, not in a manner that effectively constrains or restricts public access to records.

Section 12 of the Village's regulations states that "The inspection of records shall be limited solely to the applicant and does not permit inspection by a person other than the applicant. Abuse of this provision will require an immediate return of the records to the Access Officer". One of the hallmarks of the Freedom of Information Law in my opinion is that records available under the Law should be made equally available to any person, irrespective of one's 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)]. If a record is available for inspection to one person, I believe that it must generally be made available to another, including a person who might accompany an applicant. In short, there is nothing in the Freedom of Information Law that authorizes the restrictions embodied in section 12. Further, that provision in my opinion would fail to give effect to the intent that agencies "extend accountability...whenever feasible". From a more practical point of view, section 12 would apparently preclude an applicant from designating a family member or friend to inspect or copy records on that person's behalf in the event of illness or some other disability.

Having reviewed the materials that you sent, one is a request for abstracts, vouchers, itemized bills and minutes for certain months. The request was denied with the following notation: "Resubmit - Individual Application". If the denial is to be construed to mean that each record or each category of records sought must be requested individually, I believe that the denial would have been inappropriate. There is no language in the Freedom of Information Law that deals with the volume of materials that might be sought by means of a single request.

Lastly, several items of correspondence and a column published in Newsday (November 29, 1991) dealt in part with the refusal by the Village to permit you to use your own photocopier at Village offices, despite your offer to pay whatever costs (i.e., electricity) the use of a photocopier might entail. As indicated in the past, section 87(2) of the Freedom of Information Law provides the public with the right to inspect and copy records available under the Law. There is no statute of which I am aware that would prohibit the public from using a personal photocopier, and I do not believe that a prohibition would be valid, so long as a photocopier is used in a reasonable manner and the user offers to pay whatever minimal actual costs there might be. As in the case of other issues considered in this opinion, a prohibition concerning the use of one's photocopier would appear to be inconsistent with the intent of the Law as expressed in sections 84 and 87(2).

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Ann M. Leonard, Village Clerk
Board of Trustees
Barbara Bernstein, New York Civil Liberties Union

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6909

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 17, 1991

Mr. Terrence E. Mason
87-A-5927 E6/355
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. Mason:

I have received your letter of November 22 in which you sought assistance.

As I understand the situation, you were sent two packages in October, and prior to receiving their contents, you were required to sign a "package list". You have since made several requests for the record that you signed. However, you were informed that the list had been misplaced and that your requests have been ignored.

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 directed to the facility superintendent or his designee.

Second, if indeed the list in question has been misplaced and cannot be found, I believe that you may seek a certification to that effect under section 89(3) of the Freedom of Information Law. That provision states in part that, on request, an agency "shall certify that it does not have possession of such record, or that such record cannot be found after diligent search".

Third, assuming that the record can be found, it must in my view be made available. In short, I do not believe that any of the grounds for denial appearing in section 87(2) of the Freedom of Information Law could be asserted to withhold the record.

Lastly, 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)].

For your information, the person designated by the Department of Correctional Services to determine appeals is Counsel to the Department.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-690

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 17, 1991

Mr. Alphonso Cagan
88-T-2165
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cagan:

I have received your letter of November 25. As you requested, enclosed are copies of "Your Right to Know" and the regulations promulgated by the Committee on Open Government. In addition, you raised two questions.

First, you asked whether there are "any other F.O.I.L. agencies in New York City besides One Police Plaza in Manhattan". One Police Plaza, the headquarters of the New York City Police Department, is one among hundreds of agencies subject to the Freedom of Information Law. That statute applies to agencies, and section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally includes entities of state and local government in its scope.

Second, you wrote that "when a F.O.I.L. agency first receives an individual's file, the sender usually encloses a brief letter explaining the documents enclosed. You asked whether you can request a copy of that letter under the Freedom

of Information Law. In this regard, the Freedom of Information Law pertains to all agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Of likely relevance to the kind of letter that you described 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.

If a letter includes a factual description of the contents of a file, that aspect of the letter would in my view be available, except to the extent that a ground for denial may be properly asserted.

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-6911

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 17, 1991

Ms. Doris 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 November 22, which reached this office on December 2.

In brief, you wrote that requests for records directed to the Rensselaer County Records Access Officer have not been answered, and you asked what is a "reasonable time" for response.

In this regard, 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)].

Further, it is noted that a recent division 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 provi-

> ded 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6912

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 17, 1991

Mr. Joseph Tinsley
85-A-4661
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tinsley:

I have received your letter of November 21 in which you sought assistance.

According to your letter, you have directed requests for records to the Clerk of the Westchester County Supreme Court, the District Attorney's office and to the Peekskill City Clerk, none of which have been acknowledged.

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, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records may be withheld, for other provisions of law may grant rights of access to those records (see e.g., Judiciary Law, section 255).

Second, as the Freedom of Information Law applies to agencies, it 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)].

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-6913

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 17, 1991

Mr. Harvey M. Elentuck
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter of November 23 which pertains to a request directed to the New York City Department of Investigation. The request includes a series of categories of records that you identified as items a) through z), and you asked that I prepare an advisory opinion with respect to any of the categories which, in my view, "are likely to present problems to the NYC Department of Investigation in terms of accurately determining rights of access".

Although your statement quoted in the preceding paragraph is unclear, I offer the following remarks.

It is noted at the outset that I am unfamiliar with many of the records sought. Further, although certain of the categories of the records in which you are interested are clear, others are not. Moreover, my absence of commentary concerning particular categories of your request should not be construed to mean that there may be no issues concerning access to records described in those categories.

One of the issues of likely relevance with respect to several aspects of your request involves the requirement that an applicant "reasonably describe" the records sought. 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, 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.

I am unaware of the means by which the Department maintains its records or the volume of the records sought. However, it is possible, particularly since certain requests are unlimited in terms of time or scope (i.e., Commissioner Shepard's "office files"; all of the Department's "training materials"), that certain of the requests or perhaps some aspects of them, do not reasonably describe the records sought.

Several categories of your request involve records that would "substantiate" certain statements. Those aspects of your request appear to involve judgments or opinions concerning the contents of records. Whether a record substantiates a statement may be subject to conflicting points of view or interpretations.

Since you asked to inspect records, I point out that much of the information sought would appear to be contained in records that include a variety of material that has not been requested. If those records include material that could be withheld, you could not in my opinion inspect them without viewing deniable information. In those instances, it appears that copies would have to be prepared from which various deletions could be made and for which you could be charged a fee for photocopies.

Lastly, there are a number of grounds for denial that might properly be asserted in conjunction with the request. Certain records might consist of attorney work product, material prepared for litigation, or be subject to the attorney-client privilege. Those records would fall within the scope of section 87(2)(a) of the Freedom of Information Law, which pertains to records that are "specifically exempted from disclosure by state or federal statute". Many of the records would apparently include personally identifiable information various aspects of which if disclosed would constitute an unwarranted invasion of personal privacy under section 87(2)(b) of the Freedom of Information Law. For example, depending on their contents, grievances by employees against supervisors might include intimate personal information or they might have been found to have been without merit. Since the Department's duties involve investigations, section 87(2)(e) pertaining to the authority to withhold records compiled for law enforcement purposes may also be relevant. Finally, much of the documentation would fall within the scope of section 87(2)(g) involving inter-agency and intra-agency materials. As indicated on many occasions in previous correspondence, the contents of those materials are relevant in determining the extent to which they may be withheld.

In short, I believe that there are numerous "problems" associated with your request.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John J. Kennedy
Steven M. Gold

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6914

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 17, 1991

Ms. Amollia H. Grossman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Grossman:

I have received your letter of November 26 in which you sought assistance.

According to your letter, at a meeting held in September, the Canastota Central School District's auditor presented and explained the 1990-91 audit. Following the meeting, you verbally requested a copy of the audit, and you were verbally refused. On November 1, you submitted a written request for the audit and thereafter received a written acknowledgement of the receipt of the request indicating that "your request...will be responded to...on November 15". A week later, you were informed by phone that the records access officer was ill and were asked if you could wait until November 18. Further, on November 20, you received a letter from the District "requesting another delay".

In this regard, I offer the following comments.

First, I believe that the audit must be disclosed. 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 exceptions to rights of access is relevant, that provision often requires disclosure due to its structure. 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 the record in question constitutes an "external audit" accessible under section 87(2)(g)(iv).

Second, 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)].

Further, it is noted that a recent division 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 Divi-

> sion 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

In an effort to enhance compliance with and understanding of 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: Gary R. Betts, Records Access Officer
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-695

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 17, 1991

Mr. Alphonso Cagan
88-T-2165
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cagan:

I have received your letter of November 25, as well as the materials attached to it.

You have sought assistance in obtaining a "complaint dispatch sheet". One request for that record was made to Sgt. Louis J. Capasso, records access officer for the New York City Police Department. It is your view that, by suggesting that the record may be in possession of the Housing Police Department, he "never stated specifically whether the 'Complaint Dispatch Sheet' is in their possession or not, which is clearly a violation of [the Committee's] rules and regulations". You allege that Sgt. Capasso's response to your request involves the playing of "word games". Further, having requested the records from the "Housing Police Department", you received no response.

In this regard, I offer the following comments.

First, having read a copy of Sgt. Capasso's response to your request, I believe that it is clear and straightforward. Having described certain other records that you requested and stating that those records were enclosed, he wrote that "This represents all documents located relative to your request". In my view, his statement indicates that the Department was unable to locate any records falling within the scope of your request other than those to which he referred.

Second, you referred to provisions involving "certification". In my opinion, a certification need not be given as a matter of course, but upon request. Section 89(3) of the Freedom of Information Law includes language concerning 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."

If you believe that it would be useful to do so, you may seek a certification from Sgt. Capasso to the effect that the Department "does not have possession of such record or that such record cannot be found after diligent search".

Third, I believe that the "Housing Police" is a unit of the New York City Housing Authority. Therefore, it is suggested that you direct a request to the records access officer for the Authority, whose main offices are located at 250 Broadway, New York, NY 10007.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-69/6

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 20, 1991

Ms. Carol Linda Repka
[redacted]

The staff of the Committee 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. Repka:

As you are aware, I have received your letter of November 25. You asked whether you should "have any trouble" obtaining certain information from the West Islip School District.

One request involves records of the District's account with the Chase Manhattan Bank; the other involves a roster of the West Islip Swim Club that was supplied to the District.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and section 86(4) of the Law defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

As such, the materials to which you referred, once maintained by the District, irrespective of their origin, would in my view 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 opinion, records of the District's account with a particular bank would clearly be accessible, for they consist of factual information, and because none of the grounds for denial would apply.

With respect to the swim club roster, two of the grounds for denial may be relevant.

Section 87(2)(a) of the Freedom of Information Law pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is the federal Family Educational Rights and Privacy Act (20 U.S.C. section 1232g). In brief, that Act generally precludes an educational agency or institution from disclosing records or portions of records identifiable to students without the consent of the parents of the students.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In my view, because of the age of students and because they are identified by means of participation in a particular activity or club, their names, addresses or other personally identifiable details could be withheld. However, if, as we discussed during a recent phone conversation, the roster includes such items as names, addresses, schools attended by the students, their ages or grades and the like, I believe that it would be available following the deletion of identifying details, such as names and addresses. As such, those portions of the roster indicating schools attended by members and their age or grade level, for example, would be available.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Barbara Milne, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6917

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 20, 1991

Mr. Morsley McPhie
91-A-2684
Washington Correctional Facility
Lock 11 Road, Box 180
Comstock, NY 12821-0180

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McPhie:

I have received your letter of November 27 in which you wrote that the Washington Correctional Facility has not complied with your request for various records. You added that you need the records in order to attempt to correct "misinformation" about you.

It is unclear whether the records have been denied in writing or whether the agency has failed to respond to your request. In this regard, 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)].

For your information, the person designated by the Department of Correctional Services to determine appeals is Counsel to the Department.

With respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unfamiliar with the contents of the records in which you are interested, I cannot offer specific guidance concerning rights of access to certain of those records. Of likely relevance 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 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. Also potentially relevant 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 you referred to excerpts of your pre-sentence reports, 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 of federal statute..." Relevant under the circumstances is section 390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of section 390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in section 390.50 of the Criminal Procedure Law. Further, Matter of Thomas, 131 AD 2d 488 (1987), in my view confirms that a pre-sentence report may be made available only by a court or pursuant to an order of the court.

Lastly, although the Freedom of Information Law often confers rights of access to records, it is silent with respect to the correction or amendment of records. However, section 5.50 of the regulations promulgated by the Department of Correctional Services authorizes an inmate to challenge the accuracy of information contained in his personal history or correctional supervision history 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-6918

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 20, 1991

Hon. Nancy Calhoun
Member of the Assembly
2011 "D" Street
Stewart International Airport
New Windsor, NY 12553

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.</u>

Dear Assemblywoman Calhoun:

I have received your letter of November 22. Please note that my delay in responding was due to the absence of a copy of your request for records, which was forwarded later and reached this office on December 11.

You have sought an advisory opinion concerning rights of access to records pertaining to Camp LaGuardia, a facility of the New York City Human Resources Administration (HRA) located in the towns of Blooming Grove and Chester. It is my understanding that Camp LaGuardia is a facility for homeless adults. The records sought include incident reports, "logs listing client passes for the months of October and November 1991 from the data generated by individual passes", rules and regulations governing the operation of Camp LaGuardia, regulations and related records concerning eligibility and benefits concerning food stamps, as well as regulations pertaining to "Social Security and Veterans benefits and whether these can be applied toward the housing costs of...clients."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records, and 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 are no "logs listing client passes", there would be no obligation on the part of HRA to prepare new records on your behalf.

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 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 is in my view based upon a recognition by the State Legislature that an individual record might contain both accessible and deniable information. Further, I believe that the same phrase essentially imposes an obligation upon agencies to review records sought in their entirety to determine the extent, if any, to which the grounds for denial may properly be asserted. In short, even though certain portions of records might justifiably be withheld, the remainder might be available.

As a unit of HRA which administers public assistance programs, it appears that many of the residents of Camp LaGuardia are likely recipients of public assistance. Further, having discussed the matter briefly with Mr. Ralph Pennington, freedom of information officer for HRA, I was informed that some of the residents receive public assistance; others do not. In this regard, section 136 of the Social Services Law provides records that include the names or addresses of applicants for or recipients of public assistance are confidential. When section 136 applies, records would be specifically exempted from disclosure by statute in conjunction with section 87(2)(a) of the Freedom of Information Law. In my opinion, the nature of certain of the records sought, particularly the incident reports and logs of client passes, are largely unrelated to the provision of assistance and care, and it is doubtful that section 136 of the Social Services Law would serve to exempt those records from disclosure in their entirety. Nevertheless, residents of Camp LaGuardia are there because they are poor or homeless. Consequently, disclosure of identifying details pertaining to those persons could in my view in many instances be withheld or deleted from records on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)].

Although I attempted to elicit information concerning incident reports from Mr. Pennington, he was unable to provide significant detail concerning their nature or content. An "incident" might be any unusual occurrence; it might relate to a medical event or emergency, a motor vehicle accident involving residents as well as others, or perhaps criminal activity involving residents as alleged perpetrators or as victims. From my perspective, rights of access or the ability to deny access may differ depending upon the nature of an incident and the specific content of an incident report. If an incident involves a medical emergency, for example, it is likely that identifying details

concerning the subject of the incident could properly be withheld. If an incident is an accident involving a delivery truck on the grounds of Camp LaGuardia, there may be no issues concerning privacy, and a report might be available in its entirety. If an incident report relates to criminal activity, i.e., an arrest, I believe that the report should be available to the same extent as analogous records, such as police blotters or arrest records.

In short, I cannot provide specific guidance regarding access to incident reports, for I am unfamiliar with the circumstances in which they are prepared. However, I believe that personally identifiable details relating to residents could be deleted from the reports to protect against unwarranted invasions of personal privacy in appropriate circumstances.

Also potentially relevant with respect to incident reports is section 87(2)(g) of the Freedom of Information Law. While that provision represents a potential basis for withholding, due to its structure, it often requires 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.

Incident reports prepared by staff at Camp LaGuardia could in my view be characterized as "intra-agency" materials. Nevertheless, insofar as they include factual information, i.e., a description or summary of events or occurrences, I believe that

they would be available, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy, in which case, identifying details could be deleted.

As in the case of incident reports, I am unfamiliar with "logs listing client passes". It is assumed that any such logs consist of factual information and that they likely include such items as clients' names or identification numbers, and times or dates of departure and return. Again, I believe that those records would be available in part, but that identifying details could be deleted when disclosure would result in an unwarranted invasion of personal privacy.

Lastly, insofar as your request pertains to various regulations, assuming that those records exist and can be found based on the terms of your request, I believe that they must be disclosed. In short, none of the grounds for denial could be asserted to withhold regulations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ralph Pennington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6919

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 20, 1991

Ms. Janet A. McCue
[redacted]

The staff of the Committee 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. McCue:

I have received your letter of November 30 in which you requested an opinion concerning the adequacy of a determination to deny access to records following an appeal.

Based on your letter and a copy of a determination sent to this office by Jacqueline Papatsos, Mayor of the Village of Island Park, you requested letters sent to the Village by its attorneys. The request was denied and you appealed. In response, the Mayor wrote that: "Your appeal relative to letters from our attorneys, Snitow and Pauley, is denied. The records were properly denied under the Freedom of Information Law". The foregoing represents the entirety of the substance of the Mayor's determination of your appeal.

In this regard, section 89(4)(a) of the Freedom of Information Law states in relevant part that the person or body that renders determinations on appeal "shall...fully explain in writing the reasons for further denial, or provide access to the record sought". From my perspective, a statement that merely indicates that records were properly denied is inadequate and fails to comply with the Law. As you may be aware, the Freedom of Information Law generally states that all records are available, with certain exceptions. Those exceptions are detailed in paragraphs (a) through (i) of section 87(2) of the Law. In my opinion, a determination upholding a denial must fully explain the reasons for which one or more of the grounds for denial might have been asserted to justify the denial. In this instance, no basis for denial has been explained.

I hope that I have 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. Jacqueline Papatsos, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6920

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 20, 1991

Mr. James Knorr
86-A-8836
P.O. Box 2000
Pine City, NY 14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Knorr:

I have received your letter of December 1 in which you sought an advisory opinion concerning the Freedom of Information Law.

You have asked whether you can "obtain a statement given by a suspended correctional officer to an investigator working for the inspector general's office of the DOCS". You added that the statement "accused [you] of asking and receiving from said officer contraband which resulted in [your] being found guilty and in effect sentenced to an S.H.U.". You also asked where to write to seek the statement.

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. Since I am unfamiliar with the contents of the record in which you are interested or the effects of its 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), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal

privacy." That provision might be applicable in a variety of situations, i.e., where a record identifies persons other than yourself, 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 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). For instance, although records might properly be withheld when disclosure would interfere with an investigation under section 87(2)(e)(i), when the investigation has ended, that provision could not likely serve as an appropriate basis for a 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, unless a different ground for denial may 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.

Records prepared by Department employees or records transmitted between agencies, would in my view fall within the scope of section 87(2)(g). Insofar as those records include opinions or unsubstantiated allegations, for example, I believe that they could be withheld.

Lastly, according to the regulations promulgated by the Department of Correctional Services, a request for records kept at a correctional facility may be made to the facility superintendent or his designee; a request for records maintained at the Department's Albany offices may be made to the Deputy Commissioner for Administration.

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-6921

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 20, 1991

Mr. Darnell Jones
89-A-8334
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jones:

I have received your letter of December 2 addressed to William Bookman, Chairman of the Committee on Open Government. The staff of the Committee is authorized to respond on behalf of its members.

As I understand the situation, you requested certain records from your facility. Although you were informed that the records in question are generally created and kept, you were also told that no such records could be found following a search for the records.

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 or prepare a record in response to a request. Therefore, if the agency does not maintain the records sought, it would not be required to create records on your behalf in order to satisfy your request.

Second, if the records in question have been misplaced or lost, and you feel that it would be useful to do so, you may seek a "certification" under section 89(3). That provision states in part that, on request, an agency "shall certify that it does not have possession of such record, or that such record cannot be found after diligent search".

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-6922

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1991

Mr. Carl G. Colton
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Colton:

As you are aware, I have received your letter of December 3 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter:

> "For the past four years, the Village of Canton has had a separate Assessor, whose residence and place of business is in the Syracuse area, some 130+/- miles away and definitely outside of St. Lawrence County. What records as he uses in determining his assessments are apparently in his possession and not available for any public access within the Village of Canton with the possible exception of brief periods in early February when he holds office hours and participates in the Board of Assessment Review hearings."

Your inquiry involves the "location and availability of files of the Village Assessor", and the propriety of maintaining those records far from the Village.

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" 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 materials in question are clearly maintained for the Village. Consequently, I believe that they constitute "records" that fall within the scope of the Freedom of Information Law.

Second, section 87(2) of the Freedom of Information Law requires that an agency make records "available for public inspection and copying". Further, section 84, the legislative declaration, provides in part that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible". In my view, every law, including the Freedom of Information Law, should be implemented in a manner that gives reasonable effect to its intent. In this instance, I believe that it would be unreasonable to maintain public records 130 miles from the Village, for residents of the Village could not be reasonably expected to be able to travel that distance to inspect and/or copy records. Further, effect of maintaining records at such a distance in my view constitutes a constructive denial of access. In a case in which records were kept at the home of a town official within the town, it was held that the Town Law does not require that records be kept at town hall, but specified that the records must nonetheless be "open and available at all reasonable hours of the day" [Town of Northumberland v. Eastman, 493 NYS 2d 93 (1985)]. Again, the location of the records in question in this instance would in my view render them inaccessible to the public.

Lastly, section 57.25 of the Arts and Cultural Affairs Law, which includes the "Local Government Records Law", states in part 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". I believe that the foregoing suggests that local government records be kept by local governments in a manner that optimally enables them to carry out their duties, and that maintenance of records at a distance from their normal offices would fail to comply with the requirements of that statute.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Canton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1923

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1991

Ms. Barbara VanZandt

[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. VanZandt:

I have received your letter of November 24, which reached this office on December 5.

You described a problem involving the assessment of your property, specifically the assessment of an acre of farmland. Having posed several questions to the assessor, you received what you consider to be an "ambiguous answer" that failed to fully respond to your questions.

In this regard, I offer the following comments.

First, I point out that the title of the Freedom of Information Law may be misleading, for that statute is a vehicle under which the public may seek existing records; it does not require that agency officials provide information by answering questions. Certainly those officials may choose to respond to questions. Nevertheless, 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 records exist that contain the information you seek, Town officials would not be obliged to prepare new records on your behalf.

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. In my view, the information sought, to the extent that it exists as a record or records, would be available. I believe that it would consist of statistical or factual information, and that none of the grounds for denial would apply.

Lastly, since the issues that you raised may be somewhat technical, it is suggested that you contact the State Board of Equalization and Assessment, which is located at 16 Sheridan Avenue, Albany, NY 12210-2714. The phone number for its office of public information is (518) 474-1700.

I hope that I 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-6924

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1991

Mr. Jesse James Baker
[redacted]

Dear Mr. Baker:

I have received your letter of November 23, which, for reasons unknown, did not reach this office until today.

You have asked that I send you your adult criminal records, as well as records concerning your placement with the Division for Youth.

In this regard, the Committee on Open Government is authorized to advise with respect to access to records. This office does not maintain records generally, nor is it authorized to obtain records on behalf of an applicant. In short, I cannot make the records available, because this office does not possess them. Nevertheless, I offer the following comments.

First, the central repository of criminal history records is the Division of Criminal Justice Services. Further, criminal history records are available to the subject of the records, not under the Freedom of Information Law, but rather under provisions of the Executive Law and regulations of the Division of Criminal Justice Services. Since I am unaware of the information that an applicant must subject as proof of identity, it is suggested that you call the Division at (518) 457-6050 or write the Division of Criminal Justice Services, Office of Identification Systems, Executive Park Tower, Stuyvesant Plaza, Albany, NY 12203.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

With respect to records of the Division for Youth concerning specific individuals, section 87(2)(a) of the Freedom of Information Law, the initial ground for denial, is likely relevant. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is section 372 of the Social Services Law, which requires that various records be k{2t 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 was advised some time ago that references to the "department" have been construed to include 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.

It is suggested that a request for records of the Division for Youth be addressed to the Records Access Officer, Division for Youth, 84 Holland Avenue, Albany, NY 12208.

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-6925

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1991

Mr. Michael Kondelka
83-B-1150
P.O. Box AG
Fallsburg, 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. Kondelka:

I have received your letter of November 30 in which you sought an advisory opinion concerning the Freedom of Information Law.

By way of background, having been convicted, your appeals have been dismissed, and it is your understanding that you "have only one shot at a Federal Habeas Corpus". The problem that you now face is that you have been denied access to all exhibits that were received into evidence at trial. You added that "[a]ll exhibits that were introduced at trial, but not received into evidence [were] returned to respective counsel", and that you have been denied access to those records. Since you cannot proceed without having had an opportunity to review the exhibits, you asked which of three procedures should be followed, a motion under section 440 of the Criminal Procedure Law, an Article 78 proceeding in the nature of mandamus, or an action under 42 U.S.C. 1983. You also sought advice concerning the procedure and your rights under the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, and I have neither the jurisdiction nor the expertise to provide guidance concerning the appropriate course of action. It is suggested that you discuss that issue with your attorney.

With respect to the Freedom of Information Law, a request should be made to the "records access officer" at the agency or agencies that maintain the records sought. The records access officer has the duty of coordinating the agency's response to requests.

In terms of rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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 decision concerning a request for records maintained by an 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, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available. However, in the same decision, in Moore v. Santucci, it was also stated that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's

> denial of the petitioner's request under FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee (see, Public Officers Law [section] 87; Sheehan v City of Syracuse, 137 Misc 2d 438), unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

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-6926

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 24, 1991

Ms. Carol Edwardson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Edwardson:

I have received your letter of December 2 in which you requested assistance.

You described your unsuccessful efforts in attempting to obtain records concerning two corporations, including the identities of the persons in charge of those firms.

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 mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally pertains to governmental entities, and it would not apply to private corporations, for example.

It is noted that the Division of Corporations at the Department of State maintains certificates of incorporation concerning every corporation doing business in New York. Although those records are public, there is no requirement that they include the names of principals or directors of corporations. If you choose to request copies of certificates of incorporation,

you may do so by writing to the New York State Department of State, Division of Corporations, 162 Washington Avenue, Albany, NY 12231. The fee, which is payable to the Department of State by certified check or postal money order, is $5.00 per uncertified copy for certificates of incorporation and $10.00 for certified copies. Again, a certificate of incorporation will not necessarily identify those in charge of the corporations.

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-6927

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 24, 1991

Mr. Stanley A. Wtulich
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wtulich:

I have received your letter of December 4 which pertains to a delay in response to a request for records directed to a regional office of the Department of Environmental Conservation.

In this regard, 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)].

Further, it is noted that a recent division 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 Divi-

> sion 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 addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.)

For your information, the person designated to determine appeals at the Department of Environmental Conservation is Counsel to the Department, Marc Gerstman.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6928

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 24, 1991

Mr. Fred L. Abrams
Counsellor at Law
42 Peck Slip, Suite 5B
New York, NY 10038

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Abrams:

I have received your letter of December 2, as well as the materials attached to it.

Your inquiry pertains to an unanswered request for a "subject matter list" directed to the Mount Vernon Housing Authority. In this regard, I offer the following comments.

First, I point out by way of background 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."

Section 3(2) of the Public Housing Law states that municipal housing authorities are public corporations, and section 419 of the Public Housing Law specifies that the Mount Vernon Housing Authority "shall constitute a body corporate and politic". Since the definition of "agency" includes public corporations, I believe that the Mount Vernon Housing Authority is clearly an "agency" required to comply with the Freedom of Information Law.

Moreover, it has been held judicially that a municipal housing authority is subject to the Freedom of Information Law [Washington Rockland Newspapers, Inc. v. Fischer, 101 AD 2d 840 (1985)].

Second, among the few instances in the Freedom of Information Law in which agencies must prepare a record relates to the "subject matter list". Specifically, section 87(3)(c) of the Freedom of Information Law requires that each agency shall maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

In my view, an agency's subject matter list is not required to identify each and every record of an agency. However, it is required to include reference, by category, to all records maintained by an agency, whether or not the records are available to the public. Further, in my opinion, the purpose of the subject matter list is to enable the public to know of the categories of records maintained by an agency. With that kind of knowledge, requests for record can be made by means of a category of records appearing in the list. As stated in regulations promulgated by the Committee on Open Government, which have the force of law: "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [see 21 NYCRR Section 1401.6(b)].

Third, 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)].

Relevant to your inquiry is section 1401.2 of the Committee's regulations, which provides in 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..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel maintain a subject matter list and act appropriately in response to requests.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Director, Mount Vernon Housing Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6929

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 24, 1991

Mr. Gerald Dasch, Sr.
Mr. Greg Quigly
Concerned Taxpayers
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dasch and Mr. Quigly:

I have received your letter of November 22, which, for reasons unknown, did not reach this office until December 6.

You have asked that this office "intervene" with respect to your request for records of the Middle Island Fire District. By way of background, due to concerns regarding the expenditure of taxpayers' money, on August 5 a request was made to the Board of Fire Commissioners for copies of records of expenditures and bills for the period of January 1, 1990 to July 1, 1991, and for copies of minutes of meetings held by the Board from January 1 through August 1 of this year. On August 15, the Board's attorney advised you that the Board would discuss your request at its next meeting and advise accordingly. A week later, the attorney sent a form to be completed, indicated that the request involved "some 10,000 copies", that it would take 3 to 4 months to fulfill the request and that a check in the amount of $3,500 should be paid in advance. On September 7, you amended your request and asked to review the records in order to decide which records you wanted copied. On September 22, the attorney wrote that the request would be granted "upon receipt of the completed Freedom of Information Document Request Form" that he had previously furnished, and upon submission of "an advance deposit for document reproduction". You apparently appealed in conjunction with the foregoing and have received no further response.

In this regard, I offer the following comments.

First, since you asked that this office "intervene", I point out 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 comply with law or to grant or deny access to records. However, in an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to the Board of Fire Commissioners and its attorney.

Second, the Freedom of Information Law, section 89(3), and the regulations promulgated by the Committee (21 NYCRR 1401.5), require that an agency respond to a request 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)]. Neither the Law nor the regulations refers to or requires 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.

In short, 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.

Third, although an agency may charge up to twenty-five cents per photocopy pursuant to section 87(1)(b)(iii) of the Freedom of Information Law and may in my view require that fees be paid in advance of preparing copies, nothing in the Freedom of Information Law authorizes the assessment of a fee for the inspection of records (see also 21 NYCRR section 1401.8). Consequently, I believe that you may inspect records at no charge. If, after reviewing the records, you determine that you would like copies, a fee may be charged.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in 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: Board of Fire Commissioners
Alan M. Wolinsky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6938

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 24, 1991

Mr. Benjamin Stephens
83-B-0072
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. Stephens:

I have received your letter of November 28 in which you sought advice concerning access to records.

According to your letter, you requested copies of certain x-ray photos pertaining to you. Although those records were made available for inspection, you were informed that the Green Haven Correctional Facility does not have the ability to copy original x-rays. It is your view that you have a right to receive copies.

In this regard, there appears to be no question concerning your rights of access to the x-rays, for you have been offered an opportunity to inspect them, and that offer has apparently been made pursuant to section 18 of the Public Health Law. Paragraph (d) of section 18(2) states in part that a health care provider "shall furnish" to the subject of medical records "a copy of any patient information requested" that is accessible to that person. Further, paragraph (e) of section 18(2) as recently amended states in part that "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider". Based upon the foregoing, if it is possible to do so, I believe that facility staff should transmit your x-rays to a service that could reproduce them, in which case you could be charged for any costs, i.e., postage, etc., associated with reproducing the records, as well as the actual costs of duplication. I point out that the provisions of the Freedom of Information Law would involve the same result. Under section 87(1)(b)(iii) of that statute, an agency may charge based on the actual cost of reproduction with respect to the duplication of records by means other than photocopying.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: L. Zwillinger, Regional Health Services Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6931

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 24, 1991

Ms. Veronica Fori
[redacted]

The staff of the Committee 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. Fori:

I have received your letter, which reached this office on December 6.

As I recall the conversation to which you referred, despite your familiarity with an incident, you were denied access to a police report by the Town of Coeymans. 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.

It is unclear from your letter whether the record in question is in the nature of a police blotter entry or a more detailed report. Although the phrase "police blotter" is not specifically defined in any statute, it has been held that, according to custom and usage, a police blotter is a log or diary in which any event reported by or to a police department is recorded; it is generally a summary of events or occurrences and contains no investigative information. Further, it has been found that a police blotter containing that kind of information is accessible [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. If the record in which you are interested is in the nature of a police blotter, I believe that it should be made available. If the report is more detailed, the most relevant provision pertaining to records prepared by police and other law enforcement agencies is section 87(2)(e). That provision enables an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

As such, records compiled for law enforcement purposes may be withheld under section 87(2)(e) only to the extent that the harmful effects described in subparagraphs (i) through (iv) would arise by means of disclosure. Therefore, if those harmful effects would not occur, section 87(2)(e) would not serve as a basis for withholding, and the report would likely be available.

If there are additional facts that you could provide regarding the record that would be useful in an analysis of rights of access, please so inform me.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Ella Russo
Chief Ferraro