STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6932

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Ms. Patricia Prospero
Cortland Standard
110 Main Street
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 Ms. Prospero:

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

You have sought an advisory opinion concerning a denial of a request by the Preble Fire Commission for a report prepared by an independent consultant concerning a new fire truck. Although the truck was purchased from the low bidder, the materials that you enclosed suggest that the truck did not meet specifications and that certain aspects of its design would fail to comply with legal requirements. Although the report was denied on the ground that it "constitutes material prepared for potential litigation", it is your belief that it was prepared to address allegations and findings, many of which involve the safety of the vehicle, offered in a letter by another bidder.

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, while two of the grounds for denial are relevant to an analysis of rights of access, one appears to be inapplicable, and the other might require disclosure of certain aspects of the report.

The first ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is section 3101(d) of the Civil Practice Law and Rules, which exempts from disclosure material prepared for litigation. However, it has been held that records prepared for multiple purposes, one of which might include eventual use in litigation, cannot be withheld on the basis of section 3101(d) [see Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)]. If, for example, the consultant was retained to ascertain whether the vehicle met specifications, to check safety features, to ascertain the accuracy of a competitor's contentions and to prepare for possible litigation, I do not believe that an assertion of 3101(d) would be justified; only if the report was prepared solely for litigation would that provision serve as a valid basis for denial.

Assuming that the report could not be characterized as having been prepared solely for litigation, the other relevant provision is section 87(2)(g) of the Freedom of Information Law. 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 Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (See, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

The court, however, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports

> contain 'statistical or factual tabulations or data' (Public Officers law section 87[2][g][i]), or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents. If, for example, such a report consists wholly of opinions or recommendations, it could, in my view, be withheld under section 87(2)(g). On the other hand, insofar as it consists of statistical or factual information, for example, I believe that it would be available under section 87(2)(g)(i).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Commission and its attorney.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Preble Fire Commission
Donald C. Armstrong

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6933

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. Anton Gega
88-A-5255
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. Gega:

I have received your letter of December 24 in which you sought assistance concerning access to records.

Specifically, you wrote that you need help in obtaining records from the clerk of the Bronx Criminal Court. The correspondence attached to your letter indicates that you requested the records under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and section 86(3) of 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.

The foregoing is not intended to suggest that court records are not available, for other statutes, i.e., section 255 of the Judiciary Law, often provide substantial rights of access.

Second, having reviewed correspondence relating to your inquiry, the clerk of the court wrote that a review of the records indicates that the docket number to which you referred in your request "does not reflect your name anywhere in the record". Therefore, it is suggested that you attempt to ascertain whether the number that you cited is correct. Further, it is noted that the clerk referred to a docket number; your request, however, referred to a felony complaint number. It is possible that there may be confusion concerning the record that you seek.

As you requested, copies of your correspondence have been made and are enclosed.

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-6934

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. Juan Martinez
88-A-9565
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. Martinez:

I have received your letter of December 23 in which you requested assistance.

According to your letter, you requested records from the City of Syracuse Police Department concerning a charge that was dismissed. The request was denied with no reason given.

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..."

Further, the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law state that a denial must "explain in writing the reasons therefor" [21 NYCRR 1401.2(b)(ii)].

The regulations also 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)].

The right to appeal a denial is described 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, who shall within ten business days of the receipt

of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Second, official records and papers relating to a charge that is dismissed in favor of an accused are generally sealed pursuant to section 160.50 of the Criminal Procedure Law. However, section 160.5(1)(d) states in part that "such records shall be made available to the person accused". While I am not an expert with respect to the Criminal Procedure Law, the cited provision might be applicable in your circumstance.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Falge, Deputy Chief of Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6935

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

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 December 23 in which you sought an advisory opinion concerning the Freedom of Information Law.

You requested copies of W-2 forms concerning employees of the Saratoga County Buildings and Grounds Department for the years 1989 and 1990. The request was denied on the ground that disclosure would result in "an invasion of 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 records of an agency are available, except to the extent 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. Therefore, there may be situations in which a single record includes both accessible and deniable information. In those cases, I believe that an agency could delete those portions that may justifiably be withheld while providing access to the remainder.

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 County 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.

It has been contended in the past that W-2 and 1099 forms are specifically exempted from disclosure by statute, citing 26 USC 6103 (the Internal Revenue Code) and section 697(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 County. 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.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to County officials.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Courtenay Hall, County Attorney
Kermit Plummer, Jr., Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6936

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. Timothy J. Lippa
89-C-1381 K-3-20
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. Lippa:

I have received your letter of December 13. You wrote that you are trying to gain access to "all [your] prison, parole and arrest records", and particularly your pre-sentence report. You asked how you can use the Freedom of Information Law to review the records.

In this regard, I offer the following comments.

First, requests should be made 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 response to requests. I point out that regulations promulgated by the Department of Correctional Services state that a request for records kept at a correctional facility may be made to the facility superintendent. Those regulations also indicate that an inmate may request his "DCJS report", a criminal history record, at a correctional facility.

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

Third, I am unfamiliar with the contents of the records in which you are interested or the effects of their disclosure. However, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Finally, since you referred to your pre-sentence report, 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.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6937

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

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 a copy of your letter of December 21 to Susan E. Shepard, Commissioner of the New York city Department of Investigation, on which you raised a question concerning sections 89(8) of the Freedom of Information Law and 240.65 of the Penal Law.

You asked whether I would "agree that intentional stalling would be a Penal Law infraction". In my opinion, it would not.

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."

Similar language appears in the section of the Penal Law to which you referred.

From my perspective, "stalling" in response to an initial request might constitute a constructive denial that can be appealed under section 89(4)(a) of the Freedom of Information Law. "Stalling" following an appeal, i.e., failure to respond within the statutory time period, may be construed as a denial resulting in the exhaustion of one's administrative remedies and the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

Sections 89(8) of the Freedom of Information Law and 240.65 of the Penal Law in my view apply narrowly to two kinds of situations. One involves a case in which a record is requested, and an official, knowing that the record is maintained by the agency, denies or conceals its existence in order to prevent disclosure. The other involves a situation in which a request for a record is made and an official destroys the record in order to prevent disclosure. Those situations are in my view quite different from "stalling".

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-6938

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. Timothy Baker Sr.
90-T-1126
Gouverneur Correctional Facility
P.O. Box 480
Scotch Settlement Road
Gouverneur, NY 13642

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

Dear Mr. Baker:

I have received your letter of December 20 and the correspondence attached to it.

You have complained that ten business days passed with no response following your appeal to the "appeals officer" at the Gouverneur Correctional Facility. The correspondence indicates that your appeal was made to the Superintendent of the facility.

In this regard, the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law, section 5.45, state that an appeal following a denial of access may be made to Counsel to the Department in Albany. As such, I do not believe that the Superintendent is the appeals officer.

The provision pertaining to 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John O'Keefe, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6939

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

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 December 20 in which you referred to my opinion of December of December 9 and unanswered requests for records of the Department of Correctional Services.

In this regard, having reviewed that opinion, there is nothing that I can add concerning substantive issues. However, I point out that the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, section 89(3) of the 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.

Lastly, you might want to confer with your attorney or a representative of Prisoners' Legal Services.

As you requested, enclosed is a copy of the opinion rendered on December 9.

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-6948

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Ms. Sandra DeHayes
Grievance Chairperson
Rocky Point Teachers Association
P.O. Box 298
Rocky Point, NY 11778

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

Dear Ms. DeHayes:

I have received your letter which is dated November 6, but which reached this office on December 9.

According to your letter, on October 7 you made a verbal request for certain records obtained by the Assistant Principal of the Rocky Point Junior-Senior High School. You spoke with him again on October 15 and on the following day submitted a written request. On October 25, you "filed a formal request on the Freedom of Information form". Approximately a week later, you were informed that the records sought had been discarded. Your request involved "notices sent out by Student Council regarding teachers volunteering to chaperone at homecoming".

You have requested advice concerning "what can be done to avoid this situation happening again in the future". In this regard, I offer the following comments.

First, although an agency may require that a request for records be made in writing, nothing in the Freedom of Information Law 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 [see Freedom of Information Law, section 89(3)], 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.

Second, the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency need not create a record in response to a request. Since the records in this instance were discarded, the District could neither grant nor deny access to them. Nevertheless, statutes other than Freedom of Information Law provide direction concerning the retention and disposal of records. Specifically, section 57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. 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...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

As such, records cannot be destroyed without the consent of the Commissioner of Education, and 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 records in question. However, I believe that a retention schedule applicable to school district records may be obtained from the State Education Department, State Archives and Records Administration, Cultural Education center, Albany, NY 12230.

Lastly, second 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."

Therefore, if records are destroyed with intent to prevent public disclosure, such activity could constitute a violation (see Penal Law, section 240.65).

In an effort to enhance compliance with and understanding of law, copies of this opinion will be forwarded 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: Edward J. Swensen, Associate Superintendent
Steve Donahue, Assistant Principal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6941

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. Norman J. Goldman
[redacted]

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

Dear Mr. Goldman:

I have received your letter of December 18, in which you referred to my correspondence of December 16. In that letter you sought an advisory opinion concerning access to certain records of the Clifton Park Water Authority. Having discussed the matter with the Authority's attorney, I was informed that the records in question had been or would soon be disclosed and indicated that the matter became moot. Nevertheless, due to what you consider to have been an "inappropriate position" taken by the Authority, you asked that I render an advisory opinion.

As I understand the situation, based upon correspondence sent with your earlier letter, the Authority was negotiating with several water companies with a goal of reaching agreements with all of the companies in order to develop a single water system. You wrote that three of the agreements had been reached, and you requested the contracts between the Authority and those companies. The request was denied because the Authority was still negotiating with another company and it was contended that disclosure would "impair the ability of the...Authority to negotiate said agreement". It was also stated that "[s]ince the conclusion of the Country Knolls discussions resulting in either an agreement or filing of an eminent domain appropriation map is imminent, and the Water Authority is pursuing acquisitions for a total system, these documents will not be disclosed at this time". When I wrote to you on December 16, final agreements had apparently been reached, and the records were 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, in my view, the only ground for denial of possible relevance would have been section 87(2)(c). That provision permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". As such, the question is whether disclosure of the agreements that had been reached would have impaired the ability of the Authority to reach appropriate agreements concerning negotiations that had not yet resulted in agreement.

In your initial letter, you referred to "linkage" and wrote that negotiations had been "in process for months, if not years". However, you contended that "if...linkage was a valid issue once, it no longer is". From my perspective, the propriety of the Authority's denial would have been dependent on an issue of fact. If indeed there was a "linkage" and if the ability to engage in one or more agreements was necessarily contingent upon reaching agreements with all of the parties, it would appear that the records were properly withheld. On the other hand, if there was no such linkage or contingency, and if the contracts were negotiated individually and could stand independently, the records would in my opinion have been public.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kevin A. Luibrand

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2011
FOIL-AO-6942

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

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 December 17, as well as the materials attached to it. You asked that I review and comment with respect to an appeal made under the Freedom of Information Law to the Wilmington Town Supervisor. Although you received various records in response to requests, you expressed dissatisfaction with respect to certain aspects of the response.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and section 89(3) of that statute provides in part that an agency generally need not create records in response to a request. Similarly, while agency officials may provide explanations or answer questions, the Freedom of Information Law does not require that they do so. In short, if an agency does not maintain records containing information sought, it is not required to prepare new records in response to a request for information.

Second, an issue 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 Town maintains its records or the volume of the records sought. However, it is possible that some aspects of the request do not reasonably describe the records sought, particularly those in which you sought "all" records dealing with an issue.

Third, you questioned the propriety of the denial of access to "the attorney's recommendations on the proposed Subdivision regulations and BLDG. standards". In my opinion, the recommendations may be withheld. 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. 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. If the attorney is the Town Attorney, his or her recommendations could be withheld under section 87(2)(g).

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 Town 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.

Another aspect of the request involved contracts and related documents between the Town and an engineering firm. Based upon the content of your letter and an assumption that those records exist, I believe that any such records would be accessible, for none of the grounds for denial would be applicable.

Lastly, you raised questions concerning the contents of minutes. In this regard, 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. 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.

Copies of this opinion will be forwarded to Town officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Joanne Zaumetzer, Supervisor
Judy A. Bowen, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6943

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Ms. Eva DeFiglio
Records Access Officer
The Enlarged City School District
of Troy
1728 Tibbits Avenue
Troy, New York 12180

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

Dear Ms. DeFiglio:

I have received your letter of December 9 which pertains to requests concerning an arbitrator's determination issued with respect to a grievance filed by a teacher in the Troy City School District. You asked that I make "a determination as to whether or not [I] would consider this as something that would fall under the Freedom of Information Law or if [I] would consider this as confidential and part of a personnel record".

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. Neither the Committee nor its staff can make a binding determination or compel an agency to grant or deny access to records. Consequently, the ensuing remarks should be considered advisory.

First, the subject of the arbitrator's determination appears to relate to an individual and a situation that have attracted significant public attention and have been widely publicized.

Second, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v.

Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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.

While I am not familiar with the specific content of the records sought, it appears that 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.

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].

A second 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 arbitrator's decision is binding on both parties to the proceeding and essentially represents a final determination that would be available, except to the extent that different basis for denial [i.e., section 87(2)(b) concerning privacy) may be cited.

The third potentially relevant ground for denial, which also involves the protection of privacy, is 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, in brief, prohibits the disclosure of records personally identifiable to students, unless the parents of the students or the students themselves who have reached the age of eighteen years of age, consent to disclosure. Therefore, insofar as the record includes personally identifiable information pertaining to students, I believe that those portions could be deleted, unless consent is given.

In sum, and in view of the public disclosures that have already been made, it appears that the arbitrator's determination would be available, subject to the conditions described above relative to portions of the record identifiable to students.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Tim O'Brien
Ellen Fiore

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6944

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. Gregory D. Barnum
89-C-0602
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, unless otherwise indicated.

Dear Mr. Barnum:

I have received your letter of December 16 and the materials attached to it.

Your inquiry concerns the propriety of denials of access to records by the Division of State Police and Tioga County under the Freedom of Information Law. Your request to the Division of State Police involved an investigative report and related records concerning your arrest, which resulted in a trial during which various disclosures were made. Although an arrest report was made available, the remaining materials were withheld on the grounds that "[o]ther portions of this report were compiled for law enforcement purposes which, if disclosed, would reveal criminal investigative techniques and procedures", and because disclosure "would constitute an unwarranted invasion of the personal privacy of others concerned". I have also received a determination of your appeal in which it was found that the request would be denied "for the same reasons as set forth" in the initial denial. The request to Tioga County involved transcripts of grand jury 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.

With respect to the denial by the State Police, it appears that reliance was placed on section 87(2)(b) and section 87(2)(e)(iv).

Section 87(2)(b) authorizes an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy". I point out, however, that 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". Therefore, unless a different ground for denial could properly be asserted, the records sought might be accessible following the deletion of identifying details. Further, while I am unfamiliar with the contents of the records or disclosures made concerning persons identified in the records, it is questionable in my opinion whether a claim that disclosure would result in an unwarranted invasion of personal privacy could be justified in view of the facts that you presented.

Section 87(2)(e)(iv) states that an agency may withhold records compiled for law enforcement purposes which if disclosed would "reveal criminal investigative techniques or procedures, except routine techniques and procedures". As such, not all criminal investigative techniques and procedures may be withheld under section 87(2)(e)(iv); rather only those that are non-routine fall within the exception.

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. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude the Division from carrying out its duties effectively. To that extent, I do not believe that section 87(2)(e)(iv) would justify a denial.

Lastly, with respect to grand jury records, relevant is 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". 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 sec-

> tion or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

In short, the Freedom of Information Law appears to be inapplicable to grand jury records. As a defendant, however, you may have other rights of access to records or means of obtaining those records. Since I lack expertise concerning Criminal Procedure Law or the rights of defendants, it is suggested that you discuss the matter with your attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis A. DeFrancesco, Chief Inspector
Thomas Emnet, Tioga County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6945

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. Daniel Sullivan
[redacted]

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

Dear Mr. Sullivan:

I have received your recent letter, which reached this office on December 27.

According to the correspondence attached to your letter, you made a request to the New York City Police Department for records pertaining to "the appeal process whereby one can appeal a decision of the Police Review Board". In response to the request, the Department's records access officer wrote that he was "unable to locate said documents as the Police Department does not archive its records in the manner you have suggested". You complained that the response did not advise you of your right to appeal. Nevertheless, you appealed on October 9. As of the date of your letter to this office, you have received no further response.

You asked what I "make of all this" and asked for advice. In this regard, I offer the following comments.

First, having reviewed the Official Directory of the City of New York, I was unable to locate any reference to an entity known as the "Police Review Board". If there is no such entity, presumably there would be no records concerning an appeal process. There is, however, a reference to the Civilian Complaint Review Board. If that is the agency in which you are interested, it is suggested that you contact the Board at 295 Lafayette Street, New York, NY 10012. I point out that I am unaware of the procedures of the Civilian Complaint Review Board or whether its procedures include the ability to appeal.

Second, while the records access officer's response to your request is not completely clear, a response indicating that records cannot be located may not be reflective of a denial. In general, I believe that a denial occurs when an agency can locate records and determines to withhold them. In those instances, the reasons for denial must be made in writing [21 NYCRR 1401.2(b)(ii)] and the applicant must be informed of the right to appeal [21 NYCRR 1401.7(b)]. However, if a record cannot be found, in a technical sense, the agency can neither grant nor deny access. In such a case, an applicant may seek a certification to that effect pursuant to section 89(3) of the Freedom of Information Law. That provision states that, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". If you believe that it would be useful to do so, you might seek a certification from the records access officer.

Finally, section 89(3) of the Freedom of Information Law also 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 system.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6946

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

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 December 16 in which you asked that I advise the records access officer for the Office of the Actuary of the City of New York that records "must be made available during normal business hours".

In this regard, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, 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, for example, could not be restricted to a specified time period on a particular day.

In an effort to enhance the implementation of the Freedom of Information Law, a copy of this opinion will be sent to the records access officer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ellen Fox-Katine, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-130
FOIL-AO-6947

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Ms. Deborah A. Wilson
[redacted]

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

Dear Ms. Wilson:

As you are aware, your letter of November 21 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee is authorized to advise with respect to the Freedom of Information Law and the Personal Privacy Protection Law.

Your letter pertains to a request for time sheets pertaining to you by a private investigator who apparently was acting on behalf of your husband. You are an employee of the Department of Social Services, which released the records in question. It is your view that your privacy has been invaded in violation of the Personal Privacy Protection Law in view of the nature of records and because the request was unrelated to government accountability.

In this regard, I offer the following comments.

First, 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 is in my opinion irrelevant.

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. Although two of the grounds for denial relate to attendance records or "time sheets", based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

Of significance is section 87(2)(g), which permits an agency to withhold records that:

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

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

Attendance records could be characterized as "intra-agency materials". However, those portions reflective of dates or figures concerning the issue of leave time or absences, or the times that employees arrive at or leave work, would constitute "statistical or factual" information accessible under section 87(2)(g)(i).

Also of relevance is section 87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would result in an unwarranted invasion of personal privacy. 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 a decision dealing with attendance records that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights 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 and Hosps. Corp., 62 NY 2d 75, 80, supra; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566)."

Therefore, I believe that attendance records or time sheets are generally available.

If attendance records or time sheets include reference to the reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates and times of attendance or absence, would not in my view represent a personal detail of an individual's life and would be relevant to the performance of one's official duties. Therefore, I do not believe that section 87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

Lastly, the Personal Privacy Protection Law, when read in conjunction with the Freedom of Information Law [section 87(2-a)], often prohibits the disclosure of personal information concerning a data subject. Specifically, section 96(1) of that statute precludes disclosure, unless a disclosure is made pursuant to exceptions that authorize the release of personally identifiable information. One of those exceptions is section 96(1)(c), which authorizes disclosure of records that must be made available under the Freedom of Information Law when disclosure would not constitute an unwarranted invasion of personal privacy. Based upon the preceding analysis, and particularly in view of the direction provided by the courts, I believe that the records in question would be available to any person.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information and Personal Privacy Protection Laws. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sherrill Backer, Records Access Officer
David Keller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6948

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Ms. Joan Esopa
Deputy Village Administrator
Village of Cedarhurst
200 Cedarhurst Avenue
Cedarhurst, NY 11516

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

Dear Ms. Esopa:

I have received your letter of December 11. Please note that it was sent to the New York Conference of Mayors in error.

Your inquiry concerns rights of access to information "logged in work books" by various Village officials, specifically those pertaining to "written notices of defective conditions, i.e., sidewalks needing repair; potholes in streets, etc...". You indicated that "a civil action cannot be brought against a village of damages or injuries sustained on a street, sidewalk, etc. unless written notice of a defective condition has been received prior to the occurrence". Based on the foregoing, Village officials have been instructed by attorneys for your insurance company "not to talk about a case nor to allow anyone to look at our records of written notices, in the fear that someone may fraudulently claim a site in which to allege an accident."

You have requested a "determination...as to whether the data may be released to anyone requesting same". 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. Neither the Committee nor its staff is empowered to issue a binding determination or compel an agency to grant or deny access to records.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In my view, although two of the grounds for denial may be relevant, neither could likely be asserted to justify a denial of access to notices or logs indicating the existing or location of defective conditions.

The first ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is section 3101(d) of the Civil Practice Law and Rules, which exempts from disclosure material prepared for litigation. However, it has been held that records prepared for multiple purposes, one of which might include eventual use in litigation, cannot be withheld on the basis of section 3101(d) of the Civil Practice Law and Rules, which exempts from disclosure material prepared for litigation [Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)]. In this instance, I would conjecture that the notices are received and logs prepared in the ordinary course of business. Further, those records are likely used for a variety of purposes, one of which includes the preparation or scheduling of repairs. If that is so, and if the records are not prepared solely for litigation, I do not believe that either sections 87(2)(a) of the Freedom of Information Law or 3101(d) of the Civil Practice Law and Rules could be asserted to withhold them.

Further, as stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is a member of the public, and neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action.'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

The other provision that would be relevant to log entries would be 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. It appears that the log entries which indicate the nature and location of defective conditions would constitute factual information available under section 87(2)(g)(i).

In sum, if my assumptions concerning the records in question are accurate, I believe that the records in question would 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6949

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. Robert Sanford
74-A-257
Box 1187
Alden, NY 14004

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

Dear Mr. Sanford:

I have received your letter of December 9 in which you requested an advisory opinion concerning access to certain records.

You have asked whether an inmate in a correctional facility may obtain under the Freedom of Information Law "medical documentation of a correctional officer to see if he or she is a user of alcohol or drugs".

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. Under the circumstances, I believe that two of the grounds for denial could likely be cited to withhold the records in question.

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, which pertains to correction 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...

> 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... correction officer, except as may be mandated by lawful court order."

In a 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)]. As such, it appears that section 50-a of the Civil Rights Law might justify a denial of access.

The other provision that in my opinion would be pertinent is section 87(2)(b) of the Freedom of Information Law, which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy". In addition, section 89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, the first of which pertains to medical histories.

For the foregoing reasons, I believe that medical or similar records to which you referred could be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6950

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Henry F. Sobota, Esq.
Scolaro, Shulman, Cohen, Lawler
& Burstein, P.C.
90 Presidential Plaza
Syracuse, NY 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 Mr. Sobota:

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

In your capacity as the attorney for the Oneida County BOCES, you have sought an advisory opinion concerning a request for BOCES' payroll list in computer format. By way of background, you wrote that:

> "BOCES does not maintain the list in computer format. Rather, the list is maintained for it in computer format by the Madison-Oneida BOCES Regional Computing Center, a separate legal entity. That Center has indicated that it would charge BOCES $100 for generating a copy of the requested records on computer diskette or tape. The charge, [you are] told, is a routine charge for generating such information, and reflects the fact that producing such documentation using the Center's mainframe computers is somewhat costly. In other words, the Center does not appear to me to be making a profit at the records-seeker's expense."

It is your view that the Freedom of Information Law "authorizes BOCES to pass along the $100 fee that the Center will charge for it for reproducing the requested records in computer format".

Assuming the accuracy of the facts presented, I agree with your contention. In this regard, I offer the following comments.

First, according to the correspondence, the request involves the payroll record referenced in section 87(3)(b) of the Freedom of Information Law. That provision states that "[e]ach agency shall maintain...a record setting forth the name, public office address, title and salary of every officer of employee of the agency". In my opinion, it is clear that the payroll record required to be maintained must be made available.

Second, it appears that BOCES does maintain the record, but not in the electronic format in which the applicant has requested it. In order to provide the record in the desired format, BOCES must obtain it from another source that charges a fee for its services. I believe that BOCES may, under section 87(1)(b)(iii) of the Freedom of Information Law, "pass along" that fee. The cited provision states that agencies must adopt rules and regulations regarding the implementation of the Freedom of Information Law, and that those rules and regulations must include reference to:

> "fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

Based upon the foregoing, unless a statute other than the Freedom of Information Law prescribes a different fee, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches, and for other records, i.e., those that cannot be photocopied, an agency may charge its actual cost of reproduction.

In this instance, BOCES' actual cost in my opinion would involve the charge imposed upon the BOCES by the entity from which it obtains the data. Therefore, if the Regional Computing Center charges the BOCES $100 to reproduce the record sought in computer format, I believe that the charge of $100 could be "passed along" to the applicant. It is noted that analogous advice has been rendered in similar situations. For example, if a request is made for duplicates of photographs that an agency cannot reproduce on its premises and must send its photographs to a private service in order to obtain duplicates, it has been

advised that the agency may base its fees on the cost charged by the service. Similarly, often maps and other large documents cannot be reproduced by agencies. In those cases, the cost of having a private service reproduce outsized records could in my view be passed along to the applicant.

In sum, based upon the facts that you provided, I believe that the fee sought to be assessed by the BOCES is consistent 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

cc: Wallace Nolen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6951

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. Wallace S. Nolen
[redacted]

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

Dear Mr. Nolen:

I have received your letter of December 15 in which you raised a series of questions concerning the Freedom of Information Law.

Your first area of inquiry concerns the content of the payroll record referenced in section 87(3)(b) of the Freedom of Information Law. That provision states that "[e]ach agency shall maintain...a record setting forth the name, public office address, title and salary of every officer of employee of the agency...". In conjunction with the foregoing, you asked whether an agency must include the "full name" or whether it can provide "mere initials and/or first initial of the employee". Similarly, you questioned the propriety of providing "such questionable titles as 'Ply/Cafe', 'Hall', 'Class', 'Clerk' [or] 'Test'..." and whether the title should reflect "as close to the civil service title, or 'advertised job category' as possible".

In this regard, I am unaware of any judicial decisions that deal specifically with the issues that you raised. From my perspective, every provision of law, including the Freedom of Information Law, should be carried out in a manner that gives reasonable effect to its intent. Since the record in question is clearly intended to identify public employees and their titles and is often characterized as a "payroll record", it would be reasonable in my view to make reference to employees' names as their names appear on their paychecks. With respect to titles, while "clerk" may be sufficient, "hall", "class" or "test" appear to be terms used or recognized within a particular agency that may not be meaningful to a person unfamiliar with their narrow usage. In short, I believe that a job title or similar description should be included in the record maintained under section 87(3)(b).

You asked next whether, if an agency fails to maintain records in compliance with section 87(3), "such failure [would] constitute official misconduct, similar to the private sector where an officer of a corporation could be held criminal [sic] liable for failure to maintain such records as employment taxes, etc.". In my opinion, a failure to comply with Freedom of Information Law in the circumstance that you described could not be equated with criminal conduct. Rather, I believe that the means of compelling an agency to comply would involve an action in the nature of mandamus under Article 78 of the Civil Practice Law and Rules.

Lastly, you asked whether an agency can "require the payment of 'special handling', such as certified mail return receipt requested by a requestor as a condition of granting the request", as opposed to "normal first class mail". Again, there is nothing in the Freedom of Information Law that deals with the issue. While I believe that an agency may charge for postage, it would be unreasonable in my view to charge above the cost of ordinary first class mail unless the applicant so requests.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: West Babylon Union Free School District

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

January 2, 1992

Ms. Beth Rocke
[redacted]

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

Dear Ms. Rocke:

I have received your letter of December 19 in which you sought assistance.

You wrote that you are attempting to learn the name and address of the cemetery where a former neighbor is buried in order that you may visit her grave. Although you contended that the information in question should be available under the Freedom of Information Law by means of obtaining a death certificate, the New York City Health Department denied your request for the death certificate.

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 only under the circumstances prescribed in the Public Health Law.

Since the death certificate, under the circumstances, would not be available to you, it is suggested that you might contact funeral homes in or near Bay Ridge. While funeral homes are not subject to the Freedom of Information Law, it is my understanding that they often provide the kind of information in which you are interested.

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-6953

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. John J. Sheehan
[redacted]

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

Dear Mr. Sheehan:

I have received your letter of December 6 in which you requested an advisory opinion.

According to your letter, the City of Binghamton "buys blank cassette tapes for $1.88 each". Having requested copies of tape recordings of City Council meetings, you wrote that you were charged $10 per tape, even though you claim that "[a]ll they have to do is put the tapes on machine to copy it".

In this regard, I offer the following comments.

First, I believe that a tape recording of an open meeting is accessible, for none of the grounds for denial appearing in the Freedom of Information Law 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].

Second, 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. Alternatively, 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 contrary 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6954

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Ms. Sonia M. Dusza
[redacted]

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

Dear Ms. Dusza:

I have received your letter of December 16 and the correspondence attached to it.

You have complained that requests made to the records access officer of the City of North Tonawanda on November 20 and December 10 have not been answered. The records sought involve payroll information containing employees' job titles, classification status and annual salary.

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 ac-

knowledges 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.

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, titles and salaries of public officers and employees must be disclosed.

Lastly, although employees' classification status need not be included in the payroll record required to be maintained pursuant to section 87(3)(b), I believe that portions of other records indicating classification would be available.

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 City's records access officer.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Robert Turecki, Deputy Clerk & Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6955

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 6, 1992

Mr. Eric Smith
86-A-5811
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. Smith:

I have received your letter of January 2 in which you sought assistance in obtaining medical records and an autopsy report concerning your sister.

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 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.

However, under section 18 of the Public Health Law, the subject of medical records may obtain them from the hospital or physician that provided treatment. I am unaware of whether the family of a deceased person may obtain medical records under that statute. To obtain additional information concerning access to 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

Access to autopsy reports is governed by the provisions of the County Law. 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 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 medical examiner pursuant to section 677 of the County Law are essentially confidential regarding all but the district attorney and the next of kin.

If you are considered to be "next of kin", it appears that you should be able to obtain an autopsy report regarding your sister.

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-6956

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 6, 1992

Mr. John Uciechowski
Ms. Joan Uciechowski
Mr. Hyman 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. Uciechowski, Ms. Uciechowski and Mr. Smith:

I have received your letter of December 30 in which you sought assistance concerning your requests for information from the Sullivan County Board of Elections.

In a letter dated December 16 addressed to the Commissioners of the Board of Elections, you asked that they provide "in writing, the reasons why [y]our challenge affidavits submitted...on Nov. 4, 1991 were invalid". You also asked "why [you] were never notified...of the reason why [y]our 619 challenge affidavits submitted to the Board of Elections were not accepted". In addition, you referred to a request made on November 15 for certain records that apparently has not been answered. Finally, you wrote that "[t]his letter should be construed as a Freedom of Information request to all the above questions".

In this regard, I offer the following comments.

First, the Freedom of Information Law in terms of its title may be somewhat misleading. That statute is a vehicle under which the public may request and generally obtain records; it is not a vehicle that requires agency officials to answer questions or to provide information through responses to questions. Although public officials may provide information in response to questions, 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 the information you seek does not exist in the form of a record or records, the agency would not be required by the Freedom of Information Law to create or prepare new records on your behalf to fulfill your request for information.

Second, with respect to your request for certain records made on November 15, I point out that 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 assistance and 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

cc: Sullivan County Board of Elections
Thomas P. Zolezzi
Patricia Martinelli

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

January 6, 1992

Mr. Anthony Barrett
91-A-9620 (3-F)7
Downstate Correctional Facility
Box F
Fishkill, NY 12524-0445

Dear Mr. Barrett:

I have received your letter of December 22, which reached this office on December 30. You have requested records pertaining to the "Cointelpro or Counter Intelligence Program". In this regard, I offer the following comments.

First, the Committee on Open Government to advise with respect to the New York Freedom of Information Law. The Committee does not maintain records generally, and it has no records falling within your request. Further, this office is not empowered to obtain records on behalf of an applicant.

Second, the New York Freedom of Information Law pertains to records maintained by entities of state and local government. In view of the subject matter of your request, it is doubtful in my view that an agency of government in New York would maintain the records in which you are interested.

It appears that records on the subject might be maintained by one or more federal agencies, such as the Central Intelligence Agency or the Defense Intelligence Agency, both of which are subject to the federal Freedom of Information Act. As such, it suggested that you direct your requests to the appropriate federal agencies.

Lastly, both the New York and federal Freedom of Information statutes require that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate and identify the records. I would conjecture that a request for records concerning the counter intelligence program is so broad that it would fail to reasonably describe 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-6958

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 6, 1992

Mr. Bill Martin
[redacted]

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

Dear Mr. Martin:

I have received your letter of December 21 and the materials attached to it.

According to the correspondence, you requested a copy of testimony given at the trial of a state trooper in 1982 from the clerk of the Wayne County Board of Supervisors. In response to the request, you were informed that the information sought is not available through the Freedom of Information Law. In an effort to assist you and to learn more of the matter, I contacted the Clerk, Ms. Helen R. Maddock. She recalled your request and informed me that no trial involving the parties named was conducted in Wayne County Court. Consequently, no record of testimony is maintained by the County.

I point out that the Freedom of Information Law pertains to existing records. Moreover, section 89(3) of that statute states in part that an agency need not create a record in response to a request. As such, when information sought is not maintained by an agency or does not exist in the form of a record, an agency would not be obliged to prepare a new record on behalf of an applicant.

Having discussed the matter further with Ms. Maddock, while it is clear that no trial was conducted in County Court, she indicated that she has no knowledge as to whether a trial might have been conducted in a different court. If you are certain that there was a trial, it is suggested that you attempt to ascertain where it was held, i.e., in a town or village justice court.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Helen R. Maddock, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6959

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 6, 1992

Mr. James Monteleone
91-A-8436
Lakeview Shock
Box T
Brocton, NY 14716

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

Dear Mr. Monteleone:

I have received your letter of December 20, which reached this office on December 30.

You wrote that you made a request under the Freedom of Information Law on November 30 to the Westchester County District Attorney for "copies of all records and files they hold on [you]". In a response by the County Clerk, you received copies of two indictments and a letter stating that other records are maintained by local jurisdictions. Since there were four indictments and since your case was characterized as "the biggest case the Rackets Bureau has had", you do not believe that the response was complete.

In this regard, I offer the following comments.

First, the offices of the District Attorney and the County Clerk are separate, and it is unclear why the County Clerk would have responded to a request directed to the District Attorney. It is suggested that you review your correspondence to determine whether in fact your initial request was addressed to the Office of the District Attorney.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. It has been held that a request reasonably describes the records when 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 have not seen your requests, nor am I familiar with the record-keeping systems of the District Attorney or the County Clerk. However, it is possible that a request for "all records" pertaining to you might not have reasonably described the records sought. It might be worthwhile to submit requests with additional detail, such as indictment or docket numbers, dates, descriptions of events and the like.

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 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) 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, an office of a district attorney 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-6960

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 6, 1992

Mr. Randolph Jenkins
81-A-1656
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. Jenkins:

I have received your letter of December 25 and the materials attached to it. You have sought assistance in obtaining records from the Department of Correctional Services.

As I understand the correspondence, the Department of Correctional Services denied your request for "public risk security guidelines, and records relating to calculating [your] public risk point score". It appears that you had previously sought and were denied access to those records. Although I am unfamiliar with the records in question, there may be several grounds for denial relevant to a determination of rights of access. 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.

One of the grounds for denial, section 87(2)(g), 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, 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 of potential relevance is section 87(2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person".

I point out that those two provisions were successfully asserted to withhold records referring to an inmate as an escape risk or as a member of organized crimed [see Nalo v. Sullivan, 125 AD 2d 311 (1986)].

Also of potential significance is section 87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations 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 with respect to security guidelines 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)].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6961

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 7, 1992

Mr. Derrick Corley
90-T-1984
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. Corley:

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

Specifically, you wrote that you are seeking to request copies of "Employee's Notice of Injury" reports in order to use them in support of a case pending in federal court. You alleged that "it is the practice of the correction officers to file injury reports to their person claiming that they were assaulted by an inmate whenever they assault an inmate."

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, three of the grounds for denial may be relevant in consideration of rights of access to the records in question.

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 50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. 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 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)].

If section 50-a of the Civil Rights Law is applicable, it appears that the records would be confidential.

Also of potential relevance 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". In addition, section 89(2)(b) provides a series of examples of unwarranted invasions

of personal privacy, the first of which includes reference to medical histories. Therefore, insofar as the reports in question include medical or similar information concerning correction officers, they could likely be withheld.

Finally, 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 believe that the reports would consist of intra-agency materials that would be available or deniable based on their specific content.

I hope that I 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- 2015
FOIL-AO- 6962

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 8, 1992

Ms. Michele Di Chiara
[redacted]

The staff of the Committee 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. Di Chiara:

I have received your letters of January 3 in which you sought advisory opinions.

By way of background, in April, the Mayor of the Village of Garden City designated a committee consisting of Village residents to review and report with respect to the law firm currently employed by the Village, as well as other firms that might be interested in representing the Village. At a recent meeting of the Board of Trustees, the Mayor announced that a lengthy report had been received, and the Board entered into an executive session to discuss its contents. Soon thereafter, you requested the report, which was denied on the ground that "the Trustees were still reviewing the document". You appealed the denial on January 3. Having discussed the matter with others, I have been led to believe that much of the report pertains to the performance of Gary Fishberg, the current Village Attorney, and you wrote that "there may be statements within this report that demean [his] character". Nevertheless, you indicated that you have spoken with Mr. Fishberg and that "he waives any objections to the release of this report in its current form". You have asked whether the Village has the right to withhold the report, and whether the Freedom of Information Law applies "to minutes taken during an executive session of the Village Board of Trustees".

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."

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)]. Based upon the definition, it is clear in my opinion that the report in question would constitute a record subject to rights of access conferred by the Freedom of Information Law, for it was produced for and is maintained by the Village.

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, whether the Board has completed its review of the report or otherwise has no bearing on rights of access; only to the extent that a basis for denial appearing in section 87(2) could appropriately be asserted would the Village has the authority to withhold the report. While I believe that one of the grounds for denial is relevant to an analysis of rights of access, that provision would not likely serve as a basis for denial.

Specifically, section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article". In the context of your inquiry and discussions with others, issues of privacy have been raised with respect to those aspects of the report pertaining to Mr. Fishberg and to the law firms that expressed interest in representing the Village.

With respect to Mr. Fishberg, although allegations or statements that might "demean" his character might ordinarily be withheld as an unwarranted invasion of personal privacy, if indeed he has waived any objection to disclosure of those portions of the report, I do not believe that they could be withheld in consideration of his privacy. I point out that section

89(2)(c)(ii) states in part that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...when the person to whom a record pertains consents in writing to disclosure".

With respect to the report as it relates to law firms, 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)].

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)]. In a 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). Most recently, in a case concerning records concerning the performance of individual cardiac surgeons, the court granted access and cited an opinion prepared by this office in which it was advised that the information should be disclosed since it concerned professional activity licensed by the state (Newsday Inc. v. New York State Department of Health, Supreme Court, Albany County, October 15, 1991).

Assuming that the report identifies entities, such as law firms, 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. Insofar as the report identifies private practitioners and includes personal details about those individuals, rather than information concerning their professional activities, those details, depending upon their nature, might properly be deleted as an unwarranted invasion of personal privacy.

It is also noted that the Freedom of Information Law is permissive; even when an agency is authorized to withhold records or portions of records, it is not required to do so. As stated by the Court of Appeals: "...while an agency is permitted to restrict access to records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Third, whether the report was discussed in executive session or whether information contained in the report might have been derived from discussions that occurred during an executive session would be largely irrelevant. It is emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session [see Open Meetings Law, section 105(1)(a) through (h)] are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public, and vice versa. Further, in a Nassau County decision in which the issue was whether discussions occurring during an executive session 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).

In sum, with the exception of the possibility that certain aspects of the report concerning private practitioners might be withheld to protect against an unwarranted invasion of their privacy, I believe that the report must be disclosed.

Lastly, with respect to minutes of executive sessions, section 106(2) of the Open Meetings Law states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter..."

I point out, however, that if a public body enters into an executive session and merely discusses an issue 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

cc: Village Board of Trustees
Gary Fishberg, Village Attorney
Eileen Murphy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6963

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 9, 1992

Mr. Anthony J. Vertullo
[redacted]

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

Dear Mr. Vertullo:

I have received your letter of December 31 in which you requested an advisory opinion concerning access to records.

According to the correspondence attached to your letter, you wrote to the Port Chester-Rye Union Free School District and requested "a list of names and addresses of all school children who are members of the marching band, football, baseball, basketball and all other students whose programs were eliminated by the austerity budget which were later restored by vote". The request was denied on the ground that the information is "confidential" and "may not be released without the express written consent of the parents and/or students involved".

In this regard, I offer the following comments.

First, 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, the District maintains no list of the names and addresses of the students that you categorized, it would not be obligated to prepare such a list on your behalf.

Second, 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 students or parents of students and their addresses 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.

I hope that the foregoing serves to enhance your understanding of applicable law and that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Barbara Farrington, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6964

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 8, 1992

Mr. Walter White
91-A-4418
Wende Correctional Facility
3622 Wende Road
P.O. Box 1187
Alden, NY 14004-1187

Dear Mr. White:

I have received your letter of January 6 in which you asked that this office send copies of your records.

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. In short, I cannot provide the records that you requested, because this office does not maintain them.

As a general matter, a request made under the Freedom of Information Law should be directed to the "records access officer" at the agency that maintains the records sought. The records access officer has the duty of coordinating an agency's response to requests. I point out that the regulations promulgated by the Department of Correctional Services state that a request for records kept at a correctional facility may be made to the facility superintendent or his designee.

It is also noted that 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 my view, a request for a copy of your records, without additional description, would not likely reasonably describe 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-6965

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 9, 1992

Mr. C. Gooding
[redacted]

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

Dear Mr. Gooding:

Your letter of January 2 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 responsible for advising with respect to access to records under the Freedom of Information Law.

You wrote that you are a member of Local 971 of the International Brotherhood of Security Guards, which "refuses to give its membership information about the use of their union dues". You have sought advice on the matter.

In this regard, I offer the following comments.

First, the Freedom of Information Law would not apply to records maintained by a labor organization. That statute pertains to agency records, and section 86(3) of the Law defines the term "agency" to mean:

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

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

Second, based upon provisions of the Labor Law and regulations promulgated by the State Department of Labor, there is a means of obtaining financial information concerning a labor organization's assets, liabilities and expenditures. Specifically, section 726 of the Labor Law states that:

> "Every labor organization and employer organization shall make available to each of its members a copy of its annual financial report, or such portions thereof as the industrial commissioner shall find relevant and appropriate, in such manner as the industrial commissioner shall prescribe. The president or chief executive officer and the treasurer or chief financial officer of the organization personally shall be responsible for the preparation of such report, and both shall verify such report. The officers responsible for the preparation of reports shall be responsible for providing copies of reports under this section."

To implement section 726, the Department has adopted certain regulations and forms for reports, copies of which are 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6966

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 10, 1992

Mr. Brandon Holmes
89-B-1812
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. Holmes:

I have received your letter of January 6 in which you requested an advisory opinion concerning your right under the Freedom of Information Law to obtain grand jury minutes relating to your indictment and eventual conviction.

In this regard, it is noted at the outset 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."

Based on the foregoing, the courts and court records fall outside the coverage of the Freedom of Information Law. As such, grand jury minutes maintained by a court would be outside the scope of the Freedom of Information Law.

Further, section 190.25(4)(a) of the Criminal Procedure Law states in part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

In short, the records in question are generally confidential. As a defendant, however, you may have other rights of access to records or means of obtaining records. Since I lack expertise concerning Criminal Procedure Law or the rights of defendants, it is suggested that you discuss the matter with your attorney.

I 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-6967

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 10, 1992

Mr. Steven A. Genco
91-B-1679
Elmira Correctional Facility
Box 500
Elmira, NY 14902

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

Dear Mr. Genco:

I have received your letter of January 5 in which you sought assistance and advice concerning a request made under the Freedom of Information Law.

According to your letter, approximately a month ago, you sent a request to the records access officer at the Office of the Erie County District Attorney "for information and or an index referring to whatever they did possess that was obtainable under Article 6 Public Officers Law, and Freedom of Information Law". As of the date of your letter to this office, you had received no response to the request.

In this regard, I offer the following comments.

First, the Freedom of Information Law is Article 6 of the Public Officers Law.

Second, in my opinion, it is likely that the index in which you are interested does not and could not exist. In terms of structure, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Many of the ground for denial are written in terms of the effects of disclosure. For example, section 87(2)(e)(i) provides that records compiled for law enforcement purposes may be withheld when disclosure would interfere with an investigation. Records relating to an ongoing investigation might properly be withheld, for disclosure might interfere with the investigation. However,

after an investigation has ended, section 87(2)(e)(i) might no longer serve as a basis for denial. In short, there may be situations in which records may be withheld for a time, but which, depending upon circumstances, may become available to the public at some point in the future. Consequently, there may be no way of knowing or categorizing precisely which records are or will be public.

Third, 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, nor is the list required to distinguish records that may generally be available from others. 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)].

Fourth, for future reference and since you received no response to your request, it is noted 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."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, Office of the District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6968

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 10, 1992

Ms. Phyllis Di Florio
Village Clerk
Village of Solvay
Village Hall
1100 Woods Road
Solvay, NY 13209

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

Dear Ms. Di Florio:

I have received your letter of January 7 as well as related materials.

You have requested an advisory opinion concerning a request for records by a member of the Solvay Village Board of Trustees. By way of background, on December 19, Trustee DeStefano requested "for [his] own use" minutes of all meetings of the Board held since January 1, 1985 and all "legal billings" covering the same period. In addition, he asked that "the records from 12 meetings and 6 monthly billings be copied everyday and left in [his] mailbox", in order that the request could be fulfilled in approximately 15 working days. On January 2, since he had received no response, Trustee DeStefano wrote that he "assume[d] you are unwilling to cooperate with [his] request", advised that he "expect[ed] two years worth of the information...by the end of the workday on Friday, January 3", and held you "responsible to meet the overall deadline of January 13, 1992 for all of the material". He also wrote that, if those dates were not met, "disciplinary actions will be initiated". Further, he asked for fifty sheets of Village letterhead and twenty-five Village envelopes, either "pre-metered" or with stamps. On January 3, you wrote to him, indicating that his initial request was received on December 20, that Village offices had been closed for several days, that you took some vacation time "per Village policy", and that due to various other responsibilities, you could not respond to his request until that day. You added that the number of copies of the records sought would total more than 1,000 pages and advised that the request was being construed as a request under the Freedom of Information

Law. In view of the volume of material and the fees for photocopying, you suggested that he review the records in order to specify those that he would want to be copied and asked that he advise you as to his decision on the matter. Two days later, Trustee DeStefano wrote to you again criticizing your response and wrote that he "will not be paying any fees" and that he "expect[ed] two and one-half years worth of information to be in [his] mailbox by the end of work on Monday, January 6, 1992, and [would] also hold you responsible to meet the overall deadline of January 13, 1992, for all the material". A similar memorandum was sent to you on the following day.

In this regard, I offer the following comments.

First, I am unaware of any statute that deals specifically with requests by members of village boards of trustees for village records or any unique authority that board members enjoy, individually, concerning their capacity to obtain copies of village records. Similarly, I know of no provision that authorizes a member of a village board of trustees, acting alone, to impose a schedule upon a clerk concerning the time within which the clerk must disclose or copy a voluminous number of records.

Second, with respect to the Freedom of Information Law, that statute is, in my view, 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 a 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. A village board of trustees, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership [see Village Law, section 4-412(1); General Construction Law, section 41]. 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. When that is so, a request by a member of the Board could, in my opinion,

be considered as a request made under the Freedom of Information Law by a member of the public, and that person could be assessed fees at the same rate as any member of the public.

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)].

Lastly, in conjunction with the authority conferred by section 4-412 of the Village Law, I believe that the Board of Trustees could adopt rules or procedures pertaining to the rights or privileges of its members concerning the disclosure of records, as well as the imposition or perhaps the waiver of fees for copies under prescribed circumstances.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6969

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 13, 1992

Ms. Margaret Cashman
[redacted]

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

Dear Ms. Cashman:

I have received your letter of January 4 and the correspondence attached to it.

According to your letter, you are employed as Chief Clerk for the Combined Courts in St. Lawrence County, Fourth Judicial District. In that capacity, you wrote that you received a call on November 13 from the executive assistant in your District, who informed you that he had received "an unsigned complaint" against you. Although he initially indicated that a copy of the complaint would be sent to you, he later informed you that he would not do so. Thereafter, you submitted a request in writing for a copy of the complaint and "the envelope that same was mailed in", as well as the name of the Freedom of Information officer for the Office of Court Administration. In response, you received only the name of the Freedom of Information officer. You made the request to the appropriate person at the Office of Court Administration, but the request was denied pursuant to sections 87(2)(b), 87(2)(g) and 89(2)(b) of the Freedom of Information Law.

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

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

Second, section 87(2)(b) of the Freedom of Information Law states that an agency may 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".

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.

In this instance, if indeed the letter of complaint was unsigned, and if there is nothing in that letter that would identify the complainant, I do not believe that the exceptions to rights of access concerning the protection of privacy would be relevant or applicable. If there are identifying details, such as the complainant's address on the letter or the envelope in which it was mailed, those details could, in my view, be deleted. However, the remainder, the substance of the complaint, would be available.

Assuming that I understand the situation accurately, the remaining ground for denial cited in response to your request, section 87(2)(g), would be inapplicable. That provision pertains to the authority to withhold "inter-agency and intra-agency" materials, i.e., those documents that are prepared by agency staff and communicated within an agency or between agencies. If the complaint was received from a person outside of government, it would constitute neither inter-agency nor intra-agency material.

In sum, if my assumptions are accurate, I believe the complaint should be disclosed to you, so long as any identifying details concerning the complainant, should they appear, are deleted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Eiseman
James C. DesRocher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6970

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 14, 1992

Hon. Brian T. Deveney
Mayor
Village of Garden City
351 Stewart Avenue
Garden City, NY 11530

The staff of the Committee 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 Mayor Deveney:

I have received your letter of January 10 in which you requested advice concerning rights of access to a report prepared by a citizens committee at your request to review the legal needs of the Village of Garden City, the performance of your current legal counsel, "particularly with respect to allegations made", Cullen and Dykman's ability to satisfy future legal needs and to interview other law firms". As you are aware, an advisory opinion was prepared on the same subject recently at the request of a Village resident, Ms. Michele Di Chiara. Although it was advised that the report should be disclosed in great measure, if not in its entirety, the person designated to decide appeals, Trustee Judith Asselta, determined that most of the report could be withheld. According to her decision, which you forwarded, there are two grounds for withholding most of the report. The first is that it constitutes intra-agency material; the second, in your words, "is that the Trustees specifically requested that the Executive session meeting with the committee be confidential".

In this regard, I offer the following comments.

First, the absence of reference in the opinion prepared at the request of Ms. Di Chiara to the provision concerning inter-agency and intra-agency materials, section 87(2)(g) of the Freedom of Information Law, was by design. In reviewing the grounds for denial appearing in section 87(2) of the Law, the only ground that I considered relevant was section 87(2)(b), which pertains to unwarranted invasions of personal privacy, and issues relating to privacy were considered exhaustively. I did

not consider section 87(2)(g) because I do not believe that the committee that prepared the report is an "agency". If the committee is not an agency, the report submitted to the Village could not be characterized as an inter-agency or intra-agency material.

The committee, as I understand its composition, consists of citizens who reside in Garden City. The Committee members are not employed by the Village and their participation in the preparation of the report was purely voluntary. The committee appears to have no official status in the government of the Village and the Village appears to have no direct control with respect to the actual content of the committee's work product.

I point out that the definition of "agency" in section 86(3) of the Freedom of Information Law refers to state and municipal departments and the like, public corporations, such as the Village, "or [any] other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities". In my opinion, the committee is not a governmental entity and, based upon judicial decisions rendered under the Open Meetings Law, does not perform a governmental function. In a decision involving whether a citizens advisory committee designated by a town board was a "public body" subject to the Open Meetings Law, it was held by the Appellate Division, Second Department, that such a committee is not a public body. In its determination, the court stated that "[i]t 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, 151 AD 2d 642, 643 (1989)]. From my perspective, if a committee is not a public body because it does not perform a governmental function, it cannot be an agency, for it would not perform a governmental function. If that is so, its report would not consist of inter-agency or intra-agency material, and section 87(2)(g) would not serve as a basis for denial.

I am familiar with the decisions cited by Ms. Asselta in her determination. The first two, Town of Oyster Bay v. Williams [134 AD 2d 267 (1987)] and David v. Lewisohn [142 AD 2d 305 (1988)], dealt with records prepared by agency employees consisting of intra-agency materials that could, due to their contents, be withheld. Those decisions have no bearing upon the issue at hand, for the report in this instance was prepared not by agency employees, but rather by members of the public who are not employed by an agency.

The third case, Xerox Corporation v. Town of Webster [65 NY 2d 131 (1985)] dealt specifically with reports prepared "by outside consultants retained by agencies" (id. 133). In such cases, it was found that the records prepared by consultants should be treated as if they were prepared by agency staff and should, therefore, be considered intra-agency materials. In my

opinion, the committee could not be characterized as a consultant. As the term "consultant" is ordinarily used and according to an ordinary dictionary definition of that term, a consultant is an expert or a person or firm providing professional advice or services. As I understand the composition of the committee, while it consists of well-respected members of the community who may enjoy expertise in a variety of areas, it is not in the business of examining the qualifications of law firms for gain or livelihood. Further, in the context of the Xerox decision, I believe that a consultant would be a person or firm "retained" for compensation by an agency to provide a service. It is my understanding that the committee serves voluntarily and without compensation.

For the foregoing reasons, I do not believe that the work product prepared by the committee would be viewed as a consultant's report or that it would fall within the scope of section 87(2)(g) of the Freedom of Information Law. Again, the absence of reference to that provision in the opinion addressed to Ms. Di Chiara was not the result of an oversight; rather, I did not believe that it was relevant to a consideration of rights of access.

Second, a denial of access to records based upon a request that "the Executive Session meeting with the committee be confidential" does not appear to be based upon any provision of law. While an executive session is a portion of an meeting during which the public may be excluded, as indicated in the earlier opinion, "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). Further, based upon judicial interpretations of the Freedom of Information Law, 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)]. Therefore, an assertion of confidentiality, absent a statutory basis for such an assertion, would not in my view serve to preclude an agency from disclosing or enable an agency to withhold a record. In this instance, I am unaware of any statute that would render the report "confidential". Moreover, as suggested in the

previous opinion, even though a public body might properly have conducted an executive session, the Freedom of Information Law, rather than the Open Meetings Law, is the statute relevant to a determination of rights of access to records.

Lastly, Trustee Asselta referred to the fact that I wrote an opinion without having reviewed the report. In this regard, the function of this office is to render advice; it has not authority to acquire or review records for the purpose of rendering an opinion. Moreover, in this instance, the major issue in view of Trustee Asselta's determination is whether the report constitutes intra-agency material. For the reasons expressed earlier, I do not believe that it does, and a review of the report would not be relevant to such a consideration.

For the reasons expressed herein and in the opinion addressed to Ms. Di Chiara, I do not believe that the rationale for denial offered by Trustee Asselta is valid. Rather, subject to the qualifications described in the earlier opinion, I believe that the report is accessible under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Judith Asselta
Michele Di Chiara
Eileen Murphy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2017
FOIL-AO- 6971

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 14, 1992

Mrs. Paul Hodgson
[redacted]

The staff of the Committee on 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. Hodgson:

I have received your letter of January 4, which pertains to a request for records of the Middle Island Fire District.

According to your letter, the Board of Commissioners has begun construction of a fire training center on land bordering your property, and you "have reason to believe that the bidding for the construction contract was not made public". You referred to a portion of "Your Right to Know" involving "notice requirements" and added that neither you nor your neighbors received any notice of the decision to construct a training facility. The records that you requested, citing 5 USC 552, include bids relating to the project, "records of public notice published concerning any voting relating to construction of the road and the 100' x 100' concrete slab", "the records of public notice published by the Middle Island Fire District requesting submittal of bids", and the name of the company under contract "to pour the concrete slab".

In this regard, I offer the following comments.

First, the statute that you cited, 5 USC 552, is the federal Freedom of Information Act. That Act pertains to records maintained by federal agencies. The statute that deals with rights of access to records of state and local agencies in this state is the New York Freedom of Information Law.

Second, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. Neither of those statutes pertains to notices that might be required concerning bidding or land use and development.

With respect to requirements concerning the bid process, it is suggested that you contact the Department of Audit and Control, which has a regional office in Hauppauge and can be reached at (516) 360-6534.

The reference to notice in "Your Right to Know" pertains to meetings of public bodies, such as a board of fire commissioners. Specifically, 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."

I point out that the requirements of the Open Meetings Law involve only notice of the time and place of meetings. There is no requirement under that statute that notice indicate the subject matter to be considered at meetings or that notice be given directly to individuals, such as property owners adjacent to a project, prior to meetings. Again, however, there may be other provisions of law that impose different kinds of notice requirements.

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

In my opinion, insofar as the records sought exist, they must be disclosed. The only ground for denial of possible relevance is section 87(2)(c), which permits an agency to withhold records which "if disclosed would impair present or imminent contract awards or collective bargaining negotiations". Assuming that the deadline for submission of bids has passed and that

contracts have been awarded, disclosure would not "impair" the District's capacity to engage in appropriate contractual agreements [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (1980)].

I hope that I have 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-6972

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 15, 1992

Mr. Kenneth Bazil
90-A-6427
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. Bazil:

I have received your letter of January 2 in which you requested advice concerning to the Freedom of Information Law.

In a situation in which "a police officer sends a communication pertaining to a case investigation, to another officer who is going to use said information for the purpose of having it read during a newscast", you asked whether "said information is subject to disclosure" under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the nature of the communication is unclear, and I point out that the Freedom of Information Law pertains to existing records. If a communication was made orally, the Freedom of Information Law would not apply. If the communication constitutes a record, I believe that the record would be subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In my opinion, if the communication was actually read during a newscast that could have been heard by the general public, the broadcast of the communication would have effectively resulted in a waiver of the authority to deny access. However, if the communication was neither made available nor read during a newscast, the grounds for denial appearing in section 87(2), if applicable, could properly be asserted.

Since I am unfamiliar with the content 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 record 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, an office of a district attorney 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 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-6973

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 15, 1992

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 January 7 in which you sought assistance in obtaining "polygraph records pertaining to a witness who testified during [your] trial".

According to the correspondence attached to your letter, your request for the records in question was denied by the Office of the Kings County District Attorney on the grounds that the records consist of materials prepared for litigation and that disclosure would constitute an unwarranted invasion of personal privacy. You have contended that the denial is inappropriate because the witness in question testified before the grand jury and at your trial and, therefore, "has lost any cloak of privacy if any existed".

In this regard, I offer the following comments.

First, although the witness might have testified during a public proceeding, records of his testimony during a trial or before the grand jury are separate and distinct from those that you requested.

Second, although the Freedom of Information Law provides broad rights of access, I believe that the denial of your request was proper.

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 3101(d) of the Civil Practice Law and Rules, which exempts from disclosure materials

prepared in anticipation of litigation or for trial. Since representatives of the District Attorney wrote that the records were prepared "to determine the overall strength of the case....in anticipation of litigation", it appears that the records were appropriately denied.

Moreover, while I have no knowledge of the content of the records, those involving polygraph examinations, by virtue of their nature, could in my opinion likely be withheld as an unwarranted invasion of personal privacy pursuant to section 87(2)(b) of the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Faith Crouchley
Roseann B. MacKechnie

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6974

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 16, 1992

Mr. Joshua Acosta
88-T-1281
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. Acosta:

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

As I understand the correspondence, having requested various records from the Office of the Special Narcotics Prosecutor, some of the records were disclosed, others were apparently withheld, and some were made available that you did not request. In addition, "as sanction for Assistant District Attorney's unjustified failure to comply with time limitations of convicted defendant's Freedom of Information Law request", you asked whether he would be "required to provide defendant with first 200 pages of material which fell within terms of request without charge".

In this regard, I offer the following comments.

First, with respect to the denial and the disclosure of records that you did not request, I believe that your letter of appeal to Executive Assistant District Attorney Halpern appropriately raised those issues.

Second, 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)].

Lastly, there is nothing in the Freedom of Information Law that pertains to the imposition of the kind of sanction to which you referred. Further, even if an agency fails to respond to a request in a timely manner, I believe that it may charge up to twenty-five cents per photocopy when it duplicates records, unless a statute other than the Freedom of Information Law prescribes a different fee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Lewis A. Halpern

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6975

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 17, 1992

Mr. Frederick M. Nirsberger
Field Representative
Local No. 438
International Brotherhood of Electrical
Workers
1700 Sixth Avenue
P.O. Box 604
Troy, New York 12181

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

Dear Mr. Nirsberger:

I have received your letter of January 9 in which you requested an advisory opinion concerning the Freedom of Information Law.

By way of background, your correspondence indicates that, in your capacity as Field Representative for Local Union #438 of the International Brotherhood of Electrical Workers, you requested certain payroll reports filed by LaCorte E.C.M. from Washington County relative to a County building project in order to determine whether employees are receiving proper wages. It appears that the contractor has threatened litigation if the County "breaches confidentiality", and that, on that basis, the records were withheld.

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 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)].

Second, based upon judicial interpretations of the Freedom of Information Law, 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)]. Therefore, an assertion of confidentiality, absent a statutory basis for such an assertion, would not in my view serve to preclude an agency from disclosing or enable an agency to withhold a record.

Third, under the circumstances, assuming that the payroll records include the contractor's employees' names, addresses, social security numbers and their wages, I believe that portions of those records could properly be withheld pursuant to section 87(2)(b). That provision permits an agency to withhold records

or portions thereof when 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) authorizes an agency to delete identifying details to protect against an unwarranted invasion of personal privacy when it makes records available. In addition, section 87(2)(b) includes a series of examples of unwarranted invasions of personal privacy, one of which pertains 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..." [89(2)(b)(iv)].

In my opinion, what is relevant to an agency is whether the employees are being paid in accordance with prevailing wage standards; their names, addresses and social security numbers are largely irrelevant to that issue and may in my view be deleted to protect against an unwarranted invasion of personal privacy.

It is noted that a recent Appellate Division decision affirmed the findings of the Supreme Court in a case involving a situation in which a union sought home addresses of an agency's contractors' employees for the purpose of "monitoring and prosecution of prevailing wage law violations". The court found that the employees' home addresses could be withhold, stating that the applicant's "entitlement to access does not necessarily entitle it to the reports in their entirety. Indeed portions of the report made available to petitioner should be expunged to protect (the) privacy of the employees" [Joint Industry Board of the Electrical Industry v. Nolan, Supreme Court, New York County, May 1, 1989; affirmed 159 AD 2d 241 (1990)].

In sum, while certain identifying details regarding the contractors' employees may be deleted from the records in question, I believe that those portions consisting of figures reflective of wages paid must be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to those 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: Kenneth F. Wheeler
James Tomasi
LaCorte E.C.M. Inc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6976

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

Mr. Adrian Conwell
81-A-4761
Drawer B
Stormville, NY 12582

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

Dear Mr. Edison:

I have received your letter of January 9 in which you sought assistance concerning access to medical records.

According to your letter, certain laboratory tests were administered and are maintained by an STD clinic operated by the New York City Department of Health. Although you have requested the records, you have received no response.

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 Health 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 personnel could be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, a different statute, section 18 of the Public Health Law generally requires that the providers of medical services, such as physicians or hospitals, disclose medical records to the subjects of the records.

It is suggested that you 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 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-6977

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

Mr. Robert J. Williams
84-A-8006
135 State Street
Auburn, NY 13021

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

Dear Mr. Williams:

I have received your letter of January 9 in which you sought advice "on how to make the right request" for court records.

In this regard, 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."

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

Nevertheless, other provisions of law often grant access to court records. In the material attached to your letter, you referred to section 255-a of the Judiciary Law as the basis for your request. I point out that section 255-a deals with the

power of courts over dockets. The statute that generally pertains to access to court records is section 255 of the Judiciary Law.

In my view, a request made under that provision should be directed to the clerk of the court that maintains the records sought. Further, the request should include sufficient detail to enable staff to locate the records.

Lastly, since you apparently seek to obtain records in connection with an appeal, it is suggested that you discuss the matter with your attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6978

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

Ms. Kay O. Reich
Town Clerk
Town of Conquest
R.D. #2
Port Byron, NY 13140

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

Dear Ms. Reich:

I have received your letter of January 8 in which you requested a clarification concerning the Freedom of Information Law.

According to your letter, your office maintains the following types of records relating to building permits:

> "1. The Original Permit File which includes the Application, the Permit and the Certificate of Compliance of Occupancy. These have the applicant's name, location of project, type of activity, estimated cost of project, cost of permit etc.
>
> 2. Monthly listing from the Building Inspector of activity; the individual, location, cost. (see sample attached). This is attached to an invoice as proof of services rendered."

You wrote that a resident has requested copies of all of the "Type 2" records for 1991. You have asked whether disclosure would constitute "an unwarranted invasion 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 records of an agency are available, except to the extent 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 the "Type 1" records must be disclosed, for none of the grounds for denial would apply. However, the "Type 2" records might justifiably be withheld, depending upon the reason for which a request is made.

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.

In sum, if the lists that you described identify people, i.e., homeowners and their addresses, it is likely that they could be withheld when requested for a commercial or fund-raising 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2020
FOIL-AO-6979

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

Mr. Richard F. Palmer
Reporter
Cortland Standard
110 Main Street
P.O. Box 5548
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 Mr. Palmer:

I have received your letter of January 9 in which you requested commentary concerning two issues.

The first involves the fees that can be charged by municipalities for photocopies of records, specifically accident reports.

In this regard, by way of background, section 87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency

> to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation, for instance, establishing a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction, was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, or a fee that exceeds the actual cost of reproducing records that cannot be photocopied. Moreover, a judicial decision confirmed that a fee of more than twenty-five cents per photocopy may be assessed only pursuant to authority conferred by a statute, an act of the State Legislature [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. I point out that the Sheehan decision dealt specifically with fees for accident reports. Consequently, unless an act of the State Legislature authorizes an agency to charge fees inconsistent with the Freedom of Information Law, no more than twenty-five cents per photocopy can be charged.

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

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

The second issue involves the status of political caucuses under the Open Meetings Law.

Since 1985, section 108(2) of the Open Meetings Law has provided that the Law does not apply to:

> "a. deliberations of political committees, conferences and caucuses.

> b. for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or the legislative body of a county, city, town, or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations..."

It is noted that, prior to the 1985 amendment, several courts held that the exemption concerning political caucuses applied only to discussions of political party business and that a gathering of a majority of a legislative body to discuss public business constituted a meeting subject to the general requirements of the Open Meetings Law, even if those in attendance represented a single political party [see e.g., Sciolino v. Ryan, 431 NYS 2d 664, aff'd 81 AD 2d 475 (1981)]. Further, despite the capacity to hold political caucuses in private authorized by the 1985 amendment, many legislative bodies have acted to revoke their authority to discuss public business in private political caucuses.

I hope that I have 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 Homer
Chief, Cortland Police Department
Cortland County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6980

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

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 January 8 and the materials attached to it. As in the case of previous correspondence, your inquiry involves your unsuccessful efforts in obtaining payroll information identifying members and/or employees of the Orange County Privacy Industry Council and their salaries.

By way of background, in response to your initial request, documentation was provided indicating titles and salaries of employees, but it did not include names. You appealed, and Mr. Geoffrey E. Chanin, Chief Assistant County Attorney and Appeals Officer for purposes of the Freedom of Information Law, determined that the names of employees should be disclosed, stating that he "respectfully request[ed] the Acting Director of P.I.C. to provide the names of the people holding such positions". Having received no further response from the Acting Director, you sought an opinion from this office, in which it was advised that each agency is required to maintain and disclose "a record setting forth the name, public office address, title and salary of every officer or employee of the agency" [see Freedom of Information Law, section 87(3)(b)]. Despite your efforts, as well as those of Mr. Chanin and myself, the information sought has not been disclosed. You have asked what can be done.

In this regard, 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.

In conjunction with section 89(4)(a) of the Freedom of Information Law, Mr. Chanin appears to have been designated to determine appeals by either the County Executive or the County Legislature. If that is so, it appears that the County Executive

or the County Legislature, as the case may be, would have the authority to enforce Mr. Chanin's determination by compelling the Acting Director to comply with law.

Alternatively, following the exhaustion of one's administrative remedies, a person can initiate a lawsuit under Article 78 of the Civil Practice Law and Rules. I point out that, under certain conditions, a court may award reasonable attorney's fees and other litigation costs to a person who substantially prevails. Specifically, 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 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: Geoffrey E. Chanin, Chief Assistant County Attorney
Mary Dwyer, Acting Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6981

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

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 January 13, which deals with requests for records directed to Rensselaer County.

You wrote that you "asked that the responses to [y]our August 1991 requests...sent in December of 1992 be certified by a representative of the County", and that the "County signed for that request for certification of 'responses' on December 24, 1991". However, as of the date of your letter to this office, you have received no further response.

Although I am not sure of the meaning of the foregoing, it appears that the County acknowledged receipt of your request and indicated that the request would be granted or denied on December 24. Based upon that assumption, I offer the following comments.

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 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.)

Lastly, with respect to legislation recommended by the Committee on Open Government, enclosed is the Committee's recent annual report. The report includes a series of recommendations that may be of interest 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: Records Access Officer, Rensselaer County

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6982

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

Mr. Marvin Datz
[redacted]

Dear Mr. Datz:

I have received your letter of January 9, which pertains to a request for records of the New York State Department of Taxation and Finance.

You allege that the Department "has engaged in an ongoing and continuous pattern and policy of violations of the provisions of the New York State Freedom of Information Law, applicable court decisions, and the Rules, Regulations, Determinations of the Committee on Open Government". As such, you asked that I contact the Department's appeals officer "and secure the immediate access of the material for [your] inspection, as well as the waiving of fees for 'access to records'."

In this regard, having discussed various issues involving the Freedom of Information Law with employees of the Department of Taxation and Finance over the course of years, it is my opinion that your allegation is baseless; on the contrary, it is my view that the Department scrupulously endeavors to comply with the Freedom of Information Law.

Second, the Committee on Open Government has the authority to advise. This office is not empowered to render "determinations" or compel an agency to grant or deny access to records, nor can it "secure" records on behalf of applicants.

Third, based upon a review of the correspondence attached to your letter, the records access officer has offered to make available virtually all of the records sought upon payment of the requisite fee for photocopying. It is apparently your view that the Department is required to send the records to its Brooklyn office in order that you may inspect them at no charge. Assuming that the records are not ordinarily maintained at that office, I know of no such requirement. I believe that you could inspect the records at no charge at the office where they are kept.

However, if you choose not to do so, you could request photocopies for which a fee may be charged. It is noted, too, that it has been held that an agency my require payment in advance of photocopying requested records (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Arlene Mastrodonato

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6983

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 24, 1992

Ms. Ardith L. Baldwin
Beckstrom & Plumb
202 West Fourth Street
Jamestown, NY 14701

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

Dear Ms. Baldwin:

I have received your letter of January 16 in which you sought an advisory opinion concerning the Freedom of Information Law.

Your inquiry involves a request directed to the school district you represent for the transcript of "a disciplinary hearing on charges against a tenured teacher conducted pursuant to Education Law Section 3020-a". By way of background, you wrote that:

> "[t]he teacher in question requested that the hearing be private (emphasis yours), and the hearing was so conducted. The charges alleged were of a sexual nature relating to a specific student. The transcript contains highly personal information regarding said teacher's life. The request for the transcript comes from the parents of the student involved. This student testified at the hearing. The teacher was ultimately acquitted of all charges and an appeal was commenced, but was subsequently discontinued and withdrawn before any action by the Commissioner."

Your question is whether under the Freedom of Information Law the District "must provide all or part of the requested transcript."

Based upon the ensuing analysis, while I believe that the transcript may be withheld from the public generally, it is likely that portions of the transcript pertaining to the student must be disclosed to the parents of the student, not under the Freedom of Information Law, but rather pursuant to the federal Family Educational Rights and Privacy Act (20 USC section 1232g). 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.

One of the grounds for denial, section 87(2)(b), states that government may withhold records insofar as 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, 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 a finding of misconduct or final disciplinary action taken against a public employee would be 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". On the other hand, when allegations or charges of misconduct have not yet been determined or did not result in a finding of misconduct or disciplinary action, the records relating to such allegations might in my opinion 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, when charges are dismissed, I believe that they may be withheld. As you are aware, section 3020-a(4) of the Education Law 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". Although that provision does not specifically pertain to a transcript of a hearing, the intent in my view is to preclude disclosure when charges are dismissed because there was no finding of wrongdoing.

If a hearing is conducted in public, I do not believe that a final decision either sustaining or dismissing charges could be withheld. However, if a hearing was conducted in private and the employee is acquitted, the records relating to the proceeding, including the transcript, could in my view be withheld from the public generally under the Freedom of Information Law on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Second, in this instance, since the student testified at the hearing and since there are likely portions of the transcript identifiable to the student, the parents of the student would likely enjoy rights of access above and beyond the public generally.

As you may be aware, the Family Educational Rights and Privacy Act (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 or perhaps portions of the record would constitute 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, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the

> record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record..."
> [3][i] Records relating to an individual who is employed by an educational agency or institution, that
> [A] Are made and maintained in the normal course of business;
> [B] Relate exclusively to the individual in that individual's capacity as an employee; and
> [C] Are not available for use for any other purpose" [34 CFR 99.3].

In order to acquire information concerning the application of FERPA, I 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, to the extent that it is "directly related to a student", is an "education record" that should be disclosed to the parent of the student.

A relevant factor involves the assumption that the preparation of the transcript was precipitated by an allegation or event that could not be characterized as routine. If a document is "made and maintained in the normal course of business", as is likely the case with respect to routine evaluations of all teachers, for example, 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 a record, i.e., a transcript, was prepared as a result of an allegation, charge or incident and if it relates directly to the student, I have been advised that in those kinds of situations 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.

I am not suggesting that the entire transcript must be disclosed to the parents of the student. Rather, I believe that only those portions that are "directly related" to the student would be subject to the FERPA and available to that person's parents.

In sum, although the transcript could in my opinion be withheld from the public under the Freedom of Information Law, I believe that portions of the transcript directly relating to a student would be available to the student's parents under the FERPA.

I hope that I 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-6984

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 24, 1992

Mr. Thomas O'Dell
82-A-2257
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. O'Dell:

I have received your letter of January 6, which reached this office on January 17.

According to your letter, you sent a request for records to the Chief of the Poughkeepsie Police Department on December 16. As of the date of your letter to this office, you had not received a response to the request. It is your view that your request could be deemed denied and that you may appeal. You asked to whom you may appeal.

In this regard, I offer the following comments.

First, a request should generally be made to an agency's "records access officer". The records access officer has the duty of coordinating the agency's response to requests. I am unaware of whether the Chief has been designated as records access officer. However, if he has not been so designated, I believe that he should have forwarded the request to the appropriate person.

Second, 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)].

It is suggested that you appeal to the City Council as the governing body and that you ask that if that body does not determine appeals, your appeal be forwarded to the appropriate person or body.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Stewart Bowles, Chief of Police
Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6985

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 24, 1992

Mr. Michael L. Hanley
Staff Attorney
Greater Upstate Law Project
87 Clinton Avenue North
Rochester, NY 14604-1478

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

Dear Mr. Hanley:

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

You have sought assistance in obtaining a "marketability analysis" from the Division of Housing and Community Renewal (DHCR). You wrote that the record in question "is a standard form used by DHCR in connection with analyzing the economic feasibility of rent increases in Mitchell-Lama housing projects". You enclosed a copy of a completed form acquired previously in relation to a different project. Your request for the particular form in question was denied by the agency's records access officer on the ground that "it contains intra-agency materials which are not exclusively statistical or factual tabulations or data" (emphasis yours). In addition, you wrote that you know of a tenants' association that was denied access to the form during a rent increase review, and that it was not advised of the right to appeal the denial by DHCR.

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 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..." [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)].

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)].

Having reviewed the form that you enclosed, I believe that the majority of its contents consist of statistical or factual information that must be disclosed pursuant to section 87(2)(g)(i). The only portion that might be withheld, depending on its content, is section V entitled "Comments". In section V of the form that you forwarded, some of the commentary is factual; some consists of opinion, which could be withheld.

Lastly, with respect to the right to appeal a denial, the regulations promulgated by the Committee on Open Government, 21 NYCRR section 1401.7(b), state that:

> "Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (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, I believe that 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.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to officials at DHCR.

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: Elizabeth Hegy, Records Access Officer
Barbara Fair, Director of Legal Affairs

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6986

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 27, 1992

Mr. Bradshaw Samuels
81-A-2835
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. Samuels:

I have received your letter of January 14 in which you raised questions concerning the retention of records.

You asked how long "records in general" must be kept, such as those of "institutions, schools, prisons, corporations", etc.

In this regard, I am unaware of provisions of law that deal with the retention of records maintained by private entities, such as corporations. However, there are statutes dealing with the retention and disposal of government records.

With respect to state agencies, the Commissioner of Education, in whose Department is the State Archives and Records Administration, is empowered under section 57.05(b) of the Arts and Cultural Affairs Law:

> "To authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by any agency. At least forty days prior to the proposed disposal or destruction of such records, the commissioner of education shall deliver a list of the records to be disposed of or destroyed to the attorney general, the comptroller and the state agency that transferred such

> records. No state records listed therein shall be destroyed if within thirty days after receipt of such list the attorney general, comptroller, or the agency that transferred such records shall notify the commissioner of education that in his opinion such state records should not be destroyed."

In conjunction with the foregoing, I believe that the State Archives and Records Administration develops schedules which indicate minimum periods of retention for certain classes of records.

With respect to local government records, section 57.25(2) of the Arts and Cultural Affairs Law provides that:

> "No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments records retention and disposition schedules establishing minimum legal retention periods. The issuance of such schedules shall constitute formal consent by the commissioner of education to the disposition of records that have been maintained in excess of the retention periods set forth in the schedules. Such schedules shall be reviewed and adopted by formal resolution of the governing body of a local government prior to the disposition of any records. If any law specifically provides a retention and disposition schedule established herein the retention period established by such law shall govern."

While I am not familiar with retention schedules that might exist with respect to particular records, I believe that you could request those schedules from the State Archives and Records Administration at the State Education Department.

I am unaware of whether there are penalties that may be imposed if an agency disposes of records prior to the designated period of retention.

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-6987

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 27, 1992

Ms. Doria Higgins
[redacted]

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

Dear Ms. Higgins:

As you are aware, I have received your letter of January 15, in which you sought my views concerning a proposed resolution before the Ithaca Town Board.

The beginning of the resolution states that the Ithaca Town Board "is dedicated to the liberal provision of documents to the public", that the "laws governing freedom of information are less generous...than deemed appropriate" by the Board, and that it is "desirable for Town staff, committees, and Boards to operate as consistently as possible regarding the dissemination of Town documents". From there, the major portion of the resolution would resolve that:

> "in addition to the requirements of current New York State laws regarding the disclosure of information, the policy of the Town of Ithaca is to provide to the public draft documents that have been released by the chairperson of a Town Board or advisory committee in order to solicit comments from another Town Board or committee. Draft documents circulating exclusively among members of a Town Board, advisory committee, or department, in part or in whole, also may be released to the public at the discretion of the chairperson of the relevant Town Board or committee or by the head of the relevant department. Should a member of the public raise a question as to the desirability of releasing a particu-

> lar draft document or portion thereof, it shall be resolved by the Ithaca Town Supervisor with the advise [sic] of the attorney of the Town of Ithaca and the relevant chairperson or head of department. The costs of providing such documents to the public will be minimized wherever possible."

In this regard, I offer the following comments.

First, the Freedom of Information Law is permissive. Even though an agency may have the ability to withhold certain records in accordance with section 87(2) of the Freedom of Information Law, there is no requirement that records 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...if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, insofar as the resolution may be "less generous" than the Freedom of Information Law, the Board would be implementing policy consistent with its discretionary authority conferred by the Freedom of Information Law.

Second, although the portion of the resolution quoted above may be well-intentioned, it is possible that, in practice, it may on occasion be more restrictive than the Freedom of Information Law. It is emphasized that the Freedom of Information Law pertains to all agency records, and that section 86(4) of the Law defines the term "record" broadly to include:

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

As such, once information exists in some physical form, assuming that it is kept, held, filed, produced or reproduced by, with or for the Town, including a preliminary or draft document, it would constitute a "record" subject to rights of access.

Drafts and similar documents prepared by Town officers or employees would likely constitute "intra-agency materials". Although that category of records falls within one of the grounds for denial, their specific contents would be the factors used to determine the ability to deny access. Specifically, section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

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

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

Some draft documents might include or consist, perhaps in part, of statistical or factual information that would be available under section 87(2)(g)(i). Further, those kinds of data would in my view be available, whether or not they are released by a chairperson in order to solicit comments from other Town officers, or even if a member of the public raises a question concerning the desirability of disclosure. In short, situations could arise in which the resolution may be more restrictive than the Freedom of Information Law. To that extent, I believe that it would be invalid, for a municipal rule or policy inconsistent with a statute would be void.

Lastly, the final clause of the resolution would require that "records shall be kept as to the nature of the documents provided by the Town of Ithaca as well as when and to whom said documents are provided". While the foregoing in my view is not objectionable, in practice, it might result in unnecessary record-keeping and administrative burden. If a citizen goes to the clerk's office and requests a copy of the minutes of last month's meeting, the response may be informal. Often a clerk will simply make a copy, without requiring that a written request be made, because there is no question that minutes must routinely be disclosed. When people are reviewing assessment records in order to determine whether to file grievances, again, the process may be informal and records may be routinely disclosed. In brief, the kind of record-keeping requirement described in the resolution may be unnecessary and burdensome to Town officials and perhaps the public.

A copy of this opinion will be forwarded to the Town Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Ithaca

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6988

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 27, 1992

Mr. Thomas Chikeles
89-T-2136
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. Chikeles:

I have received your letter of January 16 in which you sought information concerning a denial of a request by the Department of Correctional Services.

By way of background, having been charged with violations of institutional rules at your facility, you wrote that "[t]hese charges centered around an 'alleged' conversation [you] were suppose[d] to have had with an inspector of the Inspector General's office that was 'alleged' to be on tape." Although you contended that you never engaged in any such conversation, your request for the tape was denied on the ground that disclosure "might jeopardize techniques utilized in future investigations conducted by the Inspector General's office".

You have asked whether you have the right to hear the tape and whether it should have been produced. In this regard, I offer the following comments.

First, I am unaware of your rights as the subject of a disciplinary proceeding. If there is a question concerning your right to listen to the tape as a matter of due process, it is suggested that you confer with your attorney.

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

Of potential significance is section 87(2)(e), which permits an agency to withhold records that:

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

Under the circumstances, it appears that most relevant is section 87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information (see Frankl v Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law

> must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v Brennan, 476 F2d 699, 702; Hawkes v Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive, of whether investigative techniques are non-routine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel..." [47 NY 2d 568, 572 (1979)].

To the extent that the record in which you are interested was "compiled for law enforcement purposes" and disclosure would enable people to evade law enforcement activities, it could in my view be withheld. If the harmful effects of disclosure described in section 87(2)(e) would not arise, it is likely that the record would be available.

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-6989

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 28, 1992

Mr. James Monteleone
91-A-8436
Lakeview Shock
Box T
Brocton, NY 14716

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

Dear Mr. Monteleone:

I have received your letter of January 14, which pertains to requests for records directed to the Westchester County Office of the District Attorney.

In brief, it is your view that responses to your requests have been incomplete and that records have been withheld, even though no references were made to those records in response to the requests. You have asked whether you may "take this as a denial and appeal".

In this regard, the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law, state in part that an agency's records access officer is responsible for assuring that agency personnel:

> "Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
>
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor" [21 NYCRR 1401.2(b)(3)].

Further, 21 NYCRR 1401.7(b) states that:

> "Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

If you believe that responses to your requests have been incomplete and that records falling within the scope of those requests have been denied, I believe that you may appeal pursuant to section 89(4)(a) of the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6990

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 28, 1992

Mr. Luis Pulido
85-A-3629 C-14-03
135 State Street
Auburn, NY 13021

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

Dear Mr. Pulido:

I have received your letter of January 10, which reached this office on January 21.

In brief, according to your letter and the correspondence attached to it, you have made repeated requests for records of the New York City Police Department relating to your case. Since you have received no response, you sought 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 is Susan R. Rosenberg, Assistant Commissioner, 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-6991

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 28, 1992

Mr. Dennis J. Nolan
[redacted]

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

Dear Mr. Nolan:

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

According to the materials, on December 4, you sent a request under the Freedom of Information Law seeking a variety of records from the NYS Office for the Aging. Having received no response, on December 30, you sent "a follow-up letter renewing [your] initial request and requesting one additional document". You wrote that you have not received a response to either communication and that you would like to appeal. You asked whether an appeal must be filed with the Committee on Open Government or some other agency.

In this regard, I have contacted Maribeth Bersani, Executive Deputy Director and Records Access Officer, on your behalf, to elicit information concerning the status of your requests. Ms. Bersani informed me that some of the records requested had been previously made available to you, and that she is in the process of determining which aspects of your request have already been satisfied, and which involve items that had not previously been requested or disclosed. She specified that efforts are being made to respond appropriately as soon as possible.

With respect to your specific question, by way of background, 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, section 89(4)(a) states that "each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon." Therefore, while a person who appeals a denial is not required to forward an appeal to this office, the agency in receipt of the appeal must 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

cc: Maribeth Bersani

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6992

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 28, 1992

Mr. J. Richard Kirk
[redacted]

Dear Mr. Kirk:

I have received your letter of January 15.

You wrote that in April of 1990, your firm was solicited by the New York City Department of Employment to bid on an advertising campaign for a summer youth program, and that you have provided documentation indicating that the solicitation was "misrepresented and that fraud was committed in denying Kirk/Marsland the contract and awarding it to a favored vendor" that "wasn't even responsive to the RFP and should have been eliminated [on] the first cut". Although an investigation is being conducted by the New York City Department of Investigation (DOI), that agency has provided no estimated date of the conclusion of the investigation and has denied access to testimony given during a hearing about you and your company.

You have asked that I "intercede on [your] behalf in opening access to the administrative hearing record and force DOI to end the investigation or at least project an end-date".

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office cannot compel an agency to grant or deny access to records, nor is it empowered to "force" an agency, such as DOI, to end an investigation or to direct an agency to conduct its duties in a particular manner.

Second, I have contacted Paul Silverman, DOI's records access officer, on your behalf in order to learn more of the matter. Mr. Silverman informed me that although the Inspector General expects the investigation to end soon, he also said that, as records access officer, he has no control over the conduct or length of investigations. Mr. Silverman indicated, however, that he will ask the Inspector General to notify him when the matter is closed in order that a timely response can be made to your pending request.

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

In my view, the records withheld to date have been denied with justification. 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". I believe that records regarding the testimony of witnesses or informal interviews with witnesses may be withheld on the basis of section 87(2)(b). Further, section 87(2)(e) states that an agency may withhold records that:

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

At this stage, since the matter is ongoing, disclosure would, according to Mr. Silverman, interfere with the investigation.

In short, it appears that the denial of your request has, to date, been appropriate. Again, Mr. Silverman indicated that he will respond in accordance with the Freedom of Information Law when the investigation is completed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul Silverman, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6993

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 28, 1992

Mr. Antonio Duprey
91-A-8799
Gouverneur Correctional Faciltiy
Scotch Settlement Road
P.O. Box 370
Gouverneur, NY 13642

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

Dear Mr. Duprey:

I have received your letter of January 17 addressed to Laura Rivera. Please note that Ms. Rivera is no longer a member of the Committee on Open Government.

You have asked how you may obtain a copy of your pre-sentence report.

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.

Enclosed, as requested, is a copy of the Personal Privacy Protection Law and a brochure describing the Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6994

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 31, 1992

Mr. Edward K. Christianson
77-D-0093
Auburn Correctional Facility
135 State Street
Box 618
Auburn, NY 13021

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

Dear Mr. Christianson:

I have received your letter of January 15 in which you sought an advisory opinion concerning requests made by inmates under the Freedom of Information Law.

Since most inmates are indigent and cannot "move at will in order to take advantage of the State's records access law", it is your contention that the Department of Correctional Services and the Division of Parole, by means of their courier mail services, "ought to afford inmates access to their central records for in camera inspections - with options to copy non-exempt materials by intra-agency records re-location to accomplish same". You cited Banigan v. Roberts [511 NYS 2d 914 (1986)] and section 18 of the Public Health Law as the bases of your contention.

In this regard, although I believe that an applicant may review accessible records at no charge at the office or facility where the records are regularly kept, I know of no requirement in the Freedom of Information Law that records be transferred to a regional office or facility in order that they can be inspected for free.

Banigan involved a situation in which an applicant sought to inspect records at a Queens office of the Department of Labor, rather than at a Brooklyn office, and the court appears to have based its decision on a provision of the regulations of the Department of Labor, 12 NYCRR 700.5. That provision states that "records shall be made available for public inspection and copying at the office of the Department of Labor where the records

are regularly maintained, or at another location more convenient to the request if, in the discretion of the records access officer, the removal of the records from the location where they are regularly maintained will not jeopardize the preservation and safekeeping of the records". The court found that there was no evidence that the records be jeopardized if transported from Brooklyn to Queens and found, therefore, that the refusal to do so was unreasonable.

In my view, the portion of the Department of Labor's regulations concerning the transfer of records to a location convenient to the applicant represents an exercise of discretion, for the Freedom of Information Law contains no such requirement. Further, transporting the records from Brooklyn to Queens involves a short distance, and the records could likely be transported and returned in a short period of time.

Lastly, there is nothing in the Freedom of Information Law analogous to the provisions of section 18 of the Public Health Law dealing with fees. Subdivision (2)(c) of section 18 as recently amended states that "[a] qualified person shall not be denied access to patient information solely because of inability to pay." There is no provision in the Freedom of Information Law involving the waiver of fees due to an inability to pay. Further, it has been held that an agency is not required to waive fees for copies of records sought under the Freedom of Information Law by an indigent inmate [Whitehead v. Morgenthau, 522 NYS 2d 518 (1990)].

In sum, while I believe that an agency may transfer records to a location convenient to an applicant for the purpose of inspecting the records, an agency in my opinion is not required 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-6995

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 3, 1992

Hon. Donald H. McMillen
Member of the Assembly
Room 819
Legislative Office Building
Albany, New York 12248

Dear Assemblyman McMillen:

As you are aware, your letter of January 2 addressed to the Department of Taxation and Finance has been forwarded by Commissioner Wetzler 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.

The issue raised in your correspondence involves the means by which local governments may increase fees that may be charged for copies of motor vehicle accident reports. In this regard, I offer the following comments.

First, as a general matter, accident reports have long been available to the public pursuant to section 66-a of the Public Officers Law and through the judicial interpretation of the Freedom of Information Law.

Second, with respect to fees, by way of background, section 87(1)(b) (iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-

> five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation, for instance, establishing a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction, was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, or a fee that exceeds the actual cost of reproducing records that cannot be photocopied. Moreover, a judicial decision confirmed that a fee of more than twenty-five cents per photocopy may be assessed only pursuant to authority conferred by a statute, an act of the State Legislature [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. I point out that the Sheehan decision dealt specifically with fees for accident reports. Consequently, unless an act of the State Legislature authorizes an agency to charge fees inconsistent with the Freedom of Information Law, no more than twenty-five cents per photocopy can be charged.

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

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

In sum, I believe that the only method of enabling local governments to charge in excess of twenty-five cents per photocopy for motor vehicle accident reports would involve the enactment of a statute that specifically confers such a right. Perhaps the most appropriate location of such a provision would be section 66-a of the Public Officers Law. As indicated earlier, that provision pertains directly to accident reports.

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-1996

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 3, 1992

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:

I have received your letter of January 17, in which you sought an advisory opinion upon receipt of a determination of your appeal by Jacqueline Papatsos, Mayor of the Village of Island Park. Her determination was recently sent to this office.

Your appeal relates to "five applications dated January 7th, with three vouchers and itemized bills requested on each". In accordance with direction offered by the Village Clerk, you wrote the following on each application: "Please arrange applications for different days so I have the time to hand copy". A similar request involving ten applications was made on January 8. You were notified approximately a week later that the requests were approved "for inspection on January 29th from 10-11 am". You explained to the Clerk that "it would be impossible to hand copy all these records in one hour". Although she advised you to use the copy machine, you indicated that doing so is "too costly". Most importantly, however, you wrote that if you cannot review or copy the records sought within a period of one hour, pursuant to Village rules, you "will have to fill out another application again and wait for another 22 to 27 days to see them again."

In response to your appeal, the Mayor wrote that your request was not denied. She added that:

> "In case you have desire for an immediate copy of the records, a coin-operated copying machine costing 25 cents per page is available to you. If you desire that

> the Village supply you with a copy, the same is available at the same charge.
>
> "Although you complain that this charge is too costly, it is specifically sanctioned by Sec. 87 (1b-iii) of the Public Officers Law and is the same cost as making a copy at the Nassau County buildings and other municipalities. Of course, you are at liberty to handcopy, but this may not be used as an excuse for 'stringing out' visits to the Clerk's Office and disrupting the efficient operations of that office as has been reported in the past."

In this regard, I offer the following comments.

First, under section 87(2) of the Freedom of Information Law, accessible records must be made available for inspection and copying. If an applicant seeks to inspect or "hand copy" accessible records, an agency cannot charge a fee. If copies are requested, an agency is obliged to provide them [section 89(3)], in which case it may charge a fee of up to twenty-five cents per photocopy [section 87(1)(b)(iii)].

Second, in my opinion, more relevant than the issue of the cost of making photocopies is the reasonableness of the rules adopted by the Village. As indicated in previous correspondence, the regulations promulgated by the Committee on Open Government, 21 NYCRR 1401.4(a), state that agencies must produce records "during all hours that they are regularly open for business". It was advised, however, that when an agency's staff needs to use records to perform its duties, it would not be unreasonable to limit an applicant's time to inspect the records. However, if records are not in use, which appears to be so in the context of your requests, it would be unreasonable in my view to limit access to an hour. Further, I believe that such a restriction constitutes a constructive denial of access.

Similarly, the Village's rule that "[i]f inspection and/or copying of records is not completed within the time specified, a new application must be completed" (section 11), is in my opinion unreasonable. Moreover, if after an inspection for an hour, the records are refiled and requested again, the rule would seem to create additional work for Village staff. When that is so, the rule may be more disruptive to the Village than allowing applicants to inspect and/or copy records for a longer period of time.

Lastly, although the Freedom of Information Law does not restrict the number of records that may be requested, it appears that by making a number of "applications" and following the direction given by the clerk, you made efforts to accommodate Village rules and that you likely expected an opportunity to view records sought in each application separately and at different times. By granting access to all of the records sought by means of a number of applications, but restricting you to a total of one hour of inspection, it appears that you have tried to live within the Village's rules, but that the Village has implemented those rules in a manner that virtually guarantees an inability to inspect and copy the records within such a short period of time.

For reasons offered herein and in the opinion of December 16, I believe that the rules and actions of the Village are inconsistent with the spirit if not the letter 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: Mayor Jacqueline Papatsos

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6997

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 3, 1992

Mr. Carl Montgomery
Vice President
Graduate Student Employees Union
170 Mariner Street (Rear)
Buffalo, NY 14201

The staff of the Committee 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. Montgomery:

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

You wrote that you represent the "Graduate Student Employees Union (GSEU), an independent local of the Communications Workers of America (CWA) through which SUNY's graduate student employees (Teaching Assistants, Graduate Assistants and Research Assistants) have been seeking collective bargaining rights since its creation in 1980". In your efforts to organize, you have unsuccessfully sought to use the Freedom of Information Law to obtain the "names, departments, and positions of those employees who would be members of [y]our bargaining unit". You have contended that since "TA's and GA's were determined to be state employees in both 1991 and 1987 PERB decisions, [y]our names are matters of public record and should be available though FOI". In addition, you contend that release of the information sought is not prohibited by the Family Educational Rights and Privacy Act (FERPA), "which excepts certain 'directory information' from its protection". Nevertheless, your contentions have been rejected based on the claim that "FERPA merely allows an institution to designate certain information as 'directory information', and that it has not done so" (emphasis yours). SUNY has claimed that your employee status is irrelevant, for "FERPA protects from disclosure information concerning employees whose employment is a result of their student status".

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

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

Further, as a general matter, records identifying public employees are generally available, and one of the few instances in which agencies are required to prepare records involves payroll information. Specifically, section 87(3)(b) of the Freedom of Information Law requires each agency, including SUNY institutions, to maintain "a record setting forth the name, public office address, title and salary of every officer or employee of the agency".

Second, however, 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 the FERPA, which exempts from disclosure so-called "education records" identifiable to students under the age of eighteen or "eligible students", persons who are eighteen years of age or older attending "an institution of postsecondary education" (34 CFR 99.3), such as SUNY.

The federal regulations promulgated by the United States Department of Education pursuant to FERPA state in 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...
> [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].

Therefore, I believe that records identifiable to persons who are employed due to their status as students would constitute "education records" that are exempted from disclosure by statute and, therefore, would be beyond the scope of rights conferred by the Freedom of Information Law.

As you are aware, an exception to the rule of confidentiality in the FERPA involves "directory information." Directory information is defined in section 99.3 of the federal regulations 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 or eligible students as the case may be in order that they 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 eligible students.

The federal regulations, 34 CFR 99.37, specify the procedure and criteria under which directory information may be disclosed. That provision states in relevant part that:

> "[a] An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of -
> [1] The types of personally identifiable information that the agency or institution has designated as directory information;
> [2] A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and
> [3] The period of time within which a parent or eligible student has to notify the agency or institution in writing

> that he or she does not want any or all of those types of information about the student designated as directory information."

Therefore, if an educational agency chooses to adopt a policy on directory information, it may include some but not all of the kinds of information described in the definition of that phrase.

Having contacted SUNY Central to learn more of the matter, I was advised that each campus adopts its own policy on directory information. In addition, I have obtained a copy of the policy adopted by SUNY at Buffalo, which states that:

> "Information about a student, including any personally identifiable information, records, or files, may be released without the student's written permission in the following cases only: a) upon request, the University will release the following directory information: the student's name, current address, telephone number, major field of study, dates of attendance, degrees, and awards. The University will release the above information only if the student indicates on his or her latest student data form, under the appropriate item, the he or she wishes to be listed in the student directory. The student may at any time rescind his or her permission for the release of directory information by notifying in writing, the Office of Records and Registration."

Based on the foregoing, insofar as the information sought is not designated as directory information, it would, in my view, be exempted from 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
cc: John T. Thurston, Records Access Officer
Gabriella Semel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6998

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 4, 1992

Mr. Richard W. Dunnigan
90-B-3027
Elmira Correctional Facility
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. Dunnigan:

I have received your letter of January 20 in which you sought an advisory opinion concerning the Freedom of Information Law.

You wrote that you requested various records from the Canandaigua Police Department relating to your arrest and conviction. Although two requests were made by certified mail, as of the date of your letter to this office, you had received no 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)].

Second, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unfamiliar with the content 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, an office of a district attorney 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, since you referred to a "911 emergency call", provisions of the County Law exempt records of 911 calls from disclosure. Specifically, section 308(5) of the County Law states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

Based upon the foregoing, the record of such a call is in my view exempted from disclosure and, therefore, outside the scope of rights conferred by the Freedom of Information Law [see section 87(2)(a)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-6999

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 4, 1992

Mr. Euguene Hauver
84-A-2400
Box 2071
Wilton, NY 12866

Dear Mr. Hauver:

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

Having requested statistics from the Division of Parole concerning recidivism, you were informed that the Division maintains no such records. You asked where the information in question is recorded. In addition, you complained with respect to the delay in responding to your request.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, I cannot indicate with certainty which agency might maintain the records in which you are interested. However, it appears that the agency most likely to maintain the records would be the Division of Criminal Justice Services, which is located at Executive Park Tower, Stuyvesant Plaza, Albany, NY 12203. It is noted, too, that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states that an agency need not create a record in response to a request. Therefore, if the statistical records in which you are interested do not exist, an agency would not be obliged to prepare new records on your behalf.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2000

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 4, 1992

Mr. Edward K. Markiewicz, Sr.
[redacted]

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

Dear Mr. Markiewicz:

I have received your letter of January 15, which reached this office on January 23.

Attached to your letter is correspondence with the former supervisor of the Town of Worcester concerning your request for a record or records reflective of the appointment of a deputy town supervisor in 1991. Since the former supervisor did not respond, you resubmitted your request to the new supervisor. You have sought my assistance in the matter.

By way of background, as you are aware, section 42 of the Town Law provides that a town board my establish the office of deputy town supervisor, and the Town Board apparently took such action. Section 42 also states that the deputy supervisor shall be appointed by the supervisor, unless he fails to do so within five days after the establishment of the office or within five days after a vacancy in that office occurs, in which case, the town board has the authority to appoint a deputy supervisor. You wrote that the Town Board's minutes of January 14 include no reference to an appointment by the Supervisor, nor is reference made to an appointment in the ensuing minutes.

In this regard, if the supervisor made the appointment within five days in accordance with section 42, I do not believe that reference to the appointment would have to be included in minutes. According to an opinion of the State Comptroller, a supervisor's choice to fill the office of deputy supervisor is not subject to approval by a town board (1969 Ops St Compt File #229). If that is so, and if the Board took no action, there

would be no requirement in my view that minutes or perhaps any other record include reference to the supervisor's designation of a deputy, because action would have been taken unilaterally by the Supervisor rather than by a public body. In that circumstance, it is possible that no record of appointment exists.

On the other hand, if the Board made the appointment due to the Supervisor's failure to do so within five days, I believe that reference to such action would be required to be included in minutes. Section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies. That provision would require that minutes include a record or summary of action taken by the Town Board, the date and the vote of its members.

I hope that I have 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. L. Anteman, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2001

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 4, 1992

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 January 22 in which you presented new "facts" concerning your request for records of a polygraph examination of a prosecution witness at your trial. The issue was the subject of an opinion rendered on January 22.

The additional "facts" involve citations to judicial decisions dealing with discovery rights of defendants accorded under provisions of the Criminal Procedure Law. In my view, those decisions are irrelevant to situations in which records are sought under the Freedom of Information Law. Rights accorded to a defendant under the Criminal Procedure Law are in my opinion separate and distinct from those conferred by the Freedom of Information Law. Rights accorded under discovery are premised upon one's status as a litigant or defendant. Rights are accorded under the Freedom of Information Law to the public generally. As stated by the Court of Appeals, "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and neither enhanced...nor restricted because he is a litigant or potential litigant" [Farbman v. New York City Health and Hospitals Corp., 62 NY 2d 75, 82 (1984)]. Therefore, your rights as a defendant under the Criminal Procedure Law are separate and likely different from your rights as a member of the public when you assert the Freedom of Information Law.

Further, in my view, and as suggested in the earlier opinion, the records in questions could likely be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [section 87(2)(b)] or perhaps on the ground that they were compiled for law enforcement purposes and would disclose confidential information relating to a criminal investigation [section 87(2)(e)(iii)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Roseann B. McKechnie

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2024
FOIL-AD-2002

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 5, 1992

Ms. Mary Therese Capone
Massapequa POST
1045-A Park Boulevard
Massapequa Park, NY 11762

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

Dear Ms. Capone:

I have received your recent letter, which reached this office on January 27.

You have sought an advisory opinion concerning a recent meeting of the Massapequa Board of Education. According to your letter, after rescinding funding for a winter track program, students petitioned the Board to restore funds, and the Board reconsidered the matter in executive session. During the executive session, the Board "directed the superintendent to reinstate the program". You added that when the public questioned the propriety of the executive session, the Board contended that "since the program would only be reinstated if two coaching positions were cut, they conducted themselves properly since the issue involved 'personnel'."

In this regard, I offer the following comments.

First, by way of background, section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, the Open Meetings Law contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

> "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, a motion to enter in an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

Second, judicial interpretations of the Open Meetings Law indicate that motions to enter into executive sessions cannot merely describe the subject to be discussed as "personnel", for example.

I point out that the term "personnel" appears nowhere in the Law. In the Open Meetings Law as originally enacted, the "personnel" exception differed from the language of the analogous exception in the current Law. In its initial form, section 105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

In reviewing minutes that referred to various bases for entry into executive session, it was held that:

> "[T]he minutes of the March 26, 1981 meeting indicate that the Board voted on two separate occasions to enter executive session to discuss 'personnel' and 'negotiations' without further amplification. On May 28, 1981, the Board again entered into executive session on two occasions. The reasons given for doing so were to discuss a 'legal problem' concerning the gymnasium floor replacement and for 'personnel items'. Again, on June 11, 1981, the Board voted to enter executive session of 'personnel matters'. "We believe that merely identifying the general areas of the subjects to be considered in executive session as 'personnel', 'negotiations', or 'legal problems' without more is insufficient to comply with Public Officers Law section 100[1].
>
> "With respect to 'personnel', Public Officers Law section 100[1][f] permits a public body to conduct an executive session concerning certain matters regarding a 'particular person'. The Committee on Public Access to Records has stated that this exception to the open meetings law is intended to protect personal privacy rather than shield matters of policy under the guise of privacy... Therefore, it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any

> particular person. When entering into executive session to discuss personnel matters of a particular individual, the Board should not be required to reveal the identity of the person but should make it clear that the reason for the executive session is because their discussion involves a 'particular' person..." [Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 19981]; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; please note that the Open Meetings Law was renumbered after Doolittle was decided].

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that section 105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In neither case in such circumstances would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to section 105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "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" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering of the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of [section] 100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f. of

> [section] 100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to budgetary matters, such as the funding or reduction of positions, could appropriately be discussed during an executive session.

Third, your article indicates that the Board did not vote, but rather merely "authorized the superintendent to take whatever action was necessary". In my opinion, since action was taken that altered a certain aspect of the District's sports program, it is likely that the Board should have acted by means of a vote. I point out 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)].

In addition, 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.

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 an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be sent to the Board of Education.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7903

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 5, 1992

Mr. Steven Briecke
85-A-4706
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. Briecke:

I have received your letter of January 20 addressed to Barbara Shack, former Chair of the Committee on Open Government. Please note that Ms. Shack is no longer a member of the Committee, and that the staff is authorized to respond on its behalf. You have sought assistance concerning an unanswered request directed several months ago to the Suffolk 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)].

I believe that the person designated to determine appeals in Suffolk County is the County Attorney.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: James Catterson, Jr., District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7004

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 5, 1992

Mr. Wallace S. Nolen
[redacted]

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

Dear Mr. Nolen:

I have received your letter of January 18 in which you sought an advisory opinion relating to issues raised in conjunction with a request for records of the Dutchess County Sheriff's Department.

The correspondence attached to your letter indicates that you requested "a copy in electronic format (i.e., copy of actual computer file(s)) with respect..." a number of items, such as pistol permit applications, arrest information, blotter entries and "[a]ll data bases that constitute the entire records of the civil department of [the] agency". In response to items 1 through 4 of your request, you were informed that the Department "do[es] not have the records".

It appears that the Department does not maintain the information sought in "electronic format" or in a format that you requested, "diskette format (either 5 1/4" or 3 1/2") in any acceptable industry standard". If that is so, the records sought in those four items do not exist, at least not in the form in which you requested them, and the Freedom of Information Law would, therefore, be inapplicable.

Even if the Department maintained the information electronically in a format acceptable to you, various aspects of your request could likely be denied. For example, section 400.00(5) of the Penal Law requires that approved pistol license applications must be disclosed. However, records reflective the rejected applications, fingerprints, investigative materials and other records relating to the application or licensing process

could likely be withheld as an unwarranted invasion of personal privacy [see Freedom of Information Law, section 87(2)(b)]. Similarly, information relating to arrests is often sealed pursuant to section 160.50 of the Criminal Procedure Law when charges are dismissed in favor of an accused.

In response to item 5, you were informed that "[y]ou have supplied insufficient information". That portion of your request involves:

> "Copies of any accusatory instruments, incident reports, summonses, accident reports, court orders of seizure, court orders of arrest, court orders ordering the sealing of records, letters that provide compliance with sealing orders of records, photographs, fingerprint cards, and/or any other written document and/or items contained and/or maintained in any computer data base, file, etc. on file with your agency."

In view of the breadth of the request and the response by the agency, I point out that the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought in order that the agency can locate and identify the records. Your request appears to encompass a significant portion of the records of the Department, and it is unlimited and open-ended in terms of time. For example, it appears to include all accusatory instruments, whether those documents were filed in 1992 or when the Department was created. In a decision involving a request that may have been similar breadth, it was found that:

> "[p]etitioner's actual demand transcends a normal or routine request by a taxpayer. It violates individual privacy interests of thousands of persons, subserves a commercial purpose outside the concerns of the Freedom of Information Law, and would bring in its wake an enormous administrative burden that would interfere with the day to day operations of an already heavily burdened bureaucracy. All in all, respondents were abundantly justified in declining to issue the directives sought by petitioner" (Fisher & Fisher v. Davison, Supreme Court, New York County, NYLJ, October 6, 1988).

Lastly, in item 7, you requested copies of "any and all letters relating to allowing access, denying access, and/or acknowledging of requests made to [the] agency under F.O.I.L. for the last two years". You were informed that the request did not reasonably describe the records. If the Department maintains separate files pertaining specifically to requests made under the Freedom of Information Law, and if staff can locate and identify those records in conjunction with its filing or record-keeping system, I believe that the request would have reasonably described the records sought.

Assuming that the request indeed reasonably described the records sought by means of item 7, 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. 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 those kinds of cases, 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 request is made for an accident report that is accessible to any member of the public, or by an entity, such as a business or newspaper, there would likely be no issues involving personal privacy.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: David W. Cundy, Under-Sheriff
Ian MacDonald, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1005

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 5, 1992

Mr. Joshua Acosta
88-T-1281
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. Acosta:

I have received your letter of January 27. As in the case of previous correspondence, the issue involves a request for records of the Office of the Special Narcotics Prosecutor.

You have asked whether that agency has "failed to provide any evidence from which the requested documents are protected from disclosure pursuant to any of the several exemptions contained in the Freedom of Information Law". You also wrote that the agency has failed to meet its burden of showing which of the records sought have been previously made available.

The meaning of your initial comment is unclear. If you are asking whether the agency in question has furnished this office with information supporting the denial, I do not believe that I have received any documentation concerning your request other than materials that you have furnished. Further, an agency is not required to demonstrate the adequacy of a denial to this office; rather, such a showing is required to be made in court if a denial is followed by the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

With respect to the second comment, as you may be aware, 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, 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).

In an effort to assist you, a copy of this response will be sent to the Office of the Special Narcotics Prosecutor.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lewis A. Halpern

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2006

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 5, 1992

Mr. David Karnovsky
Assistant Corporation Counsel
New York City Law Department
100 Church Street
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. Karnovsky:

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

By way of background, you wrote that the New York City Department of Correction maintains an "Inmate Information System" database that contains "the names of all inmates held in City jails and a variety of information relevant to their status". Following a request by New York Newsday for a "computer tape of certain of the information maintained in the database", you were informed that "a day or more reprogramming time would be required in order to produce a computer tape in the form requested". You added that "[r]eprogramming would be necessary in order both to extract the information elements requested...as well as to redact those information elements which the Department seeks to withhold from disclosure under one or more of the exemptions set forth in subdivision 2 of section 87 of the Public Officers Law."

In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. 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 more than ten years 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)].

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. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. 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)].

Lastly, I believe that there may be several options in terms of dealing with the request. First, the Department could in my view choose not to reprogram in order to generate the data sought. Second, pursuant to an agreement with the applicant, the Department could choose to reprogram, in which case it could charge in accordance with the terms of the agreement. In that event, since the Department would be acting beyond the requirements of the Freedom of Information Law, I do not believe that it would be restricted to charging the fees ordinarily applicable under section 87(1)(b)(iii) of the Law. Third, I believe that

Newsday could opt to request a printout. Since a printout would apparently include accessible and deniable data, Department staff would in my opinion be obliged to disclose those portions that are accessible under the Law, and manually delete those items that may be withheld. Whether that process would be more costly or time consuming than reprogramming is unknown to me. In some instances, it may be more efficient for an agency to engage in the process of reprogramming than engaging in the task of making deletions. Further, reprogramming might provide the agency with an increased ability to use or analyze the data for its own 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2007

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 6, 1992

Hon. Patricia O'Donnell
Town Clerk
Town of Clifton Park
One Town Hall Plaza
Clifton Park, NY 12065

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

Dear Ms. O'Donnell:

I have received your letter of January 27 and the correspondence attached to it.

The correspondence consists of a request by a member of the Town Board for "complete copies of tapes of all board meetings for the duration of [her] term of office". In addition, she asked that "all copies be made available to [her] when the Board receives draft minutes for review and approval prior to the Board meeting". You wrote, however, that "[s]ince it is necessary for these tapes to be sent out to be duplicated, [you] want to keep the tapes in [your] possession until the minutes have been approved". During our conversation in which I sought clarification of the matter, you indicated that tapes cannot be duplicated on the premises and are not sent out to be duplicated until the minutes have been approved. You also said the member seeking the tapes can listen to them or prepare duplicates by using her own tape recorder prior to the approval of the minutes.

In this regard, I offer the following comments.

First, it is clear in my view that a tape recording of an open meeting that is maintained by a municipality constitutes a "record" subject to rights conferred by the Freedom of Information Law. Further, based upon case law, a tape recording of an open meeting is accessible to the public (Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978).

Second, as a general matter, the Freedom of Information Law is intended to 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 M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984); Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Nevertheless, 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 a 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 technical perspective, one of the functions of a public body involves acting collectively, as an entity. A 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 its total membership [see Town Law, section 63; General Construction Law, section 41]. 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 and could be assessed fees at the same rate as any member of the public.

In conjunction with the authority conferred by section 63 of the Town Law, a town board could adopt rules or procedures pertaining to the rights or privileges of its members concerning the disclosure of records, as well as the imposition or perhaps the waiver of fees for copies under prescribed circumstances.

Third, as you are aware, the Freedom of Information Law requires that an agency make records available for inspection and copying. Based upon our conversation, the member making the request may "inspect" a tape recording by listening to it and may copy a tape with her own machine. While section 89(3) of the Freedom of Information Law requires that an agency provide copies of accessible records, as indicated earlier, you cannot prepare a copy with the Town's equipment and tapes must be duplicated elsewhere. That provision also states that although an agency must respond to a request within five business days of its receipt, if more than that period is needed to grant or deny access, the agency may acknowledge the receipt of the request and include "an approximate date when such request will be granted or denied". In this instance and in view of the fact that the member's request is prospective and ongoing, I believe that it would be appropriate to inform her that she can listen to or copy the tapes prior to the approval of minutes, but that, due to your

need to maintain the tapes in order to prepare minutes and in view of the Town's inability to duplicate the minutes at Town offices, duplicates cannot be made available until the minutes have been approved.

I hope that I 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-2025
FOIL-AO-2008

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 6, 1992

Ms. Rhea Serefine
[redacted]

Dear Ms. Serefine:

Your letter of January 9 addressed to the Department of State has been forwarded to the Committee on Open Government for response and was received by this office today. Although we have been discussing various related issues by phone, I would like to offer the following remarks in conjunction with your questions.

Your initial area of inquiry involves "Board Meeting Policy at a Village Level", executive sessions, what is "available in a Village office for citizens to read", and who is responsible for making records available, such as bills and vouchers.

With respect to meetings, public bodies, such as village boards of trustees, planning boards and zoning boards of appeals, are required to comply with the Open Meetings Law. That statute is based on a presumption of openness and requires that meetings be conducted in public, unless there is a basis for entry into executive session. A public body may not conduct an executive session to discuss the subject of its choice; on the contrary, the subjects that may properly be considered in executive session are specified and limited in paragraphs (a) through (h) of section 105(1) of the Open Meetings Law.

With regard to access to records, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the Freedom of Information Law. Pursuant to the regulations, a village board of trustees must designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests for records. Most often, the clerk is the records access officer.

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

Accessible records must be made available for inspection at no charge. If photocopies are requested, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches pursuant to section 87(1)(b)(iii) of the Freedom of Information Law.

Books of account, vouchers, bills, contracts and similar records relating to expenditures of public monies must in my view be made available, for none of the grounds for denial would be applicable. Although I am not an expert regarding the Village Law, I have enclosed copies of sections 4-408 and 5-524 of the Village Law, both of which may be useful to you. Those sections deal respectively with the duties of a village treasurer and the audit and payment of claims.

Lastly, you asked whether a citizen may use a tape recorder at an open meeting. Although neither the Open Meetings Law nor any other statute deals directly with the issue, several judicial decisions on the subject have been rendered.

By way of background, until 1979, there was but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

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

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

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference

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

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

> "While the board of education has supplied this court with a battery of reasons supporting its positions, its resolution prohibiting the use of tape recorders at its public meetings was far too restrictive, particularly when viewed in light of the legislative scheme embodied in the Open Meetings Law (Public Officers law art. 7) which was enacted and designed to enable members of the public to 'listen to the deliberations and decisions that go into the making of public policy'" (id. at 925).

In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, including meetings of a board of fire commissioners.

In addition to sections of the Village Law referenced earlier, enclosed are copies of the Freedom of Information Law, the Open Meetings Law and "Your Right to Know", which describes both of those statutes in detail.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2027
FOIL-AO-7009

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 6, 1992

Mr. Jeffrey H. Greenfield
NGL Realty Co.
112 Merrick Road
Box 847
Lynbrook, NY 11563

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

Dear Mr. Greenfield:

I have received your letter of January 21 in which you sought advice concerning a denial of a request for records by the Village of Lynbrook and certain practices of its Board of Trustees.

You asked initially whether "the Village Attorney can hide behind client attorney privilege to deny access to Public Village 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.

Relevant to your question is the initial ground for denial, section 87(2)(a), which 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 village 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, 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.

In sum, in accordance with the preceding commentary, records in which Village officials seek legal advice from their attorney and reflective of legal advice provided by the attorney would in my view be subject to the attorney-client privilege.

Second, you asked if the Board of Trustees may discuss and vote upon an issue that is not included in "the preprinted, posted agenda...". The Open Meetings Law is silent with respect to agendas or their functions. Nothing in that statute requires that agendas be prepared or that public bodies must adhere to them. Only if the Board of Trustees has adopted a rule requiring the Board to address only those matters appearing on an agenda would there be a restriction in terms of the subjects that could be considered.

Lastly, you indicated that the Board enters into executive session "without specifically noting the reason". In this regard, section 105(1) of the Open Meetings Law requires that a procedure be accomplished during an open meeting before an executive session may be held. 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..."

Therefore, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session. In addition, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of the Open Meetings Law specify and limit the subjects that may properly be discussed during executive sessions.

Further, judicial interpretations of the Open Meetings Law indicate that motions to enter into executive sessions cannot merely describe the subjects to be discussed as "personnel", "negotiations" or "litigation", for example.

More specifically, in the Open Meetings Law as originally enacted, the "personnel" exception differed from the language of the analogous exception in the current Law. In its initial form, section 105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

With respect to "negotiations", the only ground for entry into executive session that mentions that term is section 105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, section 105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union.

In terms of a motion to enter into an executive session held pursuant to section 105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter execu-

> tive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" (Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981).

The provisions in the Open Meetings Law concerning "litigation" are found in section 105(1)(d). The cited provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the language quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Further, since "possible" or "potential" litigation could be the result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a "potential" for litigation.

With regard to the sufficiency of a motion to discuss "litigation", it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

Enclosed is a copy of the Open Meetings Law 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

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7010

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 10, 1992

Mr. Dennis V. Tobolski
City Attorney
City of Dunkirk
Department of Law
City Hall
Dunkirk, NY 14048

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

Dear Mr. Tobolski:

I have received your letter of January 27 as well as the materials attached to it. You have asked "whether the Local Development Corporation of the City of Dunkirk is an agency within the meaning of Section 86 of the Public Officers Law."

In this regard, I offer the following comments.

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

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

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

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers

> conferred by paragraph (b) such corporations will be performing an essential governmental function."

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

In an effort to learn more about local development corporations generally, it has been found that their relationships to government are inconsistent. Some are apparently analogous to chambers of commerce and, in great measure, carry out their duties independent of government. Others appear to be partners with or extensions of government that carry out their duties in conjunction with government. In the case of the Corporation in question, its by-laws specify that "[m]embers shall be appointed by the Mayor of the City of Dunkirk and concurred with by the Common Council", that the Mayor has the authority to remove members at his or her discretion, and that the principal office of the Corporation is located at the Dunkirk City Hall. As such, there is a significant nexus between the City and the Corporation.

Third, there are two judicial decisions of which I am aware that have dealt with the status of local development corporations, both of which concluded that those corporations are "agencies" subject to the Freedom of Information Law. In the first, Legal Aid Society of Northern New York, Inc. v. Albany Local Development Corporation (Supreme Court, Albany County, January 27, 1989), the Court found that "[t]o suggest that ALDC is not an agency of the City of Albany is not realistic and the court does not adopt such reasoning". Concurrently, the Court "adopt[ed] the reasoning" offered in two opinions prepared by this office in which it was advised that certain local development corporations were subject to the Freedom of Information Law. Enclosed are copies of those opinions. Further, in a recent decision rendered by the Appellate Division, Fourth Department, Matter of Buffalo News, Inc. v. Buffalo Enterprise Development Corporation (No. 1415, December 27, 1991, ___ AD 2d ___), the Court found that the Corporation was subject to the Freedom of Information Law, stating that the Corporation:

> "was specifically organized by the City of Buffalo pursuant to the Not-for-Profit Corporation Law [sections] 102(a)(5), 201(b), 402 and 1411, 'to advance the objectives of [the City's] Department of Community Development *** [and] *** to facilitate partnership with the private sector in strengthening Buffalo's downtown, its neighborhoods, and its business and industries'. Occupying

> rent-free offices in City Hall, it 'acts as the City's agent to invest public funds in economic development activities' and 'to lessen the burdens of government and to act in the public interest'. It is required to disclose its annual budget publicly, subject that budget to a public hearing and file its audited financial report with the City annually because, as a City development agency, it 'acts for or on behalf of the City in expending money granted to the City or [itself] for development purposes."

In its conclusion, the Court found that "because the BEDC acts as a governmental agency, it is subject to the disclosure requirements of FOIL."

Based upon the materials that you provided and the judicial decisions cited above, I believe that the Local Development Corporation of the City of Dunkirk is an "agency" subject to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2011

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 10, 1992

Mr. Frederick A. Jones
88-A-0439 HU124-1
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963-0008

The staff of the Committee on Open 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 24 in which you wrote that requests to various agencies have not been answered or acknowledged, or that responses to appeals 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)].

It is noted that an applicant must exhaust his or her administrative remedies before an Article 78 proceeding may be initiated. As indicated earlier, if a response to an initial request has not been answered, an applicant may appeal on the ground that the request has been constructively denied. If more than ten business days have elapsed since the receipt of an appeal with no response, the applicant may consider the appeal to have been denied and may in my view initiate an Article 78 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

PPPL-AO-1304A
FOIL-AO 7012

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 11, 1992

[redacted]

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

Dear [redacted]:

I have received your letter of January 20, which reached this office on January 30.

You have sought assistance in relation to a request for records of the Department of Labor. By way of background, you wrote that a complaint was made about you that resulted in the imposition of charges and a disciplinary hearing. Although you were "found innocent", you indicated that you were told of the result of the proceeding not by the Department, but rather by an individual who was not acting on behalf of the Department. In conjunction with the foregoing, your attorney requested various memoranda, correspondence and statements from the Department on your behalf. The request, however, was denied on the basis of section 87(2)(g) of the Freedom of Information Law on the ground that the records constitute "intra-agency" materials.

In this regard, I offer the following comments.

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

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", and 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) of the Freedom of Information Law 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 an entire complaint could likely be withheld. Under the circumstances, as I understand the content of the correspondence attached to your letter, it appears that complaints could be withheld.

Also relevant is the provision cited by the Department in its denial, 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.

I disagree with your attorney's contention that an "alleged fact of...alleged misconduct" constitutes factual information that must be disclosed under section 87(2)(g)(i). In my view, an allegation that has not been proven could not be characterized as factual information. While it is a fact that an allegation was made, the allegation itself would represent an opinion or subjective commentary concerning an event or events. Further, it has been held that records relating to a disciplinary proceeding consisting of notes and communications made in preparation for a proceeding are "predecisional" and may be withheld under section 87(2)(g) [see Sinicropi v. County of Nassau, 76 AD 3d 838 (1980); Scaccia v. NYS Division of State Police, 138 AD 2d 50 (1988)].

In short, it appears that the records in question could properly have been withheld under the Freedom of Information Law.

Further, although you wrote that the Department did not inform you of the result of the proceeding, one of the enclosures, a letter addressed to you by Joseph Kearney dated October 2, 1991, specified that charges against you were not proven and, accordingly, were dismissed.

Second, there may be a vehicle other than the Freedom of Information Law under which some of the records sought might be available to you. The Personal Privacy Protection Law pertains to records maintained by state agencies, such as the Department of Labor, 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 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.

The foregoing is not intended to suggest that all of the records sought would be available to you under the Personal Privacy Protection Law. Insofar as disclosure would constitute an unwarranted invasion of personal privacy with respect to persons other than yourself who may be identified in the records, I believe that records may be withheld. Further, rights conferred by the Personal Privacy Protection Law do not apply to:

> "attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivisions (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena issued in the course of a criminal action or proceeding, court ordered or grand jury subpoena, search warrant or other court ordered disclosure" [section 95(6)(d)].

Nevertheless, it may be worthwhile to request the records under 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2013

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 11, 1992

George P. Keyloun, Trustee
Incorporated Village of Bellerose
50 Superior Road
Bellerose Village, NY 11001

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

Dear Trustee Keyloun:

I have received your letter of January 29 and the materials attached to it.

In your capacity as a member of the Village of Bellerose Board of Trustees, you wrote that your efforts in obtaining records from the Village, particularly those concerning fiscal issues, have been frustrated. You have questioned the propriety of "compelling and elected official" to use the Freedom of Information Law to attempt to obtain records.

In this regard, I offer the following comments.

First, I am unaware of any statute that deals specifically with requests by members of village boards of trustees for village records or any unique authority that board members enjoy, individually, concerning their capacity to obtain copies of village records. Similarly, I know of no provision that authorizes a member of a village board of trustees, acting alone, to impose a schedule upon a clerk concerning the time within which the clerk must disclose or copy a voluminous number of records.

Second, with respect to the Freedom of Information Law, that statute is, in my view, 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 Informa-

tion 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 a 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. A village board of trustees, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership [see Village Law, section 4-412(1); General Construction Law, section 41]. 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. When that is so, a request by a member of the Board could, in my opinion, be considered as a request made under the Freedom of Information Law by a member of the public, and that person could be assessed fees at the same rate as any member of the public.

Your remaining area of inquiry pertains to an incident involving the Mayor and yourself and in which the Village Attorney "took the side" of the Mayor. You have asked if you "have the right to [your] own counsel and bill the Village as a charge" and "who...is to advise [you] as a trustee of the Village". Since those issues do not deal with the statutes falling within the scope of the jurisdiction or expertise of this office, I cannot provide advice.

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-2014

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 13, 1992

Mr. Pastor Nunez
90-T-3746
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. Nunez:

I have received your letter of January 22, which reached this office on February 3.

According to your letter and the correspondence attached to it, you directed a request on November 19 for records involving missing funds to the New York City Adolescent Remand and Detention Center. As of the date of your letter to this, you had not received a response to your request, and you have sought assistance in the matter.

In this regard, I offer the following comments.

First, the copy of your request attached to your letter indicates that it was sent to the New York City Adolescent Remand Detention Center at 10-10 Hazen Street in East Elmhurst. According to the Official Directory of the City of New York, that is the address of the New York City Correctional Institution for Men. There is also reference to the New York City Adolescent Reception Detention Center, which is located at 11-11 Hazen Street. As such, it is possible that your request was sent to the wrong address and may never have been received. In that event, it is suggested that you renew your request.

Second, requests should generally be made to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests. The records access officer for the New York City Department of Correction is Ruby Ryles, whose office is located at 60 Hudson Street New York, NY 10013.

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 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-7015

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 12, 1992

Mr. Thomas J. Gaughan
[redacted]

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

Dear Mr. Gaughan:

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

According to the materials, on November 16, you requested records "pertaining to [your] own 'teacher perceiver' session as administered by the Syracuse City School District...and any data generated from the meeting...that could be described as statistical, factual or determinational in the implementation of a policy decision". The receipt of your request was acknowledged, and the request was later denied on the ground that the records constitute examination questions or answers that could be withheld pursuant to section 87(2)(h) of the Freedom of Information Law. You appealed the denial on December 29. However, as of the date of your letter to this office, you had received no response to the appeal. Further, in your appeal, you indicated that your request did not involve examination questions, but rather a "rating or score based on the statistical tabulations of the coding or responses that established a profile". You also wrote that:

> "This profile was used to generate documentation that was employed to execute an agency policy as it related to [your] veiled and confidential status in the District. This is the data requested that could be described as statistical, factual or determinational in the implementation of a policy decision."

In conjunction with the foregoing, you asked whether you should have received "an explanation of further denial", whether you have "exhausted [your] avenues", and whether you should make a new request because the denial involved information you did not seek. In this regard, I offer the following comments.

First, in my opinion, since your appeal clarified the nature of the records sought and specified that you did not request examination questions or answers, I do not believe that it should be necessary or required that you submit a new request.

Second, as you may be aware, section 89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 in determining rights of access to the records sought insofar as the records exist.

One of those grounds 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". Since you requested records pertaining to yourself, I do not believe that section 87(2)(b) would serve as a basis for denial.

The other 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. Therefore, to the extent that the records sought exist and consist of the kinds of information described in subparagraphs (i) through (iv) of section 87(2)(g), I believe that they must be disclosed.

In an effort to assist you, copies of this response will be forwarded to School District officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Henry P. Williams
Robert C. Allen, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7016

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 13, 1992

Mr. Ronald Lowe
91-A-2249 N-1-30B
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Lowe:

I have received your letter of February 9 in which you expressed the belief that this office maintains transcripts of certain proceedings.

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, nor is it empowered to compel an agency to grant or deny a request for records. In short, I cannot provide the records because this office does not possess them. Nevertheless, 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, it is unclear whether the transcripts in which you are interested are maintained by a court or by the Division of Parole. If they are maintained by a court, although the Freedom of Information Law may be inapplicable, other statutes may grant access to court records (see e.g., Judiciary Law, section 255). A request for court records should be directed to the clerk of the appropriate court. If the records are maintained by the Division of Parole, the Freedom of Information Law would be applicable and a request may be made to its records access officer. The records access officer has the duty of coordinating an agency's response to a request.

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-7017

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 13, 1992

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 29 in which you sought assistance concerning the Freedom of Information Law.

You wrote that the Board of the Great Neck Park District recently instituted "a twenty-five cents per (folio) page charge for copies of public records". It is your view that the fee is "exorbitant" and "is in clear violation of the spirit of the Freedom of Information Act."

In this regard, despite your feelings on the matter, I believe that the fee established by the Board is fully legal and consistent with law. The Freedom of Information Law requires that agencies adopt rules and regulations concerning the procedural implementation of the Law, as well as:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

Based on the foregoing, the Board in my view clearly has the right to establish a fee of up to twenty-five cents per photocopy. Further, I believe that many agencies have adopted rules establishing fees in the same amount.

I hope that the preceding commentary serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Great Neck Park District Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2018

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 13, 1992

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 January 19, which reached this office on February 3.

The first issue that you raised involves an "abuse of [your] civil rights" concerning interference with your mail. In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, the issue is beyond the scope of the jurisdiction of this office. It is suggested that you discuss the matter with appropriate officials at your facility or perhaps a representative of Prisoners' Legal Services.

Second, you asked whether you "have a right to review all prison records".

Although the Freedom of Information Law pertains to all agency records, not all records are necessarily available. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Further, section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records in which you are interested.

Finally, the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services state 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-7019

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 13, 1992

Mr. Jeffrey Chamberlain
Attorney and Counsellor at Law
RD 2, Box 57, Richloff Road
Nassau, New York 12123

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

Dear Mr. Chamberlain:

I have received your letter of January 30 in which you asked that I consider the terms of an "agreement" that you were asked to sign in conjunction with a request made to the Department of Environmental Conservation.

The correspondence attached to your letter indicates that you requested the names and addresses of individuals who have applied for deer management permits in 1991. You were informed that a list could be prepared and made available upon signing an "Agreement for the Release of Data". The agreement provides in relevant part that:

> "The applicant requesting access to the Deer Management Permit applicant list must agree with and abide by the terms specified below before data will be released. These conditions are necessary to protect the right of personal privacy of those persons identified therein. The failure to comply with the terms of the agreement may jeopardize future access to these records and could result in legal ramifications.
>
> 1. The applicant understands that no portion of this list of names and addresses can be transferred to another party without the written consent of the Records Custodian.

> 2. The applicant understands that no portion of this list of names and addresses can be used or released for commercial or fund-raising purposes or for any personal benefit.
>
> 3. The applicant will provide a sample copy of each mailing or interview made to the persons contained on this list to the Records Custodian."

You have questioned the propriety of the foregoing. In this regard, I offer the following comments.

First, as a general matter, 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 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)].

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 relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought. In that decision, it was stated that:

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

In addition, it was held that:

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

Third, with respect to the conditions quoted earlier, in conjunction with the first, you contended that if records are available to the public, a restriction on their dissemination to other members of the public is inappropriate, for others would presumably be entitled to the same records. I am in general agreement with your contention. However, in the case of a list of names and addresses, the purpose for which the request is made is relevant to a determination of rights of access. Therefore, while a list of names and addresses may be available for some purposes, it may be withheld if requested for other purposes.

The second condition imposes a prohibition upon using a list for commercial or fund-raising purposes "or for any personal benefit". The Freedom of Information Law specifies that a list of names and addresses may be denied if it would be used for commercial or fund-raising purposes. "Personal benefit" might involve financial benefit, but it might often involve a variety of other possibilities; an individual's knowledge or even satisfaction of curiosity may be a "personal benefit". Therefore, I believe that the reference to "any personal benefit" in the second condition is inappropriate.

The third condition requiring that an applicant provide a sample copy of a mailing or interview made to persons identified on a list would also, in my view, be inappropriate. As indicated earlier, while an agency may seek a certification indicating that an applicant will not use a list for commercial or fund-raising purposes, I do not believe that an agency could require that an

applicant submit the kind of information described in the agreement or perhaps even an indication or description of the intended use of a list. In my opinion, it would be sufficient for an applicant to merely certify that a list of names and addresses would not be used for commercial or fund-raising purposes.

Fourth, it is likely that among the agency's concerns is compliance with the Personal Privacy Protection Law. In brief, under section 96 of that statute, a state agency is precluded from disclosing personal information, unless in conjunction with certain exceptions authorizing disclosure. Further, when section 96 of the Personal Privacy Protection Law is read in conjunction with section 89(2-a) of the Freedom of Information Law, a state agency is prohibited from releasing records when it determines that disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2-a) states that:

> "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter."

Lastly, you referred to a portion of the agreement stating that a failure to comply with its terms "could result in legal ramifications", and that you are unaware of any provision of law that "would permit a government agency to bring legal action against someone who has obtained records under a FOIL request". Again, when records are obtained under the Freedom of Information Law, in general, I believe that they can be used for any purpose. However, if a certification was made that a list of names and addresses would not be used for commercial or fund-raising purposes, and the recipient of the list in fact obtained records for such a purpose, that person would have acquired records, which for reasons described earlier, should have been withheld in order to comply with the Personal Privacy Protection Law. While I am not an expert regarding the Penal Law, that kind of situation might involve offering a false instrument under Article 175 of the Penal 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: Elizabeth A. O'Connell, Fish & Wildlife Technician
Tom Rider, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2020

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 18, 1992

Mr. Beverly Robinson
91-G-0454 MH1-21B
Groveland Correctional Facility
P.O. Box 110
Sonyea, NY 14456

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

Dear Mr. Robinson:

I have received your recent letter, which reached this office on February 7.

You wrote that an incident occurred at Rikers Island which resulted in medical treatment at the Triboro Hospital. You asked whether you can obtain "copy of the incident" under the Freedom of Information Law.

In this regard, I offer the following comments.

First, it is unclear whether you are interested in obtaining a copy of the incident report from the correctional facility or from the hospital or both. I point out that the Freedom of Information Law pertains to agency records, and section 86(3) of the Law defines the term "agency" to mean:

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

As such, records of a correctional facility would be subject to the Freedom of Information Law; records maintained by a private hospital would fall outside the scope of the Freedom of Information Law.

Second, under section 18 of the Public Health Law, medical records are generally available to the subject of those records from the hospital or physician that provided treatment. Therefore, if you are interested in medical records maintained by a hospital, it is suggested that you request them from the hospital under section 18 of the Public Health Law. Under subdivision (2)(e) of section 18, the provider of medical records may charge up to seventy-five cents per photocopy, but it cannot deny access to patient records "solely because of inability to pay".

Third, if you are interested in a report prepared by staff at Rikers Island, it is likely that section 87(2)(g) of the Freedom of Information Law would be relevant. 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, unless a different basis for denial may be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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-7021

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 18, 1992

Mr. Raymond Knight
[redacted]

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

Dear Mr. Knight:

I have received your letter of January 30. As in the case of previous correspondence, the issue involves the use of computer equipment at York College by its alumni.

Although you indicated that York College and alumni association officials "have collectively decided to side step the issue", you wrote that you are interested in obtaining "a copy of the college's official policy position by-law relative to alumni access to the computers as well as other resources". You asked that I help you to obtain those documents.

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 compel an agency to grant or deny access to records.

Second, a request for records should be directed to an agency's designated "records access officer". The records access officer has the duty or coordinating an agency's response to requests. If you do not know who the records access officer is, it is suggested that you contact the office of the College president.

Third, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, if, for example, there is no written policy concerning the use of computers by alumni, College officials would not be obliged to prepare such a record on your behalf.

Lastly, insofar as records 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.

Relevant to your inquiry is section 87(2)(g). Although that provision represents one of the grounds for denial, due to its structure, it often requires disclosure. Specifically, section 87(2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Therefore, if the College has adopted a policy or by-law concerning the issue of your interest, I believe that such record or records would be available pursuant to section 87(2)(g)(iii) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7022

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 18, 1992

Mr. Steven Martinez
91-B-1340
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-00500

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

Dear Mr. Martinez:

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

You have raised questions concerning your ability to obtain various information pertaining to a grand jury proceeding, including the names of grand jurors, from a court and the office of a district attorney under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and section 86(3) of 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. Records maintained by an office of a district attorney, however, are subject to the Freedom of Information Law.

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

The first ground for denial, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". Relevant to your inquiry is section 190.25(4) of the Criminal Procedure Law, which states in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this 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."

It is noted that subdivision (3) of section 190.25 makes reference to a district attorney.

With respect to names of grand jurors, in Newsday v. Sise [71 NY 2d 146 (1987)], it was held that jurors' names could be withheld under the Freedom of Information Law when construed in conjunction with section 509(a) of the Judiciary Law. The Court noted that in view of the intent of that statute, disclosure "could invade the jurors' privacy interest or threaten their safety" (id. 152). Further, while I am unaware of your intent, section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy"; section 87(2)(f) permits an agency to withhold records when disclosure "would endanger the life or safety of any person".

Lastly, your correspondence indicates that a request was made to the records access officer at the Office of the Erie County District Attorney on November 14, but it appears that you have received no 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 hope that I have 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, Office of the Erie County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1023

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 18, 1992

Mr. Ed Snyder
Assessor
Town of Charlton
1602 Division Street
Galway, NY 12074

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

Dear Mr. Snyder:

As you are aware, I have received your letter of February 6.

As the newly elected Assessor in the Town of Charlton, you wrote that you have experienced difficulty in obtaining various records, including building permits and related records, from the Town's Zoning Administrator, Mr. Armand Bertrand. You added that you sought "supporting documentation" relating to new construction, that the records were not in the assessor's files, and that you need the records to carry out your duties. You were informed that the records were at Mr. Bertrand's home and that, as of the date of your letter, you had not yet obtained the records in question.

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

First, although the Zoning Administrator may have possession of certain records, I believe that the town clerk has legal custody of all town records under section 30 of the Town Law, irrespective of where they are kept or who may have physical custody of the records. Subdivision (1) of section 30 states in relevant part that the town clerk "[s]hall have the custody of all the records, books and papers of the town".

Second, I do not believe that you should have to resort to the Freedom of Information Law to obtain records in your capacity as assessor. The Freedom of Information Law generally pertains to requests for records by members of the public. In this case,

however, you are seeking the records as an elected Town official in the performance of your official duties. Nevertheless, the provisions of that statute may be useful in terms of guidance.

The Freedom of Information Law pertains to agency records, and seciton 86(4) of the Law defines the term "record" to include:

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

Based on the foregoing, documentation kept by the Zoning Administrator for the Town would constitute "records" subject to the Freedom of Information Law, regardless of whether they are kept in Town offices or elsewhere.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In my view, building permits and most records relating to assessments must be disclosed, for none of the grounds for denial would apply. Further, records accessible under the Freedom of Information Law must be made equally available to any person, regardless of status or interest [see M. Farbman & Son v. New York City Health and Hospitals Corp., 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 1d 673, 378 NYS 2d 165 (1976)]. Therefore, most if not all of the records you seek would likely be available to any member of the public. Again, under the circumstances, your use of the Freedom of Information Law to seek records needed to perform your official duties should, in my opinion, be unnecessary.

In a decision that may have some bearing on the situation, it was held that there was no requirement that a town bookkeeper keep records at town offices, but it was also found that provisions be made to ensure that the records are accessible to the public [Town of Northumberland v. Eastman, 493 NYS 2d 93, 95 (1985)].

Lastly, although I am not suggesting that the Freedom of Information is or should be applicable to the facts that you have presented, when a request is made under that statute, an agency must respond within five business days of the receipt of the request [see Freedom of Information Law, section 89(3)].

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 Clerk
Armand Bertrand, Zoning Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7024

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 19, 1992

Mr. Eugene A. Joyce
[redacted]

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

Dear Mr. Joyce:

I have received your letter of February 7 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you requested records concerning payments made to employees of the Village Pawling during a certain payroll period. A second request was made, and you specified that you "have no interest in anyone's social security number or any information other than learning the amount of overtime put down for some individual Village employees". The Mayor apparently indicated that the information is "none of your business".

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 Village officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law.

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.

One of the decisions cited earlier, Capital Newspapers v. Burns, supra, 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..." [109 AD 2d 92, 94-95 (1985)].

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 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, 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 of Fink v. Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566).

On the basis of the preceding commentary, I believe that records indicating payments made to public employees must be made available. Attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of payment of overtime must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties. Therefore, assuming that the Village maintains the records concerning salary and overtime in which you are interested, I believe that those records 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

cc: Mayor, Village of Pawling

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2025

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 20, 1992

Maureen and Gerard Curran
[redacted]

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

Dear Mr. and Ms. Curran:

I have received your letter of February 7 in which you sought an advisory opinion concerning a response to a request for records by the State Education Department.

By way of background, you requested various records relating to a particular nursery school. Although your request was granted in part, Deborah A. Glasbrener, an attorney for the Education Department, denied access to letters between Commissioner Sobol and Attorney General Abrams and between the Commissioner and Richard Rifkin, Counsel to the Attorney General, pursuant to section 87(2)(g) of the Freedom of Information Law. You wrote that the letters in question are in the nature of a "referral". Further, in the denial, you were informed that you could appeal to Commissioner Sobol. Having done so, you wrote that several calls were made to the Commissioner's office to learn of the status of your appeal. In each instance, your call was transferred to the Office of Counsel. Moreover, you spoke with and were told that Ms. Glasbrener "was handling the matter". You asked "[w]hat kind of appeal is this?"

In this regard, I offer the following comments.

First, as you may be aware, requests for records should generally be made to an agency's designated "records access officer", and it appears that you directed your request to the appropriate person. The records access officer has the duty of coordinating an agency's response to requests. In this instance, I believe that the records access officer acted properly, for Ms. Glasbrener responded to your request on his behalf.

Although the determination of your appeal was signed by Commissioner Sobol, the information that your provided suggests that the determination was in fact rendered by Ms. Glasbrener. If that was so, I believe that your right to appeal would have been effectively denied. Nevertheless, I have contacted Ms. Glasbrener and was informed that your appeal was reviewed by a different attorney on behalf of the Commissioner. Consequently, the person who rendered the initial decision was not the same as the person involved in the determination of your appeal.

Second, with respect to the determination itself, although I am unfamiliar with the specific contents of the records in question, it appears that the denial of access is consistent with law.

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

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. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Under the circumstances, the letters in

question would clearly constitute inter-agency materials. If they do not consist of the kinds of information described in subparagraphs (i) through (iv) of section 87(2)(g), they could properly have been withheld.

As indicated in the determination of your appeal, 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 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 involve communications between State Education Department officials and their attorneys, 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.

Lastly, notwithstanding the foregoing, the Freedom of Information Law is permissive. Although an agency may withhold records falling within the scope of the grounds for denial specified in section 87(2), there is no obligation to do so [see Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7026

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 20, 1992

Mr. Michael Saunders
91-B-7932
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

Dear Mr. Saunders:

I have received your letter of February 19 in which you appealed a denial of your request for records of the New York City Police Department.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee cannot compel an agency to grant or deny access to records, nor is it empowered to determine appeals.

The provisions concerning the right to appeal a denial 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1027

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 20, 1992

Maureen and Gerard Curran
[redacted]

The staff of the Committee on Open 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. Curran:

As you are aware, I have received your letter of January 31 and the materials attached to it. Please note that your correspondence did not reach this office until February 11.

Based on the materials, you and another couple provided information in the nature of a complaint, presumably orally, to the Division of State Police at its Malta barracks, and you requested that information as it was apparently recorded in a report prepared by a State Police officer. Your request was denied, initially and following your appeal, on the ground that disclosure would "constitute an unwarranted invasion of personal privacy of those concerned". You were also informed that no criminal charges were filed in conjunction with the investigation precipitated by your complaint.

You questioned "[h]ow this can be considered a privacy issue when WE are the people requesting information WE provided" (emphasis yours). 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, 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 in my view indicates that there may be instances in which a single record or report contains both accessible and deniable information. That phrase also imposes an

obligation upon agencies to review records sought to determine which portions of the records, if any, may justifiably be withheld. While portions of a record might properly be withheld, the remainder may be available.

Second, as suggested in the responses to your requests, one of the grounds for denial, section 87(2)(b), authorizes an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy". Nevertheless, I do not believe that you could invade your own privacy. Further, section 89(2)(c) of the Freedom of Information Law states that, unless a different ground for denial applies, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy:

> "i. when identifying details are deleted;
>
> ii. when the person to whom a record pertains consents in writing to disclosure;
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

Based upon the foregoing, insofar as the records sought identify or pertain to you, it appears that they must be made available. To the extent that the record might identify or pertain to others, there may be privacy considerations relating to those persons. Depending upon the nature of any such portions of the record, it is possible that names or other identifying details could be deleted in order to protect against an unwarranted invasion of personal privacy with respect to those other persons.

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: Francis A. DeFrancesco, Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7028

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 20, 1992

Ms. Barbara Weed
Secretary
FARMS FIRST
P.O. Box 101
Schuylerville, NY 12871

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

Dear Ms. Weed:

I have received your letter of February 11 and the materials attached to it.

By way of background, in a request made to the records access officer of Saratoga County, you sought "a copy of the proposal to construct an incinerator for burning paper sludge from area paper companies", as well as:

> "all written documentation (including the minutes of all meetings) regarding the proposal - including documentation from the Saratoga County Sewer Commission, the Saratoga County Industrial Development Agency, the Saratoga County Board of Supervisors, the Law and Finance Committee of the Saratoga County Board of Supervisor, Clough, Harbour & Associates, the New York State Energy Research and Development Authority, Saratoga Economic Development Corp., and all involved paper companies."

In response to the request, the records access officer "determined your request to be too broad in nature" and denied access to the information sought. In a second letter, you wrote that the "proposal is one-of-a-kind" and that you could not be

more specific "other than [that] the Saratoga County Board of Supervisors approved the study late in 1991". Further, although you sought information concerning your right to appeal the denial, no information concerning an appeal was provided.

You have sought assistance in the matter. 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 County's method of maintaining or filing its records. 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. However, despite the breadth of the request, insofar as the County is able to locate the records, I believe that is must retrieve and review them to determine the extent to which they must be disclosed.

Second, when an agency cannot locate the records because a request has not reasonably described the records, a response to that effect could not in my opinion be considered a denial. If, however, the records can be found and a determination to withhold records is based solely on the volume or breadth of a request, I believe that records would have been denied. In such a case, a denial must include reference to an applicant's right to appeal. Specifically, the regulations promulgated by the Committee on Open Government state that:

> "Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number" [21 NYCRR 1401.7(b)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kermit G. Plummer, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7029

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 21, 1992

Ms. Edna Braham
[redacted]

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

Dear Ms. Braham:

I have received your letter of February 10 in which you sought assistance concerning the Freedom of Information Law.

You asked initially whether you may obtain "roster cards" pertaining to certain employees of the Office of Court Administration. Those cards include "the title, salary, dates of employee, pers. action, class, etc."

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. 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). 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.

Relevant to your inquiry 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)].

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)]. In short, I believe that the kinds of items contained in roster cards would be available, for they are relevant to the performance of public employees' official duties and, therefore, disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

Second, you asked what further action you may take. If a request is denied, an applicant may appeal in accordance with section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

Lastly, "other than hiring a lawyer", you asked "what specific agency could follow through on this matter". Although the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, there is no agency that enforces the Freedom of Information Law on behalf of the public.

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-2030

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 21, 1992

Mr. J. Richard Kirk
[redacted]

Dear Mr. Kirk:

I have received your letter of February 7 in which you questioned the content of an advisory opinion prepared on January 28.

In brief, the records in which you are interested relate to an investigation that is being conducted by the New York City Department of Investigation. Since the investigation is ongoing, it was advised that records reflective of the testimony of witnesses or interviews with witnesses could likely be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy and because disclosure would interfere with an ongoing investigation.

You wrote that you "fail to see how testimony given in a hearing could possibly be construed as a private conversation", and you sought clarification of the matter.

In this regard, when testimony is given during a public hearing or a judicial proceeding during which members of the general public may be present, I would agree that the testimony of witnesses or others must be disclosed. Nevertheless, I do not believe that any "hearings" or interviews that may have been held in conjunction with the investigation in question were open to the public.

I point out that it has been held that when records are accessible under the Freedom of Information Law, they must be made equally available to any person, regardless of one's status or interest [see M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NYS 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. If, for example, records of interviews with witnesses were required to be disclosed, they would be available to anyone, including the subjects of investigations. In my opinion, disclosure under that circumstance would in many instances preclude an investigating

agency from effectively performing its duties, and potential lawbreakers might tailor their activities to evade detection or law enforcement. In addition, it has been held in similar circumstances that such records may be withheld because disclosure would have a "chilling effect" on future investigations since witnesses would be reluctant to come forward [see e.g., Hawkins v. Kurlander, 98 AD 2d 14 (1983)].

In short, if I understand your contention correctly, that public testimony should be made public, I believe that your assumption is inaccurate, for the records of testimony and interviews in which you are interested were not conducted during proceedings open to the public.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7036

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 21, 1992

Mr. Jerry Junior Lineberger
86-T-0018
135 State Street
Auburn, NY 13024

Dear Mr. Lineberger:

I have received your letter of February 15. Although your comments are not entirely clear, it appears that you requested medical records maintained at the Auburn Correctional Facility from this office.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not 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 records that you requested, because this office does not possess them. Nevertheless, 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 personnel could be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, a different statute, section 18 of the Public Health Law generally requires that the providers of medical services disclose medical records to the subjects of the records.

It is suggested that you submit a request to the appropriate official at your facility citing section section 18 of the Public Health Law as the basis for the request.

To obtain additional information concerning access to medical records, you may write to:

Access to Patient Information Coordinator
New York Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2031
FOIL-AO-2032

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 24, 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 February 12 in which you requested clarification and opinions concerning issues arising under the Open Meetings Law and the Freedom of Information Law.

With respect to the first, at the end of a meeting of the Saratoga County Law and Finance Committee, you wrote that the Chairman of the Committee "motioned for an executive session". Although no "formal vote" was taken, the members verbally supported the motion. The reasons given for holding the executive session were to discuss "a personnel matter and litigation". When you sought a more descriptive basis for the executive session by questioning the Chairman and the County Attorney, "both replied that they did not know the reason for the session".

In this regard, I offer the following comments.

First, section 105(1) of the Open Meetings Law requires that a procedure be accomplished during an open meeting before an executive session may be held. 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..."

Therefore, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session. In addition, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of the Open Meetings Law specify and limit the subjects that may properly be discussed during executive sessions.

Second, judicial interpretations of the Open Meetings Law indicate that motions to enter into executive sessions cannot merely describe the subjects to be discussed as "personnel matters" or "litigation", for example. It is also noted that the term "personnel" appears nowhere in the Open Meetings Law.

More specifically, in the Open Meetings Law as originally enacted, the "personnel" exception differed from the language of the analogous exception in the current Law. In its initial form, section 105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

The provisions in the Open Meetings Law concerning "litigation" are found in section 105(1)(d). The cited provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the language quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Further, since "possible" or "potential" litigation could be the result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a "potential" for litigation.

With regard to the sufficiency of a motion to discuss "litigation", it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

The second issue involves a response to your request for copies of financial disclosure statements filed with the County. In brief, you indicated that a portion of the County's Code of Ethics states that "the payment of a fee of $1 per page if a copy of the disclosure statement is desired". It is your view that the fee is excessive. Based upon the ensuing analysis, I agree with your contention.

By way of background, section 87(1)(b) (iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation, for instance, establishing a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction, was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, or a fee that exceeds the actual cost of reproducing records that cannot be photocopied. Moreover, a judicial decision confirmed that a fee of more than twenty-five cents per photocopy may be assessed only pursuant to authority conferred by a statute, an act of the State Legislature [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Consequently, unless an act of the State Legislature authorizes an agency to charge fees inconsistent with the Freedom of Information Law, no more than twenty-five cents per photocopy can be charged.

As you requested and in an effort to enhance understanding of and compliance with the Freedom of Information Law and the Open Meetings Law, copies of this opinion will be forwarded to the County Attorney and the Chairman of the Board of Supervisors.

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: Courtenay Hall, County Attorney
Philip Klein, Chairman, Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2033

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 24, 1992

Mr. Edward K. Christianson
77-D-0093
Auburn Correctional Facility
135 State Street
Box 618
Auburn, NY 13021

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

Dear Mr. Christianson:

I have received your letter of February 9 in which you referred to your letter to this office of January 15 and my response of January 31.

In brief, in your original letter, you contended that since most inmates are indigent and cannot "move at will", the Department of Correctional Services and the Division of Parole should enable inmates to view records obtainable under the Freedom of Information Law at their facilities by transferring the records to those locations by means of the agencies' courier mail services. I advised that there is no general requirement that the agencies must do so. In your letter of February 9, you contend that the Freedom of Information Law, as it has been implemented, "creates a discriminatory practice against a large group of inmates as a class, simply because they are poor, confined and without access to resources to accomplish access to records", thereby violating the equal protection clause of the Fourteenth Amendment to the Constitution. You also cited section 18 of the Public Health Law, sections 1101 and 1102 of the Civil Practice Law and Rules and section 5.36 of the regulations promulgated by the Department of Correctional Services in an effort to strengthen your contention.

With respect to the constitutional claim, some have contended that since they work during the day, government offices should be open for the purpose of providing access to records in the evening or on weekends. Others have argued that fees for copies, although limited to twenty-five cents per photocopy, are too high when a request is voluminous or when an applicant is

poor. Some state agencies maintain records at regional offices hundreds of miles from a central office. In those instances, I do not believe that the Law requires that records be transferred to accommodate the needs of applicants. Further, unlike large state agencies, municipalities may keep most if not all of their records at a single location. Certainly there is no requirement in those instances that records be transferred, free of charge to an applicant, to a location convenient to the applicant. In short, although inmates may be poor and unable to travel, many members of the public find it difficult or impossible to inspect records at no cost or at times or locations convenient to them.

You contended that sections 1101 and 1102 may be utilized to enable poor persons to use the Freedom of Information Law at no cost. While I am not an expert with respect to those statutes, I believe that they pertain solely to judicial proceedings. Neither a request for records under the Freedom of Information Law nor an appeal of an agency's denial could be characterized as a judicial proceeding. As such, I do not believe that those statutes would apply to the situation that you described.

Although the Freedom of Information Law makes no reference to the waiver of fees, section 5.36 of the regulations promulgated by the Department of Correctional Services states in part that "the custodian of the record may, in his discretion, waive all or any portion of the fees authorized by this section for any department record". Consequently, there is no right to a waiver of fees; fee waivers are discretionary under section 5.36.

In short, I know of no provision that would require an agency to waive fees relating to requests made under the Freedom of Information Law or that would require an agency to transfer records from one location to another to enable inmates or others to inspect them free of charge.

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-7034

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 26, 1992

Mr. Constantin Nicolau
[redacted]

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

Dear Mr. Nicolau:

I have received your letter of February 11 in which you indicated that a request sent to the Rockland Psychiatric Center on January 11 had not been answered as of the date of your letter to this office. You added that you would be "expecting legal measures [to be taken] in due course" by 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 is not empowered to enforce the Law or to compel 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)].

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-2035

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 26, 1992

Mr. Alan Flacks
[redacted]

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

Dear Mr. Flacks:

I have received your recent correspondence in which you questioned the propriety of certain fees assessed by the New York City Board of Elections.

The first item to which you referred pertains to a fee of $3.00 "per individual search provided by Easy System Printout" and "$15.00 per individual search, for a certified copy or transcript or letter from Board of Elections stating that no record was found". The second involves a fee schedule requiring a fee of twenty-five cents per photocopy, except in the case of copies of voter registration cards. You wrote that, for security reasons, those cards cannot be removed by the public; rather, staff retrieves them and charges $3.00 per photocopy.

Based upon the ensuing commentary, unless a statute, an enactment of the State Legislature, authorizes a different fee, an agency cannot charge in excess of twenty-five cents per photocopy up to nine by fourteen inches or the actual cost of reproducing other records (i.e., records that are not photocopied, such as computer generated records). Similarly, absent statutory authority, I do not believe that an agency can charge for search, personnel or other administrative costs.

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 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)].

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."

With respect to records that are not or cannot be photocopied, the regulations 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)].

The regulations promulgated by the Committee also 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 the Board of Elections.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Aaron Maslow, Counsel to the Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2036

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 26, 1992

Mr. James L. Carter
92-A-0027
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Carter:

I have received your letters of February 20 and February 21 in which you requested various records from this office concerning lists and procedures used by the Division of State Police and other agencies in conjunction with certain activities relating to law enforcement.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee neither maintains records generally, nor is it empowered to compel an agency to grant or deny access to records. In short, I cannot provide the information that you requested because this agency does not possess it. Nevertheless, I offer the following comments.

First, a request should be made to the "records access officer" at the agency that you believe maintains the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests.

Second, 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 create a record in response to a request. Therefore, if, for example, the Division of State Police does not have a "list" reflective of a coding system, it would not be required to prepare a list on your behalf.

Lastly, although the Freedom of Information Law provides broad rights of access, the Law includes various grounds for denial of access [see Freedom of Information Law, section 87(2)(a) through (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-7037

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 26, 1992

Mr. Robie Drake
[redacted]

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

Dear Mr. Drake:

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

Your inquiry pertains to a request made on October 21 to the Director of Personnel at the Erie County Medical Center. The receipt of your request was acknowledged on October 25, and you were informed that the request was forwarded to Timothy Trost, Assistant County Attorney. As of the date of your letter to this office, you had received no further response. The records sought involve materials relating to a named employee whose employment was terminated in 1982, including reports, memoranda, complaints and the like that led to her termination, as well as evaluations of her performance.

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, it is likely that two of the grounds for denial may be relevant with respect to certain of the records or perhaps portions of the records sought.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable with respect to the employee, as well as others, such as complainants. Section 87(2)(g) enables an agency to withhold records that:

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

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

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

Although the standard concerning privacy may be subject to conflicting points of view, 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 records reflective of final disciplinary action taken against a public employee or dismissal would be 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. However, it has also 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. Similarly, although a final determination to impose discipline upon a public employee would be available, it has been held that records leading to disciplinary action may be withheld under section 87(2)(g) [see Scaccia, supra; Sinicropi v. County of Nassau, 76 AD 2d 832 (1980)].

In the case of a complaint submitted by a member of the public concerning a public employee, it has been advised that disclosure of identifying details concerning complainants may be withheld on the ground that disclosure would constitute 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 to its work; what is relevant is whether the complaint has merit.

With regard to evaluations, although I am unfamiliar with the form of any evaluations 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.

Lastly, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law provides in part that an agency need not create or prepare a record in response to a request. Since the dismissal of the former employee occurred ten years ago, it is possible that some of the records in which you are interested may no longer exist.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Timothy Trost, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1038

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 28, 1992

Mr. Alan Freeman
91-B-1357
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-001

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

Dear Mr. Freeman:

I have received your letter of February 12. You wrote that you were recently denied access to your pre-sentence report, and you described various problems concerning its contents.

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.

The other issues that you raised do not appear to relate to access to records, and it suggested that you discuss those matters with an attorney or a representative of Prisoners' Legal Services.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-131
FOIL-AO-2039

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 9, 1992

Mr. Arnold Chapman
[redacted]

The staff of the Committee 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. Chapman:

As you are aware, I have received your letter of February 12 and the materials attached to it.

Your inquiry concerns a request made under the Freedom of Information Law and the Personal Privacy Protection Law to the Office of Indian Relations for notes of interviews pertaining to an investigation conducted by that agency involving "the alleged illegal activities of the N.Y.S. Police and other individuals on and around the St. Regis Mohawk Reservation". You also referred to "the issue of possession of Racial Identification Cards" and asked for the names, titles and state agencies involved in the preparation of orders or memoranda relating to that issue. In response to your request, Robert C. Batson denied access to the notes of interviews pursuant to paragraphs (f) and (g) of the Freedom of Information Law. In the denial, he wrote that:

> "On behalf of the Office of Indian Relations, Mr. Hunt interviewed several residents of the St. Regis Mohawk Reservation regarding their views of the activities of the New York State Police on that Reservation. Because of the concern for life and safety expressed by several interviewees, Mr. Hunt agreed to keep their identity confidential. The information recorded by Mr. Hunt in his notes was anecdotal, and in no way constitutes a statistical or factual tabulation or data.

> "A draft report prepared by Mr. Hunt summarizes the anecdotal material provided in the interviews. The draft report contains only Mr. Hunt's analysis, and it in no way constitutes final agency policy of the Office of Indian Relations nor is it a statement of agency policy."

He added that the Office of Indian Relations maintains no records concerning racial identification cards.

You have contended that, as one of the persons interviewed, you are a "data subject" for purposes of the Personal Privacy Protection Law, that the interviewer informed you "that the only fear expressed by interviewees was that of retaliation; not life or safety", and that you and others interviewed were led to believe that you "would receive or be entitled to receive copies of the report and that confidentiality would be protected". In addition, you complained that you were not informed of the right to appeal the denial of your request.

In this regard, I offer the following comments.

First, with respect to the Personal Privacy Protection Law, that statute generally requires that state agencies disclose records about data subjects to those persons. 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)].

From my perspective, if the report does not or could not be used to identify you or others by means of a name or other identifier, I do not believe that you or others who may have been interviewed could be characterized as data subjects. While the author of the report might have the ability to recollect persons who were interviewed, if the report does not include names or other characteristics that would enable others to identify persons interviewed, those persons would not, in my view, be data subjects and the Personal Privacy Protection Law would be inapplicable.

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

of the Law. 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, although section 87(2)(g) represents one of the grounds for denial, due to its structure, it often requires disclosure. Specifically, section 87(2)(g) permits an agency to withhold records that:

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

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

Although the report consists of intra-agency materials that do not constitute a final policy or determination, those factors alone are 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)].

The other basis for denial offered by Mr. Batson, section 87(2)(f), authorizes an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person". If the report does not identify persons who were interviewed, it is difficult to envision how disclosure would endanger their lives or safety. However, since I am unfamiliar with the contents of the report, I cannot offer specific guidance regarding the propriety of the assertion of section 87(2)(f).

Third, 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)].

Fourth, I point out 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, for example, the Office of Indian Relations maintains no records concerning "racial identification cards" or the names and titles of agencies involved in the preparation of orders or memoranda on the subject, there would be no requirement that new records be created or prepared on your behalf.

Lastly, as you are aware, a person denied access to a record 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, 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)].

Having spoken with representatives of the Office of Indian Relations, I have been informed that the person designated to determine appeals is Leigh F. Hunt, Director.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert C. Batson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7040

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 9, 1992

Mr. John Burns
Browns Letters Inc.
P.O. Box 35
Tarrytown, NY 10591

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

Dear Mr. Burns:

As you are aware, I have received your letter of February 12. In brief, you complained that the Village of Mount Kisco has engaged in a series of delays in responding to your request for records under the Freedom of Information Law.

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.)

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: Village Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7041

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 9, 1992

Mr. David Zinman
Newsday
Long Island, NY 11747

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

Dear Mr. Zinman:

As you are aware, I have received your letter of February 17 and the materials attached to it.

Your inquiry concerns the propriety of a denial of your request by the State Department of Health for "consultants' reports on the coronary bypass programs at New York's three 'outlier' hospitals". By way of background, in 1991, the Department required cardiac centers whose adjusted mortality rates fell outside their expected rates to retain independent consultants to evaluate the centers' performance and to determine where improvements should be made. Although you were provided redacted letters describing improvements made by hospitals, you wrote that "absent the consultant reports themselves, it is difficult to figure out what were the weaknesses that the consultants found in each program."

The request for consultants' reports was denied on the ground that "they are protected from disclosure pursuant to Public Health Law [sections] 2805-m and 2805-j and Education Law [section] 6527 since the reports were requested for the purpose of assessing the quality of care at the hospitals, contain substantial factual information about the quality of existing services and health care outcomes, and were solicited as part of each hospital's deliberations concerning the quality of services offered."

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. Often, however, other statutes, such as those identified in the Department's denial, must be viewed or construed in conjunction with the Freedom of Information Law in order to provide appropriate guidance. In this instance, I believe that the issue

involves whether the statutes cited in the denial are applicable, and the ensuing remarks will deal initially with those provisions.

First, section 2805-m of the Public Health Law states in relevant 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."

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". Therefore, when section 2805-m of the Public Health Law is applicable, records falling within the scope of that statute would be exempted from disclosure, and the Freedom of Information Law would be inapplicable.

Section 2805-j of the Public Health Law requires that every hospital must "maintain a coordinated program for the identification and prevention of medical, dental and podiatric malpractice". The remaining provisions of section 2805-j state in part that such a program shall include:

> "(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;
>
> (b) A medical, dental and podiatric staff privileges sanction procedure through which credentials, physical and mental capacity and competence in delivering health care services are periodically reviewed, and reviewed as otherwise warranted in specific instances and circumstances, as part of an evaluation of staff privileges;
>
> (c) The periodic review and the review as otherwise warranted in specific instances and circumstances of the credentials, physical and mental capacity and competence in delivering health care services of all persons who are employed or associated with the hospital;
>
> (d) A procedure for the prompt resolution of grievances by patients or their representatives related to accidents, injuries, treatment and other events that may result in claims of medical, dental or podiatric malpractice;

> (e) The maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients, patient grievances, professional liability premiums, settlements, awards, costs incurred by the hospital for patient injury prevention and safety improvement activities;
>
> (f) The maintenance of relevant and appropriate information gathered pursuant to paragraphs (a) through (e) of this subdivision concerning individual physicians, dentists and podiatrists within the physician's, dentist's or podiatrist's personnel or credential file maintained by the hospital..."

All of the foregoing pertains to a hospital's "coordinated program", which appears to represent the ongoing and continual efforts by a hospital to prevent malpractice. Such a program operates pursuant to the direction provided by section 2805-j. It also appears that the consultant reports that you requested were not prepared as part of those programs, but rather pursuant to separate direction given to three hospitals by the Department of Health. If that is so, if the consultant reports were prepared not pursuant to section 2805-j, but rather based upon a directive issued by the Department, neither section 2805-j nor section 2805-m of the Public Health Law would govern access to the records in question. Assuming that those statutes are inapplicable and would not serve as an appropriate basis for denial, I believe that rights of access would be governed by the Freedom of Information Law.

A similar analysis may be offered with respect to the other statute cited by the Department to justify its denial, section 6527 of the Education Law. While the consultants engaged in assessing the quality of care, if such a function was not carried out in conjunction with the conditions described in that statute, section 6527 would not apply.

The beginning of subdivision (3) of section 6527 describes a series of functions carried out by "an individual who serves as a member" of certain committees described in provisions identified as items (a) through (d) and (f), or who participated in the preparation of incident reports under section 2805-l of the Public Health Law. The ensuing language in subdivision (3) exempts from disclosure the proceedings and records relating to the functions described in the preceding portion of that subdivision.

Those functions do not appear to include the preparation of the consultant reports that are the subject of your request. If that is so, section 6527 of the Education Law would not exempt those reports from disclosure.

Lastly, assuming that neither the provisions of the Public Health Law nor section 6527 of the Education Law cited by the Department as the bases for its denial were justifiably asserted, the Freedom of Information Law would determine rights of access to the consultants' reports. Although I am unfamiliar with their contents, it appears that they would be available, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy, i.e., insofar as they include personally identifiable information pertaining to patients.

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: Donald MacDonald
Peter Slocum

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 2042

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 9, 1992

Mr. Bernie Cullen
Gannett Suburban
One Gannett Drive
White Plains, NY 10604

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

Dear Mr. Cullen:

I have received your letter of February 19 as well as the materials attached to it.

By way of background, you wrote that two residents of the Town of Kent asserted that it took firefighters up to 54 minutes to respond to a fire, which was extinguished by the time firefighters reached the scene. In an effort to determine whether there is a basis for their contention, you seek "to listen to the tape recordings of the initial report of the fire to police to determine what time it was made". You added that "[t]he authorities place the call at about 8:30 p.m. The families placed it at 7:50 p.m. to 8 p.m." Three agencies are involved, the Kent Police Department, the Carmel Police Department and the Putnam County Sheriff's Office. The Kent Police Department informed you that its tape machine was broken at the time of the fire and that the records sought do not exist. The Sheriff's Department has informed you that it is prohibited from releasing the tapes under section 87(2)(a) of the Freedom of Information Law. Although both of those agencies have provided computer printouts "showing what time they claim to have received the calls", you wrote that, without listening to the tape, you cannot know whether an earlier call was made as claimed. In addition, you pointed out that the agencies involved do not maintain a "911 police emergency response system".

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."

In view of the breadth of the language quoted above, I believe that tape recordings maintained by an agency constitute "records" subject to rights conferred by the Law. Moreover, it has been held in various contexts that tape recordings fall within the scope of the Law [see e.g., Buffalo Broadcasting Co., Inc. v. City of Buffalo, 126 AD 2d 983 (1987), involving tape recordings of conversations broadcast over police radio, and Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978, involving tape recordings of school board meetings]. It is also noted that the Freedom of Information Law pertains to existing records. Therefore, if a tape recorder was inoperative and no tape exists, the Freedom of Information Law would not apply. Further, 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.

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 that follow. The phrase quoted in the preceding sentence indicates that a single record might include both accessible and deniable information. That phrase also imposes an obligation upon agencies to review records sought to determine which portions, if any, may justifiably be withheld. Therefore, even though a record includes material that could properly be withheld, the remainder of the record might be available.

As I understand the facts, the basis for denial cited by the Sheriff's Department, section 87(2)(a), would be inapplicable. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute". Therefore, a statute, an act of Congress or the State Legislature, must confer or require confidentiality with respect to particular records. In this instance, I am unaware of any statute that would exempt the records in question from

disclosure. It is noted that Article 6 of the County Law, sections 300-309, refer to "Enhanced Emergency Telephone Systems", and that section 308(5) states that "[r]ecords, in whatever from they may be kept, of calls made to a municipality's E911 shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency...". When section 308(5) is applicable, I believe that it would exempt records from disclosure. However, if your contention that the method of communicating emergency calls does not involve an "enhanced emergency telephone system", section 308(5) of the County Law could not, in my opinion, be asserted as a basis for withholding the tape recordings.

There may, however, be other grounds for denial applicable to a ten minute segment of the tape recording.

Section 87(2)(e) of the Freedom of Information Law 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."

Within a lengthy segment of a tape, it is possible that a number of calls might have been made. To the extent that disclosure would interfere with an investigation or identify a confidential source, for example, I believe that those portions could be withheld. Nevertheless, the portion of the tape in which you are specifically interested could not in my view be withheld on the basis of section 87(2)(e), because a call regarding a fire would not have been "compiled for law enforcement purposes", and none of the harmful effects described in that provision would arise by means of disclosure.

The only other basis for denial of apparent 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". Without familiarity with the actual content of the tape, specific guidance cannot be offered. If an emergency call is made by a person obviously in a state of severe

distress, it is likely in my view that portions of the tape indicating such distress could be withheld. Similarly, if a call describes a medical problem or condition, I believe that that portion of a tape could be withheld [see Hanig v. State of New York Department of Motor Vehicles, Court of Appeals, February 18, 1992, ___ NY 2d ___]. However, if the particular aspect of the tape that you are seeking would not disclose that a caller is in a state of emotional distress or reveal a person's medical condition or problem, I believe that the tape should be disclosed, particularly in view of the public's knowledge of the identity of the caller.

In sum, in response to your request, I believe that an agency in possession of a tape recording must review the content of the tape to ascertain whether any portion or portions may properly be withheld, and that a blanket denial is likely inappropriate.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Putnam County Sheriff's Department
Records Access Officer, Town of Carmel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7043

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 10, 1992

Mr. Carl Montgomery
Vice President
Graduate Student Employees Union
170 Mariner Street (Rear)
Buffalo, NY 14201

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

Dear Mr. Montgomery:

I have received your recent letter in which you raised a series of questions relating to your earlier inquiry concerning the Freedom of Information Law and the Family Educational Rights and Privacy Act (FERPA).

The initial two questions are related. The first involves whether a policy pertaining to "directory information" could "allow for a distinction to be drawn between graduate and undergraduate students" in order that you could obtain a list identifying only the latter. The second question is whether, irrespective of the items within records disclosed as directory information, you have the right to receive it broken down "by one of the 'directory information' categories", i.e, major field of study.

As indicated in the opinion sent to you on February 3, the regulations promulgated under the FERPA define "directory information" to mean "information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed..." (34 CFR 99.3). The same provision includes examples of the kinds of items that might be included as directory information, such as students' names, major field of study, dates of attendance, etc. In my view, an educational agency could identify students by class (i.e., freshman, sophmore, etc.) or as graduate students. However, I do not believe that an educational agency is or could be required to identify students in that manner.

With respect to a breakdown by category, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency need not create or prepare a record in response to a request. Although FERPA does not specify an analogous principle, it is implicit in my opinion that an agency would not be required to prepare "breakdowns" by categories of directory information. If such breakdowns have been prepared, as is likely in some instances (i.e, a dean's list or list of members of an athletic team), I believe that they would be available.

Your third and fourth questions are also related to one another. In the third, you asked whether a "record of all checks paid out of the Temporary Services line of U.B.'s budget (the line out of which TA's and GA's are paid), including the person to whom each check was made out, the work area of each payee, and the amount of each check" would be available. In the fourth, you asked whether U.B.'s payroll record must include reference to TA's and GA's and whether it would be accessible.

The focus of your initial inquiry involves records pertaining to students, and it was generally advised that those records are exempted from disclosure under the FERPA, except to the extent that provisions pertaining to directory information might apply. In my view, it is likely that a distinction can be made between a request for records identifying students who are employed by U.B., as opposed to a request for records identifying employees, some of whom may be students. As stated in the earlier opinion, education records identifiable to students are generally confidential, and the phrase "education record" is defined to exclude:

> "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 the individual's capacity as an employee; and
> [C] Are not available for use for any other purpose."

The records that you described in items 3 and 4 of your letter would not appear to constitute education records, for they appear to pertain solely to individuals in their capacities as employees. If that is so, the FERPA would not serve as a basis for withholding, and rights of access would be determined by the Freedom of Information Law.

Assuming that the Freedom of Information Law governs rights of access, I believe that the records in question insofar as they exist or are required to be maintained, must be made available.

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.

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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law.

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.

In one of the decisions cited earlier, Capital Newspapers v. Burns, supra, 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 of Fink v. Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566).

On the basis of the preceding commentary, I believe that records indicating payments made to employees must be made available, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of employees' official duties.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John T. Thurston, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7044

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 10, 1992

Ms. Aimee J. Fitzgerald
Co-President
Tag/Taxpayers Action Group
P.O. Box 629
Highland Mills, NY 10930

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

Dear Ms. Fitzgerald:

I have received your letter of February 14 in which you sought a "pre-ruling" concerning the right to obtain a variety of information from the Monroe-Woodbury Central School District.

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee cannot compel an agency to grant or deny access to records. Similarly, although it is hoped that advisory opinions rendered by this office are educational, persuasive and that they enhance compliance with law, they are not binding and could not be characterized as "rulings".

In the ensuing comments, I will attempt to respond to your questions, although not necessarily in the order in which you presented them.

First, I believe that the Board of Education, as the governing body of a school district, is responsible for ensuring compliance with the Freedom of Information Law. Pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, a board of education is required to designate at least one "records access officer". The records access officer has the duty of coordinating an agency's response to requests. In addition, a board of education must designate a person or body to determine appeals made following denials of access to records.

Second, it is irrelevant, in my view, who submits a request. The Freedom of Information Law does not distinguish among applicants, and requests may be made by an individual, a group, a corporation, a newspaper, etc. Further, it has been held that records accessible under the Freedom of Information 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 Health and Hospitals Corp., 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)].

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 grounds for denial that follow. Therefore, there may be situations in which a single record includes both accessible and deniable information. In those cases, I believe that an agency could delete those portions that may justifiably be withheld while providing access to the remainder.

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 County 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. Therefore, while a district might not maintain an "organizational chart", it must maintain the payroll list described above. 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.

It has been contended in the past that W-2 and 1099 forms are specifically exempted from disclosure by statute, citing 26 USC 6103 (the Internal Revenue Code) and section 697(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 County. 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.

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, Sup. Ct., Essex Cty., January 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". Respondents contended "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 NY 2d 62, 68). Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra, at 69.)
>
> "There appears 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 involving expenses incurred in conjunction with litigation should be disclosed.

Legal opinions, attorney work product, and material prepared solely for litigation could in my view be withheld, unless such records were disclosed to a legal adversary, for example, or filed with a court. As indicated earlier, section 87(2)(a) of the Freedom of Information Law 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 you are entitled to obtain "copies of correspondence from the state instructing, advising, or directing the district to reduce or stop maintaining fund balances in excess of 5% allowed by the state". Here I direct your attention to section 87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

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

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

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 Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7045

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 10, 1992

Mr. Byron Clinton
90-T-2826 B-V-345
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. Clinton:

I have received your letter of February 24 in which you requested advice concerning an unanswered request for records of the Kings County Office of the District Attorney.

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 referred to a "Vaughn" index, it is noted that the decision under which you requested such an index, Vaughn v. Rosen [484 F2d 820 (1973)], was rendered under the federal Freedom of Information Act. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. However, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by the lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Offices Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567,

571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information." [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

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-2046

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 10, 1992

Mr. Joseph A. Zysman
[redacted]

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

Dear Mr. Zysman:

I have received your letter of February 21 as well as the correspondence attached to it.

By way of background, on February 11, you requested the following information from the Town of Woodstock Assessor, Ms. Marie Baumgarten:

> "1. Schedule for determining land values, for 1992 and 1993.
>
> 2. Maps of 'neighborhood' zones or areas, for 1993.
>
> 3. Assessment ratio, expressed as a percentage of assessment to market value, for 1992 and 1993.
>
> 4. State regulations pursuant to which property types are determined or classified.
>
> 5. Line by line indication, for each of the 60 categories on the Property Cards, as to whether that category is used in formulating the property's assessment or not.
>
> 6. Property Cards for lots 25.2-1-22, 25.2-1-23, and 25.4-3-3.

> 7. Identification of any classification of data used in formulating a property assessment, other than data on the Property Cards."

In response to the request, although an appointment was scheduled to provide you with information relating to your properties and assessments generally, Ms. Baumgarten wrote that, due to a heavy workload, it would be impossible to fully comply with your request in the immediate future and she rescheduled a meeting with you "for sometime in April". Although you view her response as a denial, Town officials maintain that it is not a denial "because it does not explicitly state that they are denying access". You added that timeliness is a relevant factor relative to your rights relating to 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)].

I believe that the response by Ms. Baumgarten represents an acknowledgement of the receipt of your request. Further, if her reference to a meeting in April is intended to mean that the records will be made available then, and if it is impossible to disclose them before that time, her response appears to have been appropriate.

Second, there may be certain aspects of your request in which you sought information beyond the requirements of the Freedom of Information Law. That statute pertains to existing records, and section 89(3) states that an agency is not required to create or prepare new records in response to a request. In the context of your request, in item 5, for example, it appears that you essentially sought answers to a question, i.e., whether a category on a property card was used in formulating an assessment. If there are no existing records containing that kind of information, the Assessor would not be obliged to review the property cards for the purpose of preparing a new record in response to your question. While the Assessor could choose to create a new record on your behalf or answer your questions, I do not believe that she would be obliged to do so in response to a request made under the Freedom of Information Law.

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. Freemna
Executive Director

RJF:jm

cc: Marie Baumgarten, Sole Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2047

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 16, 1992

Ms. Lisa A. Herbold
Syracuse United Neighbors
1540 South Salina Street
Syracuse, NY 13205

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

Dear Ms. Herbold:

I have received your letter of February 24 and the materials attached to it.

By way of background, Syracuse United Neighbors (SUN) has sought to obtain records from the City of Syracuse concerning the implementation of the Federal Narcotics Profit Forfeiture Act, sections 480 of the Penal Law and 1349 of the Civil Practice Law and Rules. Beginning in June of 1991, SUN requested records indicating names of recipients of monies pursuant to the statutes cited above, a "nominal listing of all seizures and forfeitures" occurring during the past three years, records reflective of the monetary value of all seizures, forfeitures and fines during that period, and related records concerning the matter. Although SUN received a partial response, it was communicated in letter form, rather than by means of copies of original records containing the information sought. A second request was made in July for records indicating the balance of funds that had not been allocated or expended, a list of allocations and their purposes, a list of expenditures of $500 of more from those allocations, excluding allocations for salaries, a summary of salary expenses, and yearly cumulative expenses and balances regarding the foregoing. Following an additional exchange of correspondence, the request was denied on November 18 pursuant to section 87(2)(e) of the Freedom of Information Law. A third request was made in December pertaining to the use of approximately $600,000 received under the federal Act, with an explanation that SUN is not interested in obtaining records that could properly be withheld under section 87(2)(e). On January 16, you were provided with some of the data. However, in responding to your request, the City appears to have created a new document rather than making copies of original records.

You have sought my views on the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and section 86(4) of 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."

Based on the foregoing and judicial decisions relating to the definition [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 N Y 2d 246 (1987)], insofar as the documents sought exist, I believe that they would constitute "records" subject to rights conferred by the Freedom of Information Law. Although some of the information sought has been made available by means of new records prepared by the City, I agree with your contention that a response that substitutes new records in lieu of copies of original records or perhaps portions of original records would fail to comply with the requirements of the Freedom of Information Law.

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

It appears that two of the grounds for denial, paragraphs (e) and (g) of section 87(2), may be relevant to a determination of rights of access. However, the extent to which those provisions could appropriately be asserted would be dependent upon the specific contents of the records and the effects of their disclosure.

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

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

Some of the records sought might be characterized as having been compiled for law enforcement purposes; others might have been prepared for accounting purposes or in the ordinary course of business. Insofar as the records fall within that latter category, I do not believe that section 87(2)(e) would serve as a basis for denial. Insofar as the records were compiled for law enforcement purposes, in my opinion, only to the extent that the harmful effects of disclosure described in subparagraphs (i) through (iv) of section 87(2)(e) would arise could the records be withheld. I am unfamiliar with the content of the records sought or whether portions of those records might if disclosed, for example, interfere with an investigation. In short, while section 87(2)(e) might properly be asserted with respect to some portions of the records, other portions might fall beyond the scope of the ability to withhold records under that provision.

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. It appears that the records sought consist of "intra-agency materials". However, it also appears that they consist of statistical or factual data that would be available under section 87(2)(g)(i), again, unless portions of those materials could justifiably be denied under section 87(2)(e).

Third, I point out that the Freedom of Information Law has been construed broadly by the courts. In a decision in which the Court of Appeals considered the intent and utility of the statute, it was 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 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 of Fink v. Lefkowitz, 47 NY 2d 567, 571..." [Capital Newspapers v. Burns 67 NY 2d 564-566 (1986)].

Fourth, as you may be aware, the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency need not create a record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or records, the City would not be obliged by the Freedom of Information Law to prepare new records on your behalf. However, there is no reference in the responses to your requests to the possibility that the records sought are not maintained by the City. If they do not exist, I believe that you should have been so informed.

In sum, I believe that the City is obliged to review existing records falling within the scope of SUN's requests to determine the extent to which the records may be withheld. Further, it does not appear that a blanket denial on the basis of section 87(2)(e) was appropriate or consisting with the Freedom of Information Law.

Lastly, while I am generally unfamiliar with the forfeiture statutes that relate to the basis of your request, section 1349 of the Civil Practice Law and Rules imposes a reporting requirement. Subdivision (4) of that statute states that "The

claiming authority shall report the disposal of property and collection of assets pursuant to this section to the state crime victims board, the state division of criminal justice services and the state division of substance abuse services".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Finkelstein, Senior Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2044
OML-AO-2048

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 17, 1992

Mr. Donald Reid
Chairman of Assessors
Town of Argyle
RD #2 Box 2020A
Argyle, NY 12809

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

Dear Mr. Reid:

I have received your letter of February 26 in which you raised a series of issues.

The first situation that you described involved an orientation meeting for newly elected assessors. You sought to attend, even though you have served as an elected assessor for some thirty years. As of the date of your letter, it was unclear whether you would be given permission to attend.

In this regard, the Open Meetings Law applies to meetings of public bodies, and a "meeting" ordinarily represents a gathering of public body for the purpose of conducting public business as a body. Although many public officials would attend the session in question, I do not believe that it would be a meeting of a public body. While the Open Meetings Law, in my opinion, would not have been applicable, it is difficult to understand any reason for precluding you from attending for the purpose of being educated, and perhaps to enable you to share your experience with others.

Second, you asked whether the Board of Assessors must keep minutes of its work sessions. By way of background, 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, I believe that a "work session" must be conducted in accordance with the requirements of the Open Meetings Law.

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. If none of those actions occur during work sessions, technically, I do not believe that minutes would have to be prepared.

Third, you referred to an advisory opinion prepared on December 6 at the request of person seeking records from the Board. You wrote that there seems to be "no end to it", and you asked "How far do we have to go". I point out in this regard that the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency need not create a record in response to a request. Therefore, while I believe that an agency must disclose existing records to the extent required by law, if, for example, computations or other information sought have not been prepared, you would not be obliged to create new records on behalf of an applicant.

Lastly, you asked whether the Board can meet in private with its attorney. It is noted that the Open Meetings Law provides two vehicles under which a public body may meet in private. One is the executive session, a portion of an open meeting that is closed to the public in accordance with section 105 of the Law. The other arises under section 108 of the Open Meetings Law, which contains three exemptions from the Law. When a discussion falls within the scope of an exemption, the provisions of the Open Meetings Law do not apply.

Relevant to your inquiry is section 108(3), which exempts from the Open Meetings Law:

"...any matter made confidential by federal or state law".

When an attorney-client relationship has been invoked, it is considered confidential under section 4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client. In short, when the Board seeks the legal advice of its attorney, I believe that the communications in that context would be outside the coverage 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-7049

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 17, 1992

Mrs. Sondra Bauernfeind
Chairman
Sullivan County Conservative Party
73 Brittman Road
Mongaup Valley, NY 12762

The staff of the Committee on 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. Bauernfeind:

I have received your letter of February 26 and the correspondence attached to it.

Your inquiry concerns access to a variety of information that you requested from the Monticello Housing Authority and whether the Authority is subject to the Freedom of Information Law. The information sought includes budgets and expenses, the salaries of employees, and requirements needed to hold certain positions.

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 470 of the Public Housing Law specifies that the Monticello Housing Authority "shall constitute a body corporate and politic". Since

the definition of "agency" includes public corporations, I believe that the Monticello Housing Authority is clearly an "agency" requires 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, the Freedom of Information Law pertains to existing records, and section 89(3) states in part that an agency need not create new records in response to a request. From my perspective, insofar as records exist that contain the information sought, they are subject to rights conferred by the Freedom of Information Law.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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. Therefore, there may be situations in which a single record includes both accessible and deniable information. In those cases, I believe that an agency could delete those portions that may justifiably be withheld while providing access to the remainder.

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 County 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. Therefore, while a district might not maintain an "organizational chart", it must maintain the payroll list described above. 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.

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, Sup. Ct., Essex Cty., January 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'."

Lastly, I am generally able to conduct seminars or workshops, and 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
Executive Director

RJF:jm

cc: Records Access Officer, Monticello Housing Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7050

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 17, 1992

Ms. Cheryl S. Root
Deputy Clerk
Village of Elbridge
210 West Main Street
P.O. Box 267
Elbridge, NY 13060-0267

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

Dear Ms. Root:

I have received your letter of February 24 in which you sought clarification concerning the Freedom of Information Law.

In conjunction with an inventory grant, you wrote that representatives of the Village of Elbridge Fire Department have expressed concern with respect to "patient confidentiality in regards to their 'incident' book". Although you advised that, in response to requests, records should be copied followed by the deletion of patient information, "they said none of it was available unless subpoenaed."

In this regard, I offer the following comments.

First, 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.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report may contain both accessible and deniable information. Moreover, that phrase in my opinion imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Third, of relevance is section 87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

> "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article..."

In addition, section 89(2)(b) lists a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to:

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

From my perspective, a record of a medical emergency call consists in great measure of what might be characterized as a medical history relating to the person needing care or service (see Hanig v. NYS Department of Motor Vehicles, Court of Appeals February 18, 1992, ___ NY 2d ___).

In my opinion, portions of records identifying those to whom services were rendered, their ages, and descriptions of their medical problems or condition could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, for disclosure of a name coupled with those details in my view represents a personal and somewhat intimate event in an individual's life. However, I believe that other aspects of the records, such as the locations of calls or addresses should be disclosed. In my view, an emergency call, particularly when sirens or flashing lights are used, is an event of a public nature. When a fire truck or ambulance travels to

its destination, that destination is or can be known to those in the vicinity of the event. In essence, I believe that event is of a public nature and that disclosure of an address or a brief description of an event would not likely constitute an unwarranted invasion of personal privacy. Nevertheless, the personally identifiable details described earlier could in my view be withheld.

Lastly, I do not believe that the information could be characterized as privileged and confidential; rather I view the items that could be withheld as deniable. It is noted that the Freedom of Information Law is permissive; although an agency may withhold records falling within the exceptions to rights of access, there is no requirement that records must be withheld. As indicated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

I hope that I 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-7051

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 18, 1992

Mr. Robert Jones
90-A-6339
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

Dear Mr. Jones:

I have received your recent letter in which you requested various policy directives, rules, regulations, manuals and the like that are use by the Department of Correctional Services.

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. However, I offer the following comments.

First, a request should be made to the agency that maintains the records sought. I point out that the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that a request for records kept at a facility may be made to the facility superintendent.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records.

Third, 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 those kinds of records 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 pur-

> sued 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.

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-2052

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 18, 1992

Mr. Guy D. Paquin
Executive Vice President
NYS Land Title Association
17 Battery Place
Room 2244
New York, NY 10004

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

Dear Mr. Paquin:

As you are aware, I have received your letter of February 26 and the materials attached to it.

Those materials represent situations in which municipalities have raised fees for copies of records, particularly certificates of occupancy. By means of illustration, you referred to "an amendment to the Riverhead Town Code which raises their fee for a copy of a Certificate of Occupancy from a previously illegal $25.00 to a still illegal $50.00". In addition, you indicated that some agencies have also established fees for searches.

You have requested an advisory opinion concerning the matter. 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)].

I hope that I 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-2053

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 19, 1992

Mr. Brownie L. Epps
91-R-3600
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. Epps:

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

According to the correspondence attached to your letter, following your arrest in September, you contacted the office of the Bronx Borough President, who in turn called a Ms. James, Manager of the Housing Preservation and Development office in the Bronx, to alert her that you "left [your] oven on and that [your] cats were without someone to care of them". After speaking with Ms. James, you submitted a request to her on January 3 for records concerning the care of your cats and the contents of your apartment. As of the date of your letter to this office, you had received no response.

In this regard, I offer the following comments.

First, although I am unaware of any arrangements that might have been made with Ms. James, I point out that 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. If Ms. James is not authorized to respond to your requests, I believe that she should have forwarded your request to the agency's records access officer, Mr. Alfred Schmidt, whose office is located at 100 Gold Street, New York, NY 10038.

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, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states in part that an agency need not create records in response to a request. I am unaware of the extent to which records were prepared or exist in relation to the matter of your concern.

In an effort to encourage the agency to respond to your request, copies of this correspondence will be forwarded to Ms. James and Mr. Schmidt.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ms. James, Manager
Alfred Schmidt, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2054

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 19, 1992

Mr. Richard Winkler
81-B-2146
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

Dear Mr. Winkler:

I have received your letter of March 1 in which you asked for assistance in obtaining records involving a grievance committee's investigation of your attorney.

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.

I hope that the foregoing serves to enhance your understanding of the issue 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-2055

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 19, 1992

Mr. Ronald Atkins
88-A-6317
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. Atkins:

I have received your recent letter in which you sought information "on how to get Attorney's Investigation Records, through the Freedom of Information Act, or otherwise". You added that you are interested in "what [your] attorney (Legal Aid Society) did in the investigation of [your] case."

In this regard, as I understand the situation, it is unlikely that the Freedom of Information Law would be applicable. I point out 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 a part of the federal Legal Services Corporation, some may be private, not-for-profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, it appears that most are not "agencies" as the term is defined in the Freedom of Information Law and, as such, are not subject to the Law.

Since I am unfamiliar with the specific status of the Legal Aid Society in question, I cannot offer specific guidance regarding rights of access to its records. However, I would conjecture that it is a corporate entity separate and distinct from government, that it is not an "agency" subject to the Freedom of Information Law and that, therefore, the records in which you are interested 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.

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-
FOIL-AO-7056

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 19, 1992

Mr. Jeffrey H. Greenfield
NGL Realty Co.
112 Merrick Road
Box 847
Lynbrook, NY 11563

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

Dear Mr. Greenfield:

I have received your letter of February 28 in which you sought advice concerning the Open Meetings Law and the Freedom of Information Law.

With respect to meetings, you asked whether the Open Meetings Law permits the public to record meetings "either on an audio tape or video tape camcorder", and whether a local government can "bar an individual from recording a session, especially if they use these 2 means of recordings themselves".

In this regard, it is noted at the outset that the Open Meetings Law is silent with respect to the issue, and there is no other law or rule that governs the use of recording devices at meetings. Further, while there are no judicial decisions involving the use of video equipment, several decisions have been rendered concerning the use of tape recorders at meetings.

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

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

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

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

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

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

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

As indicated earlier, there are no decisions rendered in New York with which I am familiar concerning the use of video equipment at meetings of public bodies. However, I believe that the principles are the same as those described with respect to the use of tape recorders. If the equipment is large, if special lighting is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.

If a public body uses audio or video equipment to record its meetings, I believe that the public would be able to use similar equipment in a similar manner. In short, if the use of the equipment by a public body is not disruptive, similar activity by the public could not in my view be characterized as disruptive or prohibited.

It is noted that legislation has been introduced to amend the Open Meetings Law to confer the right to photograph, broadcast or record meetings by means of audio or video equipment in an orderly manner. The legislation has been approved in the Assembly and is pending in the Senate.

With regard to the use of a fax machine to request records under the Freedom of Information Law, I point out that an agency may require that a request be made in writing [see Freedom of Information Law, section 89(3)]. There are no judicial decisions of which I am aware that deal with the use of fax transmissions to request records under the Freedom of Information Law. Absent a judicial determination to the contrary and assuming that such a request is directed to the appropriate person, i.e., the records access officer, I am unaware of any basis for refusing to accept a request made by means of a fax transmission.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Lynbrook

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2057

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 19, 1992

Mr. Thomas Edmonds
88-T-0531, H-10-36
P.O. Box 2001
Dannemora, NY 12929-2001

Dear Mr. Edmonds:

I have received your letter of March 17, in which you requested various records. The records deal with rules and procedures implemented by the New York City Police Department.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office does not maintain records generally and has no power to compel an agency to grant or deny access to records. In short, I cannot make the records requested available, because this agency does not possess them.

In general, a request 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. In the case of the New York City Police Department, the records access officer is Sgt. Louis J. Capasso whose address is:

New York City Police Department
One Police Plaza - Rm. 110C
New York, New York 10038

It is also noted that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should 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-7058

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 19, 1992

Mr. Edwin T. Olah
Information Resource Systems
19 Penny Lane
Bayville, NJ 08721

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

Dear Mr. Olah:

As you are aware, your letter of February 21 addressed to the New York State Attorney General has been forwarded to the Committee on Open Government. The Committee is authorized to advise with respect to the New York Freedom of Information Law.

You have inquired with respect to a variety of issues relating to access to records. In this regard, I offer the following comments.

First, enclosed is a copy of the Freedom of Information Law, which deals generally with access to agency records. However, there are many other statutes that either require that certain records be disclosed or kept confidential.

Second, 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 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, section 255). Insofar as the records in which you are interested 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.

With respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such 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]. It is noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to those events are generally sealed pursuant to section 160.50 of the Criminal Procedure Law

Rights of access to driver license and registration records are governed by sections 202 and 508 of the Vehicle and Traffic Law (see attached).

Lastly, enclosed is a list of state correctional facilities and their locations. This office does not maintain any list of federal prisons.

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-2059

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 19, 1992

Mr. Donald E. Burghart
[redacted]

Dear Mr. Burghart:

I have received your letter dated February 3 and the materials attached to it. Please note that your letter did not reach this office until today.

You have appealed a denial of a request for records by the Aetna Insurance Company. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records maintained by agencies. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

As such, the Freedom of Information Law is applicable to records maintained by entities of state and local government in New York; it does not apply to records maintained by private entities, such as the Aetna Insurance Company.

Second, when the Freedom of Information Law does apply, the Committee on Open Government is authorized to advise. The Committee is not empowered to render determinations following appeals or to compel an agency to grant or deny access to records. For future reference, in the event that an agency subject to the Freedom of Information Law denies a request for records and you seek to appeal the denial, section 89(4)(a) of the Freedom of Information Law pertains to the right to appeal. That provision states in relevant part that:

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

I hope that 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:jm

cc: Aetna Insurance Company

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2060

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

Mr. Andre Britton
91-B-0551
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. Britton:

I have received your letter of March 5 and the correspondence attached to it.

By way of background, at a shopping mall, while participating in a work release program, a shot was fired. Since you "knew the people who were alleged to have fired the shot", you gave statements to officers with the City of Rochester Police Department. As a result of your relationship to the event, your participation in the work release program was terminated. However, you wrote that statements maintained by the Police Department indicate that you were neither involved in the incident nor did you have any contact with those who were charged.

Since your "liberty interests are at stake", you contended that the reports relating to the incident are needed to perfect your appeal to the Department of Correctional Services. Your request for the reports and statements was denied by the City of Rochester's acting records access officer "as these statements were gathered for law enforcement purposes". Consequently, you raised the following question: "[w]here there is a liberty interest at stake, is the agency responsible for storing those records, obligated to turn over the requested records and documents where there is a liberty in question".

In this regard, I offer the following comments.

First, I lack expertise concerning claims involving the assertions of a "liberty interest". However, from my perspective, such a claim would likely be irrelevant to a determination of rights conferred by the Freedom of Information Law.

In situations that may have been somewhat analogous, it has been held that one's status as a litigant or potential litigant is irrelevant to that person's rights as a member of the public under the Freedom of Information Law; rights under that statute are neither enhanced nor diminished by one's status as a litigant [see M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY 2d 75 (1984)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more 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. Therefore, there may be situations in which a single record includes both accessible and deniable information. In those cases, I believe that an agency could delete those portions that may justifiably be withheld while providing access to the remainder.

Third, although the materials in question were apparently compiled for law enforcement purposes, the ability to withhold those kinds of records is limited. Specifically, section 87(2)(e) of the Freedom of Information Law 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."

Based on the foregoing, the ability to deny access under section 87(2)(e) is limited to those situations in which the harm described in subparagraphs (i) through (iv) would arise by means of disclosure.

I am unfamiliar with the content of the records sought or the effects of their disclosure. However, it is possible that portions of the records reflective of your status or role in the incident would not, if disclosed to you, result in the kinds of harm or jeopardy described in section 87(2)(e). If that is so, those portions should be made available, while other aspects of the records might justifiably be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard G. Packard, Acting Records Access Officer
Louis Kash, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2061

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

Mr. Buddy Aiken
90-A-6564 A-3-18
Box G
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. Aiken:

I have received your letter of March 8 in which you asked that this office "help [you] get" various records from the Office of the Suffolk County District Attorney.

The records sought relate to a proceeding brought against you and include "[a]ll police reports, supplementary reports, police notes, logs, arrest reports, identification information and witness statements". You also referred to delays in responding to your request.

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 this office empowered to obtain records on behalf of an applicant. However, in an effort to assist you, 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 sought.

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". That provision 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. Concurrently, those 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: Mary Ellen Harkin, Assistant District Attorney
Donald J. Byrnes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7062

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

Mr. James Rosebrough
Erie County Holding Center
40 Delaware Avenue
Buffalo, NY 14202

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

Dear Mr. Rosebrough:

I have received your letter of February 18, which reached this office on March 6, as well as the materials attached to it.

As I understand the situation, on January 17, you directed a request to the Office of the Erie County District Attorney for copies of all records pertaining to you and mugshots of yourself that were used in the prosecution of another individual. It appears that your mugshots were used in a grand jury proceeding. In a letter addressed to you on January 30, Eleanor T. Kubiniec wrote that:

> "Your application is denied pursuant to Sections 87(b), (e) and 89(3) of the Public Officers Law, Article 6, Freedom of Information Law. Any information devulged with respect to another individual constitutes an unwarranted invasion of personal privacy. Mugshots are compiled for law enforcement purposes and are exempt from disclosure. With respect to information maintained by this office pertaining to you, denial is based upon lack of specificity in the request."

You have asked for assistance in 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. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify records. Rather than seeking all records pertaining to you, it is suggested that you provide additional detail, such as dates, identification docket or indictment numbers, descriptions of events and similar information that would enable an agency to locate records in which you are interested.

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

The first ground for denial, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". If my interpretation of the facts is accurate, that your mughsot was used in a grand jury proceeding regarding a person other than yourself, it appears that section 190.25 of the Criminal Procedure Law would be relevant with respect to the issue of disclosure. That provision states in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.709 of 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."

Based upon the foregoing, records presented to a grand jury are in my view generally confidential.

Ordinarily, I believe that mugshots pertaining to an individual would be available to that person under the Freedom of Information Law, for none of the grounds for denial could appropriately be asserted. However, again, when records fall within a statutory exemption, such as section 190.25 of the Criminal Procedure Law, the Freedom of Information Law would not govern rights of access.

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-7063

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

Mr. Carl Montgomery
Vice President
Graduate Student Employees Union
170 Mariner Street (Rear)
Buffalo, NY 14201

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

Dear Mr. Montgomery:

I have received your letter of March 4 in which you complained about routine delays in responses to requests by SUNY/Buffalo.

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.)

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: John Thurston, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2064

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

Mr. David Karnovsky
Senior Legal Counselor
Division of Legal Counsel
NYC Law Department
100 Church Street
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. Karnovsky:

I have received your letter of March 3 in which you sought an advisory opinion concerning a request for records of the New York City Department of Transportation (DOT) under the Freedom of Information Law.

You wrote that:

> "By way of background, DOT has entered into a series of contracts for the operation of municipally-owned parking garages. Under these agreements, the contractor is required to staff the garage with qualified and experienced personnel. The contracts typically include a list of 'Personnel Assignments' which sets forth the minimum staffing requirements for operation of the garage. In order to ensure that these standards are being met, the contractor is required to provide DOT with weekly payroll summaries showing, for each payroll period, the names and titles of all employees assinged to the garage, an identification of their positions in relation to the 'Personnel Assignments" list, hours worked each day, hourly rate of salary and gross weekly pay.

> "DOT has informed [you] that a garage operator has made a FOIL request for copies of the weekly payroll summaries submitted by one of DOT's current contractors. DOT is of the view that disclosure of the wage data set forth in the weekly payroll summaries would provide the requesting entity with information concerning the cost structure of a competitor which could be used to prepare bids for future municipal or other contracts."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is noted that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report, for example, may contain both accessible and deniable information. That phrase also imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Therefore, even though some aspects of a record might properly be withheld, an agency may be required to disclose the remainder of the record.

Second, the provision to which you alluded, section 87(2)(d), was amended in 1990. That provision 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."

In conjunction with the foregoing, I believe that issue involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of commercial entities. If, for example, the records could be used to ascertain the allocation of a firm's resources or involve significant financial information, it might properly be contended that the records, or perhaps portions of them would, if disclosed, cause substantial injury to its competitive position.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.).

In my view, the nature of the records and the area of commerce in which profit-making entities are involved would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of the firms. Therefore, the proper assertion of section 87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entities to which the records relate.

In the context of your inquiry, if indeed the wage data to which you referred would if disclosed cause substantial injury to a firm involved in a competitive area of commerce, it appears that a denial of access would be appropriate.

Lastly, you referred to agreements that require contracting firms to implement "minimum staffing requirements". I believe that records reflective of whether those requirements have been met should be available, for disclosure of that kind of information would indicate whether a firm is complying with the terms of a contract. If those portions of the records are segregable, I believe that they should be disclosed. However, related data, such as information regarding wages or assignments of employees, for example, could be withheld or deleted to the extent permitted by section 87(2)(d).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2065

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

Ms. Cecilia M. Rowe
Concerned Citizens for Effective Schools
RD #1 Box 15
Gilbertsville, NY 13776

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

Dear Ms. Rowe:

I have received your letter of March 2 in which you sought advice concerning the Freedom of Information Law. Please note that your correspondence did not reach this office until March 9.

Your inquiry concerns rights of access to the resume presented to the Gilbertsville-Mt. Upton Central School District by the Superintendent at the time he was hired. You were apparentlty informed that the record could be withheld.

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, the only relevant ground for denial would be section 87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". 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)].

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, 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 or certifications 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 indi-

vidual 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 School District officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Superintendent Loveland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2049
FOIL-AO- 7066

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

Mr. David J. Kurzeja
[redacted]

The staff of the Committee 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. Kurzeja:

I have received your letter of March 7 in which you requested my views concerning the propriety of an action taken during a recent "unadvertised" meeting of the Alexandria Central School District Board of Education.

By way of background, in May of last year, an issue arose concerning "excessive administrative costs", for there had been two principals and a superintendent in a building serving fewer than 700 students. The budget was twice defeated and an austerity budget was adopted. In October, the Superintendent announced that he would retire at the end of the school year. During the ensuing months, based upon discussions with Board members, you wrote that you were led to believe, in view of the Superintendent's upcoming retirement, that there would be two administrators in the future, rather than three. You indicated, however, that on March 2 an "unadvertised and executive meeting" was held solely to discuss "the third administrative position". It is your belief that members of the Board were given notice on February 29 relative to a meeting to be held on March 2, and you wrote that "[t]he secrecy was carried out to the extent that one person was told in the school office on March 2, there was no meeting". I point out that I discussed the matter with Mr. Wiley Keeler, the District's treasurer. Mr. Keeler informed me that the Board, at its preceding meeting held on February 13, scheduled a meeting for March 2, and that reference to that meeting appears in the minutes of the February 13 meeting. He also said, however, that he did not believe that notice was posted or given to the news media. Notwithstanding the foregoing, you and two others went to the school that night, where you found the meeting room locked, knocked on the door and were admitted. Mr. Keeler said that although one door was closed, the main office

door, the usual entrance, was open. After some two hours of discussion, the Board entered into an executive session. You learned the following day that a third administrator position was approved by a 4 to 3 vote. Mr. Keeler informed me that the executive session was held to discuss "administrative alignment" and the duties inherent in certain administrative positions. He also said that, although the public had left the meeting, the Board voted in public following the executive session.

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" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

The court also dealt with the characterization of meetings as "informal," stating that:

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

Based upon the direction given by the courts, if a majority of the Board gathers to discuss School District business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must 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 of the time and place must be given to the news media and posted in the same manner as described above, "to

the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Third, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As indicated in the language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

It is noted that 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 subjects that may properly be considered during an executive session.

Although the issue of creating or retaining a position might be viewed as a personnel matter, I point out that the term "personnel" appears nowhere in the Law. In the Open Meetings Law as originally enacted, the "personnel" exception differed from the language of the analogous exception in the current Law. In its initial form, section 105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

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.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that section 105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, a decision involving the creation or retention of a position or the duties of a position, irrespective of who may hold that position, would not focus on a particular individual.

Lastly, 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.

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.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be sent to the Board of Education and Mr. Keeler.

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
Wiley Keeler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2067

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

Mr. David Boyle
[redacted]

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

Dear Mr. Boyle:

I have received your letter of February 19, which reached this office on March 13, as well as the correspondence attached to it.

As I understand the situation, as a producer of a public access television station, you sought to appeal the cancellation of a program. Additionally, in a letter addressed to the Woodstock Cable Commission, you requested minutes of a meeting held by the Commission on January 22. It appears that you were given an opportunity to appeal the cancellation. However, you were informed that your request for minutes "should be addressed on the proper form, i.e., 'Application for Public Access to Records" which may be obtained from the Town Clerk."

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 requests" [21 NYCRR 1401.5(a)]. As such, neither the Law or 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

cc: Walter Laskowsky
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2068

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

Ms. Connie A. Baum
District Clerk
North Syracuse Central Schools
555 West Taft Road
North Syracuse, NY 13212

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

Dear Ms. Baum:

I have received your letter of March 9 in which you raised a question concerning the manner of dealing with requests for records by members of the Board of Education.

Specifically, your inquiry involves:

> "excessive requests for information from Board of Education Members, when the requests are not related to a project/assignment that the Board of Education has assigned a particular member and the information requested has been readily available and been given to all members of the Board of Education at one time or another."

You added that you:

> "have had past incidents where a Board Member has repeatedly made requests for information which has already been supplied to him/her and re-issuing the information is voluminous, extremely time consuming to retrieve and copy and expensive for the district, and the information is not being used to execute assignments/projects for the Board."

In this regard, I offer the following comments.

First, I am unaware of any statute that deals specifically with requests by members of boards of education for school district records or any unique authority that board members enjoy, individually, concerning their capacity to obtain copies of district records. Similarly, I know of no provision that authorizes a member of a board of education, acting alone, to impose a schedule upon a clerk concerning the time within which the clerk must disclose or copy a voluminous number of records.

Second, with respect to the Freedom of Information Law, that statute is, in my view, 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 a 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. A board of education, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, section 41). 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. When that is so, a request by a member of the Board could, in my opinion, be considered as a request made under the Freedom of Information Law by a member of the public, and that person could be assessed fees at the same rate as any member of the public.

Lastly, in conjunction with the authority conferred by section 1709 of the Education Law, I believe that the Board of Education could adopt rules or procedures pertaining to the rights or privileges of its members concerning the disclosure of records, as well as the imposition or perhaps the waiver of fees for copies under prescribed circumstances.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7069

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 27, 1992

Ms. Rebecca LaBrake
[redacted]

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

Dear Ms. LaBrake:

I have received your letter of March 12 in which you detailed a series of problems relating to the Child Protective Services' State Central Register. You asked that this office investigate the manner in which that agency deals with requests for records.

In this regard, first, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee has neither the resources nor the statutory authority to "investigate" an agency's practices.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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. One of those circumstances involves disclosures to "any person who is the subject of the report or other persons named in the report" [section 422(A)(d)]. 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."

In sum, in my view, rights relating to the records in question would not be governed by the Freedom of Information Law, but rather by provisions of the Social Services Law.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7070

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 27, 1992

Mr. Michael Arena
[redacted]

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

Dear Mr. Arena:

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

Your inquiry concerns a request for records maintained by the New York City Department of Investigation (DOI). At your request, the Department reviewed the conduct of an administrative judge of the Department of Transportation who, according to your letter, "sought to adjudicate violations charged against [you] both at the trial and appeals levels". Having requested all records involved in the review, you were granted access to the closing memorandum. However, all other records were denied. You appealed, specifying that the request included but was not limited to:

> "1) records compiled from the original DOT hearing
>
> 2) records compiled from the appeal DOT hearing
>
> 3) taped record of the DOT appeal
>
> 4) the complete names and job titles of the officers who conducted the appeal
>
> 5) complete name, job title and current salary of ALJ BALSAM."

DOI's appeals officer denied the appeal on the basis of section 87(2)(g) of the Freedom of Information Law. In the denial, he wrote that:

> "To the extent that any of the records which you now seek to obtain may be in the possession of this Department, they were not created by this Department. They are, therefore, exempted from disclosure by Section 87(2)(g) of the Public Officers Law, as they constitute inter-agency or intra-agency materials which are not the final policy or determinations of this Department. We suggest that you contact the Parking Violations Bureau of the Department of Transportation which would be the custodian of any records created in the course of PVB hearings and appeals."

You have requested an advisory opinion concerning the foregoing. 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."

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" (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 for 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).

From my perspective, insofar as the documentation that you requested is "kept, held [or] filed" by or with DOI, it would constitute a "record" subject to rights of access conferred by the Freedom of Information Law, irrespective of its source or origination of preparation [see Capital Newspapers v. Whalen, 69 NY 2d 246 (1987)]. Consequently, I believe that DOI must disclose records that it maintains to the extent required by law, regardless of the source of the records.

Second, although the records sought might fall within the scope of section 87(2)(g), the Appeals Officer in my view adopted a position that is unduly narrow and inconsistent with the language of that provision. Again, he wrote that the records "constitute inter-agency or intra-agency materials which are not final policy or determination of this Department". 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 lve 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 date 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)].

Similarly, the Court of Appeals has 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).

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 your request was overbroad.

Lastly, I believe that records indicating names and job titles of public employees are available under the Freedom of Information Law. Although tangential to the issue, 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 records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". However, payroll information has been found by the courts to be available under the Freedom of Information Law, and prior to the enactment of that statute [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765 (1976); Gannett Co. v. County of Monroe, 58 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 the departmental functioning are 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, titles and salaries of public officers and employees must be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to DOI'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: Steven M. Gold
Paul Silverman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO. 2052
FOIL-AO-2071

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 27, 1992

Mr. Gerald Dasch Sr.
Mr. Gregory Quigley
Concerned Taxpayers
22 Woodville Road
Middle Island, NY 11953

The staff of the Committee on Open 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. Quigley:

I have received your letter of March 13 and the correspondence attached to it. You have sought assistance in relation to certain issues concerning the implementation of the Freedom of Information Law and the Open Meetings Law by the Middle Island Fire District.

One issue involves a directive that you "will not be permitted to have anyone assist you in reviewing" records sought under the Freedom of Information Law. While I believe that an agency is required to maintain custody of its records and may adopt reasonable rules regarding the means by which records are made available, 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 Health and Hospitals Corp., 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 is 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 restriction imposed by the District.

Another issue relates to restrictions on public participation at meetings of the Board of Fire Commissioners. 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 Law is silent with respect to the issue of

public participation. Consequently, if a public body does not want the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to permit public participation. If a public body does permit the public to speak, I believe that it may do so based upon reasonable rules that treat members of the public equally.

You also wrote that the Board refers to one of its monthly meetings as a "workshop" that the public cannot attend. In my opinion, there is no distinction between a "workshop" and a meeting.

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" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

2d 409, 415)

The court also dealt with the characterization of meetings as "informal," stating that:

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

Based upon the direction given by the courts, if a majority of the Board gathers to discuss public business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, 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.

Lastly, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the 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 portion of an open meeting. Before conducting an executive session, a procedure must be accomplished during an open meeting. Section 105(1) of the Law states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting

> pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Moreover, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may properly be considered during executive sessions.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the Board and its Secretary.

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 Fire Commissioners
John A. Mouzakes, Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2072

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

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 March 10 in which you sought advice concerning the means by which you may obtain a copy of your pre-sentence report.

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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7073

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 27, 1992

Mr. William A. Caldwell
[redacted]

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

Dear Mr. Caldwell:

I have received your letter of March 14 in which you requested assistance concerning the Freedom of Information Law.

As the plaintiff in a federal civil rights action against the City of White Plains and its Police Department, you wrote that you have had difficulty obtaining records from the City. Attached to your letter is a copy of correspondence addressed to Anthony J. Grant, Corporation Counsel, in which you requested various information "[u]nder the terms of the Federal Court Consent Judgement in the Civil Rights action brought by the United States Department of Justice". The information sought relates to an eligible list and action taken in relation to the list, as well as racial and ethnic characteristics of candidates for employment and present and former employees in a number of contexts.

In this regard, I offer the following comments.

First, I am unfamiliar with the terms of the consent judgment to which you alluded, or whether the terms of that document direct the City to disclose the information sought. For purposes of responding to you, it will be assumed that the consent judgment does not contain any such direction and that access to information sought is governed by the Freedom of Information Law.

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute specifies that an agency is not required to create or prepare a record in response to a request. Therefore, insofar as the information sought exists in the form of a record or records, I believe that the

City would be obliged to disclose the records to the extent required by the Freedom of Information Law. However, to the extent that the information sought does not exist as a record or records, the City, in my view, would not be required by the Freedom of Information Law to create 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. In my opinion, two of the grounds for denial are likely pertinent to your inquiry.

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 interprepations, 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 Monroe, 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].

From my perspective, based on the language of the Freedom of Information Law and its judicial interpretation, the race or ethnicity of a public employee or a candidate for public employment would be irrelevant to the performance of one's duties, whether actual or potential, and, therefore, would if disclosed constitute an unwarranted invasion of personal privacy. Therefore, insofar as records might include a person's name and that person's race or ethnic background, I believe that one or other of those items could be withheld. For example, I believe that a list of an agency's employees by name would constitute a public record. However, if a list includes both employees' names and their race, those portions of the record indicating race

could in my opinion be withheld as an unwarranted invasion of personal privacy. Conversely, if a person is interested in knowing the race of employees or candidates, and if records exist indicating race, those records might be made available without names.

The other provision of likely reference 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 [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.

Other information described in certain items of your request could in my view be withheld. For example, in item 5, I believe that portions of records indicating reasons for disqualification could be withheld as an unwarranted invasion of personal privacy; in item 6, ratings of candidates as "preferred, acceptable or unacceptable", could be withheld based on privacy considerations and because those ratings appear to consist of opinions deniable under section 87(2)(g); in item 7, records concerning those "who allegedly lied" could in my view also be withheld under both section 87(2)(b) and (g).

Finally, insofar as existing records consist purely of statistical information, absent names or racial or ethnic characteristics, they would in my view likely be available under section 87(2)(g)(i) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Grant, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2074
PPPL-AO-132

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 27, 1992

Mr. Milton Payne
75-A-0741
Fishkill Correctional Facility
P.O. 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. Payne:

I have received your letters of March 9 and correspondence relating to them. You have asked this office to investigate denials of access to records by the Office of the Queens County District Attorney and the New York County Supreme Court. Your request to the District Attorney was made under both the Freedom of Information Law and the Personal Privacy Protection Law.

In this regard, the Committee on Open Government is authorized to advise with respect to the statutes referenced above. The Committee does not have the resources or the authority to conduct an investigation. Nevertheless, 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."

Based on the foregoing, the Freedom of Information Law does not apply to the courts or court records. That is not to suggest that court records are confidential; on the contrary, court records are often available under other provisions of law (see e.g., Judiciary Law, section 255). It is suggested that a request be directed to the clerk of the appropriate court, including sufficient detail to permit the location and identification of the records.

Second, with respect to records of an agency, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 sought.

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". That provision 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. Concurrently, those 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.

Third, since you referred to grand jury records, the first ground for denial, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute", it appears that section 190.25 of the Criminal Procedure Law would be relevant with respect to the issue of disclosure. That provision states in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.709 of 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."

Based upon the foregoing, records presented to a grand jury are in my view generally confidential. It is noted that subdivision three of section 190.25 specifically refers to a district attorney.

Lastly, since your request to the District Attorney was made under the Personal Privacy Protection Law and the Freedom of Information Law, I point out that the Personal Privacy Protection Law pertains only to state agencies. The defintion of "agency" appearing in section 92(1) of that statute specifically excludes local governments and offices of district attorneys.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Records Access Officer, Office of the
Queens County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-133
FOIL-AO-2075

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 30, 1992

Ms. Gloria Kivuts
[redacted]

Dear Ms. Kivuts:

I have received your letter of March 22 in which, pursuant to the Personal Privacy Protection Law, your requested from this office "all information gathered" about yourself by various state and local agencies.

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to advise with respect to the Personal Privacy Protection Law and the Freedom of Information Law. This office does not maintain records generally and is not empowered to compel an agency to grant or deny access to records. Nevertheless, I offer the following comments.

First, the Personal Privacy Protection Law is applicable only to state agencies. For purposes of that statute, the term "agency" is defined in section 92(1) to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

As such, the Personal Privacy Protection Law does not apply to municipal agencies, such as county or city departments.

Second, the Freedom of Information Law, which pertains generally to access to records, applies to most entities of state and local government. For purposes of that statute, "agency" is defined in section 86(3) to include:

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

Therefore, although the Personal Privacy Protection Law would not apply to a local police department, for example, the Freedom of Information Law would be applicable.

Second, requests should generally be made to the "records access officer" at the agency or agencies that you believe would maintain records pertaining to you. The records access officer has the duty of coordinating an agency's response to requests. Further, under both the Freedom of Information Law and the Personal Privacy Protection Law, an applicant is required to "reasonably describe" the records sought. If you merely seek records gathered about yourself, it is unlikely that such a request would reasonably describe the records. Therefore, a request should include sufficient detail, such as names, dates, identification numbers, descriptions of events, etc., to enable agency officials to locate and identify the records in which you are interested.

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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-134
FOIL-AO-2076

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 30, 1992

Mr. Hal Coe
Crystal Capital
389 Sunset Drive
Corning, NY 14830

The staff of the Committee 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. Coe:

I have received your letter of March 16 in which, in conjunction with our telephone conversation of that date, you asked that I write to you and Mr. Mark Fleischer, Chemung County Records Access Officer, to "express the correct interpretation of the laws...".

Although you did not identify in your letter the matter that we discussed, my telephone log indicates that the issue involved rights of access to a list of vendors that is maintained by the County. Based on the assumption that I have accurately recalled the issue, I offer the following comments.

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

Second, 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 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 issue involves a list of commercial entities, I believe that would be available.

As you requested, a copy of this opinion will be forwarded to Mr. Fleischer.

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: Mark Fleischer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7077

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 30, 1992

Mr. Victor Suarez
90-T-4586
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

Dear Mr. Suarez:

I have received your letter of March 16. In brief, you wrote that you have written to the property clerk at the 112th precinct in New York City in an unsuccessful effort to obtain records indicating the whereabouts of personnel property taken into custody at the time of your arrest.

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

First, it is unclear whether you have received any response to your requests. Here I point out that a request for records made under the Freedom of Information Law should generally be addressed to an agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests. Therefore, it is suggested that you resubmit your request to Sgt. Louis J. Capasso, Records Access Officer, New York City Police Department, Room 110C, 1 Police Plaza, New York, NY 10038.

Second, section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records. I would conjecture that your correspondence addressed to the property clerk indicating your indictment and NYSID numbers, the date of the arrest, the nature of the property and the vouchers relating to the items in question would reasonably describe the records sought. It is suggested that a request including the same kind of detail be sent to Sgt. Capasso.

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-2078

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 30, 1992

Mr. Robert Brock
88-A-4368
Wallkill Correctional Facility
Box G
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. Brock:

I have received your letter of March 16 in which you sought assistance concerning a request made under the Freedom of Information Law.

According to your letter, on March 3, you were compelled to appear in federal court "by way of a 'Writ'". Having requested a copy of the writ from the inmate records coordinator at your facility, you were denied access "based on the fact that writ was addressed to the Superintendent of the facility".

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."

Based on the foregoing, I believe that a writ addressed to and maintained by the facility superintendent constitutes a "record" subject to rights conferred by the Freedom of Information Law.

Second, although I have no knowledge of the contents of the writ, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Third, a denial of a request may be appealed pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

The regulations promulgated by the Department of Correctional Services state that an appeal may be made to Counsel to the Department.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Ms. P. Orce, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7079

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 30, 1992

Mr. Dan M. Potter
Capital District Association of
Rental Property Owners
21 Forest Avenue
Albany, NY 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.

Dear Mr. Potter:

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

Your inquiry pertains to records of the City of Albany Water Board. As I understand the matter, reference was made at a meeting of the Board to a report prepared by a consulting firm retained by the Board. When you sought the report, your request was denied pursuant to section 87(2)(g) of the Freedom of Information Law. As a separate matter, you sought a copy of the Board's expense budget, which was adopted on January 17. You asked how section 87(2)(g) would apply to that document and whether there would be a basis for a 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, 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 Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we

> hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (See, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

The court, however, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers law section 87[2][g][i]), or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

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

Lastly, although a budget adopted by an agency could be characterized as intra-agency material, I believe that it would consist wholly of factual information available under section 87(2)(g)(i) or, alternatively, or that it would be reflective of a final agency policy or determination available under section 87(2)(g)(iii).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Albany Water Board
Pamela Primono Alley, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1080

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 30, 1992

Mr. George G. Douglas
[redacted]

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

Dear Mr. Douglas:

I have received your letter of March 19, as well as the materials attached to it.

You wrote that you have expressed interest in the assessment policies of the Town of Stephentown for some five years. You added that:

> "[o]f particular concern within the last two years is the act of Town Assessor Thomas MacVeigh placing his daughter's new house on the tax rolls at $19,320. At the February 17, 1992 regular town board meeting, Mr. MacVeigh presented Town Supervisor Michael Angley with data on four properties to support his actions. On February 19, 1992 [you] sent a Certified letter to Supervisor Angley requesting copies of that data per the Freedom of Information Act. [You] never received a response.
>
> "At the March 16, 1992 Town Board meeting, Supervisor Angley stated he would not release the data based on the premise of Personal Privacy of the individuals involved. Supervisor Angley then stated the Board had reviewed such data and agreed with the Assessor's action concerning his Daughter's assessment."

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

It is noted initially that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In addition, section 89(6) of the Freedom of Information Law provides that nothing in that statute can be cited to diminish rights conferred by other provisions of law or by means of judicial interpretation. I point out that 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 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)].

Further, in Szikszay v. Buelow [107 Misc. 2d 886, 436 NYS 2d 558 (1981)], the applicant sought assessment information as well as tax maps. The assessment information existed in computer tape format. The court referred to section 87(2)(b), as well as section 89(2)(b)(iii) (id. at 558) of the Freedom of Information Law, which states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names

and addresses 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)].

In sum, I do not believe that the records in question could be withheld based upon considerations of privacy. On the contrary, in view of judicial decisions relating to the subject, the records must in my view be disclosed to the public.

To enhance compliance with and understanding of law, copies of this opinion will be forwarded to the Town Supervisor and Assessor.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Angley, Supervisor
Thomas MacVeigh, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2081

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 30, 1992

Mr. Joseph J. Seymour
City Manager
City of Peekskill
City Hall
Peekskill, NY 10566

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

Dear Mr. Seymour:

I have received your letter of March 16 in which you sought an advisory opinion concerning access to records.

According to your letter:

> "[t]he City of Peekskill has granted a Special Permit to the Peekskill Area Pastors Association for the management of a nineteen bed homeless shelter. One of the conditions attached to this Special Permit is that the shelter provide services predominately (80%) for Peekskill residents.
>
> "The shelter receives its funding from Westchester County who has refused to identify the place of origin of the occupants who receive assistance. It is our contention that this is a matter of public information and should not be withheld from the City. It is not necessary that we know the names of the individuals, but, merely, where they have resided for the past two years."

The resolution authorizing the special permit states in part that:

> "[a]ll persons served by the Shelter shall become clients and enrollees of programs offered by the Westchester County Department of Social Services. Certification of clients enrolled in Department of Social Services program shall be included in the quarterly reports issued to the City Manager."

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 apparent relevance to the issue 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 section 136 of the Social Services Law. Subdivision (1) of section 136 states in part that:

> "The names or addresses of persons applying for or receiving public assistance and care shall not be included in any published report or printed in any newspaper or reported at any public meeting except meetings of the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town; nor shall such names and addresses and the amount received by or expended for such persons be disclosed except to the commissioner of social services or his authorized representative, such county, city or town board or body or its authorized representative, any other body or official required to have such information properly to discharge its or his duties, or, by authority of such county, city or town appropriating board or body or of the social services official of the county, city or town, to a person or agency considered entitled to such information."

Further, subdivision (2) of section 136 states that:

> "All communications and information relating to a person receiving public assistance or care obtained by any social services official, service officer, or employee in the course of his work shall be considered confidential and, except as otherwise provided in this section, shall be disclosed only to the commissioner of social services, or his authorized representative, the county board of supervisors, city, council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town or its authorized representative or, by authority of the county, city or town social services official, to a person or agency considered entitled to such information."

In my view, the information in question could be withheld from the public if requested under the Freedom of Information Law on the ground that it is exempted from disclosure under section 87(2)(a) or perhaps on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to section 87(2)(b). However, under the circumstances, you are not seeking the information as a member of the public but rather as a government official acting in the performance of your official duties on behalf of the City of Peekskill. Further, although the matter does not involve funding for public assistance and care, it appears in this instance in my opinion that you should be entitled to the information as the representative of the City under subdivisions (1) or (2) of section 136 of the Social Services Law, particularly since you are not seeking names. It also appears that the actual residence addresses of those housed in the Shelter would not be needed for your purposes; an indication of the municipality of one's residence or that person's zip code would likely suffice to enable the City to acquire the information needed to ascertain compliance with the conditions established in the permit.

In sum, although I do not believe that the Freedom of Information Law would necessarily apply, it appears that, in the performance of your official duties, you should be entitled to the kind of residence information described above.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Westchester County
Department of Social Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7082

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 31, 1992

Mr. Max J. Danziger
68-A-0221 Annex 42
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. Danziger:

I have received your letter of March 27.

As you requested, enclosed are copies of "Your Right to Know" and "You Should Know".

You asked whether the New York-New Jersey Port Authority falls within the scope of the New York Freedom of Information Law. In this regard, since the Port Authority is a bi-state entity, I do not believe that it is subject to the New York, New Jersey or federal freedom of information statutes. In short, a state cannot impose its laws beyond its borders (see e.g., Metro-ILA Pension Fund v. Waterfront Commission of New York Harbor, Sup. Ct., New York County, NYLJ, December 16, 1986). However, I believe that the Port Authority has adopted a policy on disclosure that is generally consistent 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2083

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 31, 1992

Mr. Richard J. Roberts
Land Data Associates Inc.
5919 East Henrietta Road
Rush, New York 14543

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

Dear Mr. Roberts:

I have received your letter of March 17 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter and the correspondence attached to it, on December 26, 1991, you requested from the Schenectady County Real Property Tax Service "[a] duplicate copy of the most recent Schenectady County tax maps on 35 mm microfilm as held by the Schenectady County Real Property Tax Service Agency". As of the date of your letter to this office, although you had received no written response to the request, you wrote that the County Attorney informed you by phone "that it was his opinion that the microfilm did not fall under the Freedom of Information Law and that the County was under no obligation to provide it". You added that he also stated that if you "could provide him with documentation showing the County's obligation to provide the film, that he would reevaluate his decision."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable 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."

Based upon the foregoing, I believe that microfilm 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. In this instance, I do not believe that any ground for denial could be asserted to withhold tax maps, whether they are maintained on paper or on microfilm. While I know of no decision dealing specifically with microfilm, an analogous situation involved a request for copies of tax maps that existed in traditional paper form, and assessment records maintained on computer tape. In holding that the computer tape is available, it was found that accessible records should be disclosed irrespective of the format in which they are maintained [see Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

Lastly, section 89(3) of the Freedom of Information Law requires that agencies provide copies of accessible records upon payment of the requisite fee. I point out that, pursuant to section 87(1)(b)(iii), for copies of records other than photocopies, an agency may assess a fee based on the actual cost of reproduction.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Hayner, County Attorney
Schenectady County Real Property Tax Service

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2084

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 31, 1992

Mr. Joe DeFalco
[redacted]

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

Dear Mr. DeFalco:

I have received your recent letter and the correspondence attached to it. Your inquiry concerns a request made under the Freedom of Information Law to the Town of Delaware.

According to the materials, your request focused on the Town Building Inspector, how long he has been a building inspector, where and when two courses were taken and "cancelled checks showing payment for these courses". In addition, you sought "copies of all permits for signs (wooden, illuminated or any other signs) in the Town of Delaware from 1985 to present", "copies of all cancelled checks pertaining to permits concerning zoning law 604-12345", and "a list under the New York State Uniform Fire Prevention and Building Code 717.3(e)(4), every house that you [the Building Inspector] have ever inspected since you have been a building inspector that are in the township of Delaware where you required the individuals to raise their oil burners 18" above the ground".

In November of 1991, the Building Inspector indicated that the information sought is available at the Town Hall. You found, however, that it was not available. In addition, you were informed by the Town Clerk that the list concerning oil burners does not exist. You have asked that I write to the Town, "telling them to make this information available" 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 is not empowered to compel an agency to grant or deny access to records.

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if, for example, the list that you requested does not exist, Town officials would not in my opinion be obliged to prepare a list or other record 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. While I believe that existing records falling within the scope of your request would be available, for none of the grounds for denial would apparently apply, the issue in my view involves the ability of Town officials to locate the records in which you are interested.

I point out that 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 Town's record-keeping system. I would conjecture that records reflective of a public employee's classification, courses taken and their dates and locations, as well as the period of one's employment, could be located without a great deal of difficulty. However, with respect to other aspects of your request, it is possible that a review would have to be made of all records within a particular category. For instance, if there is no system of locating permits for signs, it may be necessary to review all permits to locate those that you requested; similarly, all cancelled checks may be filed chronologically, in which case, perhaps thousands of checks would have to be reviewed to locate those of your interest. In that kind of situation, even when a request is specific, the ability to locate records may be dependent upon the manner in which the records are filed and the agency's ability to retrieve records in conjunction with its filing system.

In short, while some aspects of the request might have "reasonably described" the records, others might not have. It is suggested that you discuss the manner in which the records are kept with the Town Clerk and/or Building Inspector.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Lillian Bauernfeind, Town Clerk
Alfred Steppich, Building Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7085

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 31, 1992

Mr. Terry M. Williams
91-A-3772
P.O. Box 276
Route 374
Lyon Mountain, NY 12952

The staff of the Committee on Open 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 March 14. According to your letter, you are appealing a conviction which you contend "stemmed from false arrest and illegal search and seizure by the New York State Police". Your requests for an investigative report relating to your arrest have been denied, and you have sought an advisory opinion on the matter.

In this regard, I offer the following comments.

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

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". That provision 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. Concurrently, those 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.

I hope that I have 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, Division of State Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7086

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 31, 1992

Mr. Andre Britton
91-B-0551
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. Britton:

I have received your letter of March 16 in which you sought assistance concerning access to records.

According to your correspondence, on February 24, you requested copies of records relating to your recent Tier III proceeding form the Chairman of the Temporary Release Committee at your facility. As of the date of your letter to this office, you had not received a response to the request.

In this regard, I offer the following comments.

First, it is possible that the absence of a response is due to the likelihood that your request was made to the wrong person. Having discussed the matter with an attorney for the Department of Correctional Services, it was suggested that the Chairman of the Temporary Release Committee may have no relationship to the proceeding, and that your request should be made to the person who conducted the proceeding or the facility superintendent.

Second, I believe that rights of access to the records under the circumstances are based primarily upon considerations of due process, as well as the Freedom of Information Law. In brief, I was informed that you should be able to receive all records that were reviewed by the hearing officer, unless that person determines that certain records or portions thereof "would jeopardize institutional safety or correctional goals" [see 7 NYCRR 254.5(b)], as in the case in which a confidential informant's identity appears in 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-2087

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 31, 1992

Mr. Paul Ciaciulli
91-A-8784
Box 3600
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. Ciaciulli

I have received your recent letter in which you wrote that you are "having trouble getting a corrected time computation from the Nassau County Jail". You have requested 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. The Committee cannot compel an agency to grant access to records or to prepare records.

Second, if your question involves access to a record indicating the computation of jail time, and if such record exists, I believe it would be available to you. 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. Under the circumstances, I do not believe that the record in question would fall within any of the grounds for denial.

Third, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if the record in which you are interested does not exist, an agency would not be obliged by the Freedom of Information Law to prepare such a record on your behalf.

Lastly, of possible relevance to the matter, is section 500-f of the Correction Law, which pertains to county jail 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."

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-7088

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 31, 1992

Mrs. W.R. Powell
[redacted]

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

Dear Mrs. Powell:

I have received your letter of March 16 as well as the materials attached to it. You have requested assistance relating to the implementation of the Freedom of Information Law by the Roosevelt Union Free School District.

One of the issues involves a requirement that you complete a form prescribed by the District to request records. 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. Further, 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."

Second, you referred to a "new requirement of paying up-front without viewing same and without a choice for selected payment of what record [you] may need". You also wrote that the Superintendent said: "If I pull these records, you must pay up front or otherwise I will not comply". Here I point out that section 87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying. When copies of records are requested, an agency my assess a fee of up to twenty-five cents per photocopy, and, in that situation, I believe that an agency may require payment "up front". However, when records are available, an applicant may inspect them free of charge, for no fee may be assessed for the inspection of accessible records (see regulations, section 1401.8).

A third issues involves a series of delays in responding to requests. 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

Although travel vouchers and similar or related records might identify specific officers or employees, the courts have made it clear that public officers or employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of public employee's duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980].

In my opinion, bills, vouchers, contracts and similar records involving payments to or expenditures by public officers or employees are relevant to the performance of their official duties. As such, those types of records would in my view be available on the ground that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. Again, however, some aspects of those records may be deleted as an unwarranted invasion of personal privacy, as in the case of public employees' home addresses or social security numbers, which may have no relevance to the performance of one's official duties.

It is also noted 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 governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers

> 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 respect to rights of access, 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.

From my perspective, records pertaining to billing or payments made to officers, employees or others are accessible, except to the extent that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, sections 87(2)(b), 89(2)(b)]. If, for example, records include social security numbers or home addresses, those details could be deleted to protect privacy, while the remainder would be accessible. However, I believe that records involving reimbursements for travel and other expenses incurred by public officers or employees, such as vouchers, would be accessible.

> 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

> (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 or Fink v. Lefkowitz, 47 NY 2d 567, 571..." [Capital Newspapers v. Burns, 67 NY 2d 562, 564-566 (1986)].

On the basis of the decision rendered in Capital Newspapers, other decisions and the language of the Freedom of Information Law, I believe that records reflective of expenditures are generally available under the 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 the Superintendent of Schools.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Rodgers M. Lewis, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2089

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 1, 1992

Hon. Thomas G. Clingan
Albany County Clerk
Court House
Albany, NY 12207

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

Dear Mr. Clingan:

I have received your letter of March 23 and the correspondence attached to it.

Your inquiry focuses on a request by an inmate who is appealing his conviction pro se and has requested a variety of records. One of the issues deals with records maintained by the District Attorney and whether they should be characterized as "judicial" or "non-judicial". A second involves the fee that may be charged for "actual photographs". The applicant has apparently contended that the fee should be twenty-five cents per copy; it is your view that you may charge five dollars because that is the actual cost of reproduction. The applicant also asked how he might "inspect" the records "given his incarceration".

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)].

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. Further, the Freedom of Information Law is a vehicle separate and distinct from discovery provisions in other statutes. Rights conferred by the Freedom of Information Law are essentially public rights; rights conferred under discovery statutes are generally based upon one's status as a litigant.

Second, 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 authorizes other fees, 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 duplicated by means of photocopying, such as actual photographs. Therefore, if, for example, the actual cost of reproducing a photograph is five dollars, I believe that a fee in that amount could appropriately be assessed. It is also noted that in a decision in which an inmate claimed indigency, it was held that nothing in the Freedom

of Information Law requires a waiver or reduction of fees that may otherwise be charged [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Lastly, section 87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR section 1401.3). I would conjecture that the procedures adopted by Albany County under the Freedom of Information Law specify the locations, presumably county offices, where records may be inspected and copied. In my view, neither the Law nor the regulations require that records be transferred from their usual locations to accommodate an applicant at a site convenient to the applicant.

In short, while inmates may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than its designated or customary locations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7090

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 1, 1992

Mr. William A. Caldwell
[redacted]

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

Dear Mr. Caldwell:

I have received your letter of March 21 and the correspondence attached to it.

You have sought assistance in obtaining an eligible list and related records from Westchester County.

In this regard, I believe that eligible lists must be disclosed, for section 71.3 of the regulations promulgated by the Department of Civil Service states that:

> "Eligible lists may be published with the standing of the persons named in them, but under no circumstances shall the names of persons who failed examinations be published nor shall their examination papers be exhibited or any information given about them, except as provided in this regulation and regulation four."

The other aspects of your request were considered in an advisory opinion addressed to you on March 27. If you have not received that correspondence, please so inform me.

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-2091

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 1, 1992

Mr. Anthony J. Ruggiero
Labor Relation Specialist
CSEA
300 Vanderbilt Motor Parkway
Hauppauge, NY 11787

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

Dear Mr. Ruggiero:

I have received your letter of March 9 in which you sought assistance concerning the Freedom of Information Law. Please note that your correspondence did not reach this office until March 23.

Specifically, in preparation for contract negotiations, you have requested records indicating salaries of teachers and administrators from Suffolk BOCES-II. You were informed, however, that the administrators' salary information for a particular fiscal year "was not available and they had no responsibility to maintain this information". In addition, it was also contended that "they would not provide salary information for the teachers in the employ of Suffolk BOCES-II".

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 speoified 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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Similarly, I believe that the payroll record and other related records identifying employees and their salaries 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 [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. If no such list exists for a previous fiscal year, I believe that other existing records indicating employees' names and salaries must be disclosed for the same reasons.

The remaining ground for denial of possible significance is section 87(2)(c) which permits an agency to withhold records that:

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

Since the payroll record required to be compiled pursuant to section 87(3)(b) must be continually maintained, I believe that it is accessible on an ongoing basis, notwithstanding the pendency of negotiations. Further and more importantly, in conjunction with a denial of salary and fringe benefit data requested by a public employee union, the Court of Appeals rejected the denial and held that the data must be made available [see Doolan v. BOCES, 48 NY 2d 341 (1979)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Suffolk County BOCES-II.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Fratimico

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2058
FOIL-AO- 7092

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 1, 1992

Mr. Jim Parker
Clapsaddle Farm
437 Otsego Street
Ilion, NY 13357

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

Dear Mr. Parker:

I have received your recent letter, which reached this office on March 24, as well as the materials attached to it. You have raised a number of issues and sought my views relating to the implementation of the Open Meetings Law and the Freedom of Information Law in the Village of Ilion.

The first issue concerns a hearing and subsequent meeting of the Village Zoning Board of Appeals. In brief, following an expression of concern by many residents pertaining to applications for variances, you wrote that the Acting Chairman "maneuvered" the Board into an executive session. When you questioned the basis for entry into executive session, you wrote that his response was "I'm not going to answer that". You added that, although the Board approved the application, the only people who spoke in favor were attorneys for or officials of the firm seeking the variance.

In this regard, with respect to the Open Meetings Law generally and the authority to conduct executive sessions, I point out that every meeting must be convened as an open meeting, and that section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed. The ensuing provisions of section 105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

I point out, too, that the Open Meetings Law has undergone a series of amendments since its initial enactment in 1976. Among the amendments is a change in the Law concerning zoning boards of appeals.

By way of background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. The Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law. Further, due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than section 108(1). As indicated earlier, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a public body, including a zoning board of appeals, must deliberate in public.

A second issue involves the "rumor" of a lawsuit and the use of the "litigation" exception by the Village Board of Trustees to exclude the public from its meetings.

The "litigation" exception for executive session is section 105(1)(d) of the Open Meetings Law. 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 foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since possible or potential litigation could be the result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a possibility of litigation.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the

> executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

A third issue involves access to minutes of meetings, particularly minutes of executive sessions. 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). If no action is taken during an executive session, minutes of the

executive session need not be prepared. It is noted that under section 106(3) of the Open Meetings Law minutes of both open meetings and executive sessions are available in accordance with the Freedom of Information Law.

Lastly, you referred to a request made under the Freedom of Information Law on March 12. As of March 23, however, no response had been received. Here I point out that 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)].

As you requested, copies of this opinion will be forwarded to the person 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: Hon. Joseph Collea, Mayor
Village Board of Trustees
Chairman, Zoning Board of Appeals
John McGraw, Evening Telegram
Tim Blydenberg, Utica Observer-Dispatch
Molly Graves, WKTV Television

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2093

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 1, 1992

Mr. John J. Sheehan
[redacted]

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

Dear Mr. Sheehan:

I have received your letter of March 17 and the materials attached to it.

Your inquiry concerns a draft report prepared by a consultant retained by the City of Binghamton. Although your request for the report was denied by City officials, you wrote that it "was shown on TV". You have sought an advisory opinion concerning the propriety of the denial.

In this regard, I offer the following comments.

First, as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person without regard to one's status or interest [see e.g., M. Farbman & Son v. New York City Health and Hosps. Corp., 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 the report in question was made available to the news media upon a request made under the Freedom of Information Law, I believe that it would be available to anyone. If, however, a record is inadvertently disclosed, such inadvertent disclosure would not, according to case law, create a right of access on the part of the public [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)].

Second, based upon the judicial interpretation of the Freedom of Information Law, records prepared for an agency by a consultant m ay 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 Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protec-

> tion when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (See, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

The court, however, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers law section 87[2][g][i]), or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, ordinarily, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Juanita M. Crabb, Mayor
Robert Seidel, Council President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2094

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 3, 1992

Maxwell D. Weinstein, Esq.
[redacted]

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

Dear Mr. Weinstein:

I have received your letter of March 23, as well as the materials attached to it. On behalf of your client, you have sought an advisory opinion "as to the positions taken" by various officials of the Village of Ocean Beach relative to requests for records.

In this regard, I offer the following comments.

It is noted at the outset 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."

Based on the foregoing, the Freedom of Information Law does not apply to the courts or court records. Further, although the Freedom of Information Law includes certain procedural

guarantees, such as the right to an administrative appeal of an initial denial [see section 89(4)(a)], those kinds of provisions are inapplicable with respect to court records.

The preceding commentary is not intended to suggest that court records are not subject to rights of access, for statutes other than the Freedom of Information Law may be pertinent. For example, section 2019-a of the Uniform Justice Court Act states in part that "[t]he records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public...".

Part of your request involves the names, last known addresses, social security numbers and dates of birth of all Village police officers. While records indicating the names of public employees are available, I believe that denial by the Village of home addresses, social security numbers and dates of birth was clearly proper. Section 89(7) of the Freedom of Information Law states that nothing in that statute requires the disclosure of the home address of a present or former public employee. In addition, section 87(2)(b) authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". It has been found in a variety of contexts that records which are relevant to the performance of a public employee's official duties are generally available, for disclosure in those instances would result in a permissible rather than an unwarranted invasion of personal privacy. However, when items pertaining to public employees are irrelevant to the performance of their duties, i.e., social security numbers and dates of birth, I believe that those items may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Several aspects of your requests involve appearance tickets and police blotter entries. For instance, you sought a list of certain items and the numerical order of appearance tickets. Additionally, you sought docket numbers or similar records relating to cases that were sealed pursuant to section 160.50 of the Criminal Procedure Law, as well as those involving juvenile and youthful offender cases.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency need not create a record in response to a request. Therefore, if, for example, no list containing information sought exists, the Village would not in my opinion be required to create or prepare a new record on your behalf.

Second, section 89(3) also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 requests, I must admit to being unfamiliar with the Village's record-keeping systems; whether the Village has the ability to locate and identify all of the records sought in the manner in which you requested them is unknown to me. It is possible, however, that based upon its filing or indexing mechanisms, certain aspects of your request might not have reasonably described the records.

Third, insofar as your request involves 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. Relevant under the circumstances is section 87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute".

One such statute, which was referenced earlier, is section 160.50 of the Criminal Procedure Law. That statute states in part that:

> "1. Upon termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision two of this section, unless the district attorney upon motion with not less than five days notice to such person or his attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise, or the court on its own motion with not less than five days notice to such person or his attorney determines that the interests of justice require otherwise and states the reasons for such determination on the record, the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding has been sealed. Upon receipt of notification of such termination and sealing...
>
> (c) 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 shall be sealed and not made available to any person or public or private agency..."

In my opinion, the foregoing represents an intent to ensure that an event, essentially an allegation that could not be proven, cannot be cited or used to the detriment of a person against whom charges have been dismissed. Further, I believe that any reference that could be used to identify such a person would fall within the scope of section 160.50; otherwise, the purpose of that statute would, in my view, be subverted.

Similarly, in view of sections 720.35 of the Criminal Procedure Law pertaining to youthful offender adjudications and 784 of the Family Court Act pertaining to police records relating to juveniles, I believe that any references to those persons in an agency's records must be kept confidential.

Having spoken with a representative of the Village, I was informed that Village officials are reviewing records to determine which involve sealed or "unsealed" records in an effort to disclose records to you to the extent required by law.

Lastly, some of your correspondence involves records made available to you that are either illegible or "not fully reproduced". In this regard, I was also informed that the Village has offered or will offer copies of the records in question or an opportunity to inspect the records in order that you can make notations.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael I. Youchah, Mayor
Martin Bradley Ashare, Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7095

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 3, 1992

Ms. Judi Vining
[redacted]

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

Dear Ms. Vining:

I have received your letter of March 25 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, at a recent meeting of the Board of Education of the Long Beach City School District, the Board voted to approve a stipulation of settlement relating to a proceeding brought under section 3020-a of the Education Law. During the meeting, you requested "the terms of settlement and the cost to the district in Attorney's fees". In response to your request, you were informed that "this was not a matter of public record since the stipulation was sealed and would remain so."

You have questioned the propriety of the Board's position.

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 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 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 promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make

> any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

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 tenured employees.

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.

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.

With regard to expenses incurred, as a general matter, 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 specific 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 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 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 liable 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 CPR 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. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys 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: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2063
FOIL-AO-7096

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 6, 1992

Robert T. Corey, M.D.
Deputy Commissioner of Health
Cortland County Health Department
60 Central Avenue
P.O. Box 5590
Cortland, NY 13045-5590

<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 Dr. Corey:

As you are aware, I have received your letter of March 25 in which you questioned the propriety of an executive session held by the Cortland County Board of Health. In addition, you raised a series of related issues in your correspondence and during our conversation of April 1.

You wrote that:

> "[t]he Cortland County Board of Health met in regular monthly session on March 17, 1992. At the conclusion of the regular listed agenda, a Board member moved that the Board go into Executive Session to discuss 'possible pending litigation concerning a real estate development.' The Chair ruled that this was a legitimate reason to have such a session and there was no second or vote to do so. The entire staff present at the meeting, along with the press and others were asked to leave, even the Secretary to the Board. The Secretary was later called in to be present when the Board adjourned, after returning to regular session. No minutes of the session

> are known to exist. Out of this session have come orders from the Board Chair to the Public Health Director."

You also indicated that "there is no actual litigation concerning any real estate development pending at this time."

In this regard, I offer the following comments.

First, I point out that every meeting must be convened as an open meeting, and that section 102 (3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of section 105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Second, the "litigation" exception for executive session is section 105(1) (d) of the Open Meetings Law. 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 purposes of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens

> to to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since possible or potential litigation could be the result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a possibility of litigation.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co. , Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

A third issue involves access to minutes, particularly minutes of the executive session. 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). If no action is taken during an executive session, minutes of the executive session need not be prepared. It is noted that under section 106(3) of the Open Meetings Law minutes of both open meetings and executive sessions are available in accordance with the Freedom of Information Law.

Lastly, 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)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, a record of votes is maintained as part of the minutes.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be sent to the Board of Health.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Cortland County Board of Health

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2097

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 6, 1992

Mr. Dennis E. A. Lynch
Dorfman, McCormack, Lynch & Phillips
51 North Broadway
P.O. Box 995
Nyack, NY 10960-0995

The staff of the Committee on Open 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 25. In your capacity as attorney for the Village of Airmont, you referred to a request for access to "all itemized bills concerning litigation."

It is your view that "the total monies expended for legal services as well as the identity of the law firms involved" should be disclosed under the Freedom of Information Law. However, you also wrote that you advised your client that:

> "the precise nature of work as itemized in various statements should not be divulged since revealing the itemized litigation strategy and work performed would reveal certain attorney-client confidences."

In this regard, I offer the following comments.

As you are aware, in general, 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 specific respect to payments to attorneys, 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 liable 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 CPR 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. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys 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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1098

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 6, 1992

Mr. James E. Cliff
92-A-2300 3-C-16
Box F
Dannemora, NY 12524-0445

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

Dear Mr. Cliff:

I have received your letter of March 24 in which you sought assistance concerning access to records.

It is your view that you were convicted of a crime you did not commit due to your assigned counsel's "ineffectiveness in investigating and preparing for trial". You have asked how you can determine whether similar claims have been made or whether there is an agency that maintains records involving those kinds of claims.

In this regard, I have contacted the Office of Court Administration to discuss the matter. In brief, I was informed that there is no central source or agency that maintains records of claims concerning the ineffectiveness of counsel. As such, it appears unlikely that any such claims could be located.

A second issue involves witnesses at your trial who said "they did not have any criminal cases in court." However, you learned that they are involved in proceedings in Connecticut.

I am unfamiliar with the laws of the state of Connecticut and cannot advise with respect to records maintained by agencies or courts in that state. However, Connecticut has enacted a version of a freedom of information law, and records could be requested from the appropriate entities in that jurisdiction. In New York, 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].

Lastly, under the circumstances, it is suggested that you confer with an attorney.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7099

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 6, 1992

Mr. Dennis Duboy
86-A-0700
Drawer B
Stormville, NY 12582

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

Dear Mr. Duboy:

I have received your letter of March 26 in which you requested assistance.

You wrote that you are an inmate at the Green Haven Correctional Facility and that you twice requested a copy of a "grievance complaint". However, you had received no response to your requests as of the date of your letter to this office.

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 state that a request for records maintained at a correctional facility may be made to the facility superintendent or his designee. If your request was not made to the appropriate person, it is suggested that you resubmit your request accordingly.

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)].

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. 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-2100

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 6, 1992

Ms. Jeanine M. Hillman
[redacted]

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

Dear Ms. Hillman:

I have received your letter of March 25 and the materials attached to it.

Among the attachments is a copy of a request made on March 11 to the records access officer for the Village of Blasdell in which you sought to "examine all of the Village records which are audited on a monthly basis from April 1, 1991" under certain funds that you identified. Due to the "voluminous nature" of the information sought, your request could not be fulfilled until May 6. As the former Village Administrator Clerk-Treasurer, you wrote that the items that you requested are "audited on a monthly basis", that they are "on computer and saved on a monthly basis", and that they are "readily available and easily retrievable by the Clerk." You contended that "[i]t would take approximately fifteen minutes to get all the files for review." In addition, you requested vouchers and cash receipts, which you also contend are readily accessible. Finally, you asserted in some cases, the clerk charged fees for copies, but in others no fee has been assessed.

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)].

If indeed your contentions are accurate, that the records sought are readily retrievable, it would be unreasonable in my view to delay disclosure until May 6 or beyond a reasonable time. On the other hand, if the records cannot be readily located, it is suggested that they may be made available, perhaps in a piecemeal manner, on an ongoing basis at times that are mutually convenient.

With regard to the assessment of fees, as you are aware, the Village Administrator wrote that:

> "[t]he Freedom of Information Law allows, but does not require the Village to charge for copies of information requested. In the past, the Village has answered some requests for information at no charge, when that request

> was minimal in nature and required minimal staff time to comply. Requests of a more voluminous nature, which require considerable staff time to prepare, have been and will continue to be provided with compensation required to the Village as outlined in our previous letter."

In my view, her response was reasonable and appropriate. In a discussion of fees in the Committee's most recent annual report, it was stated that some agencies "routinely waive fees for small or routine requests, for the time and cost involved doing the paperwork for small transactions exceeds the amount that they would acquire." From my perspective, so long as applicants are treated equally with respect to fees, i.e., if fees are uniformly waived when a request is "minimal in nature and require[s] minimal staff time", the actions of the Village would be proper.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jo-Anne M. Young, Village Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7101

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 6, 1992

Mr. Joe Martinez
89-T-2539
Auburn Correctional Facility
135 State Street
P.O. Box 618
Auburn, NY 13021-9000

Dear Mr. Martinez:

I have received your letter of March 27, which reached this office on April 6. You have requested various records from this office pursuant to the federal Freedom of Information and Privacy Acts, as well as the New York 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 does not maintain records generally, and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot provide the requested records, because this office does not maintain possession or control of those records.

Second, a request should generally be made to the "records access officer" at the agency that maintains the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests. Since your correspondence appears to involve records of the New York City Police Department, a request may be made to Sgt. Louis J. Capasso, Records Access Officer, New York City Police Department, Room 110C, 1 Police Plaza, New York, NY 10038.

Third, I point out that the federal Freedom of Information and Privacy Acts pertain to records maintained by federal agencies. Therefore, those statutes are inapplicable to a municipal agency.

The New York Freedom of Information Law, however, pertains generally to records maintained by entities of state and local government in this state.

Lastly, since you sought a waiver of fees, it is noted that such a request may be appropriate under the federal Act. Nevertheless, there is nothing in the New York Freedom of Information Law that deals with fee waivers. Based upon case law, fees may be charged despite one's status as an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that the foregoing serves to enhance your understanding of the matter 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-7102

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 6, 1992

Mr. Daniel Lynch
82-A-6183
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, NY 12733-0116

<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 March 29 and the correspondence attached to it.

You wrote that you "requested to review records" maintained by the Department of Correctional Services, and that you "did not request to purchase any records." Nevertheless, you indicated that "the records access officer is only willing to sell [you] copies of records and not let [you] review the records first."

You have asked for my views on the matter.

In this regard, section 87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying. When copies of records are requested, an agency may assess a fee of up to twenty-five cents per photocopy. However, when records are available in their entirety, I believe that an applicant may inspect them free of charge, for no fee may be assessed for the inspection of accessible records (see regulations, section 1401.8). Therefore, assuming that the records sought are maintained at your facility and are available in their entirety, no fee could in my opinion be charged if you merely seek to inspect the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Sullivan Correctional Facility

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7103

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 7, 1992

Mr. Philip H. Dixon
Whiteman, Osterman & Hanna
1700 Liberty Building
Buffalo, NY 14202

The staff of the Committee on Open 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 April 1, which was submitted on behalf of Mr. Ed Snyder, an elected assessor in the Town of Charlton. As in the case of correspondence sent previously to this office by Mr. Snyder, your inquiry involves his requests for Town records.

By way of background, Mr. Snyder's earlier correspondence involved building permits and related records that he sought in an effort to perform his legal responsibilities as an assessor. The records in question were maintained at the home of the Town's zoning administrator, and it was advised, in brief, that the materials sought constituted "records" subject to rights conferred by the Freedom of Information Law, irrespective of the site where they were maintained. It was also suggested that, under the circumstances, Mr. Snyder should not have been required to request the records, essentially as a member of the public, under the Freedom of Information Law, for it was clear that he sought the records in his capacity as an elected Town official in the performance of his official duties.

Following the receipt of my written advisory opinion, you wrote that Mr. Snyder again attempted to obtain records, "both as a public official and pursuant to the Freedom of Information Law". You wrote that his efforts were unsuccessful, and that Mr. Snyder appealed on March 12 to the Town Supervisor. Although the Supervisor indicated that the records would be made available and

disclosed many of the records sought, upon review of the records by Mr. Snyder, several of the records sought were not included. On March 23, Mr. Snyder wrote to the Supervisor identifying the records sought that had not been disclosed. As of the date of your letter to this office, no further response had been given.

You have sought an opinion "as to whether Mr. Snyder is entitled, pursuant to the provisions of the Freedom of Information Law, to access to the records that he identified in his March 23 letter to the Town Supervisor or to a full written explanation detailing why access to those records is not being provided."

In this regard, I offer the following comments

First, attached to your letter is Mr. Snyder's correspondence of March 23. The documents that he identified represent 21 building permits. In my view, those records would be accessible to any person. As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In short, I do not believe that any basis for denial could appropriately be asserted to withhold building permits.

Second, the responsibilities of an agency in receipt of an appeal 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

In my opinion, if, in response to an appeal, an agency grants access to all of the records sought, the provisions of section 89(4)(a) would be satisfied. However, if, in response to a request, an agency provides access to some of the records requested but withholds others, the agency is obliged "to fully explain in writing to the person requesting the record[s] the reasons for

further denial". Moreover, when a determination of an appeal results in disclosure of some of the requested records and no explanation of the reasons for withholding others, such failure in my view would constitute a constructive denial of access. In such a circumstance, I believe that the person denied access could seek judicial review of the denial 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

cc: Ed Snyder
John Simon, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7104

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 7, 1992

Mr. M.J. Dowden
Village Residents Party
183 Wheatley Road
Brookville, NY 11545

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

Dear Mr. Dowden:

As you are aware, I have received your letter of March 10 and the materials attached to it.

Your correspondence involves a request for records of the Village of Brookville. Although several aspects of the request were granted, you were denied access to "the village mailing list/tax rolls showing all property owners and their section, block, & lot numbers and acreage". You added that the list in question has been disclosed to other organizations, and that you obtained an equivalent list in 1987.

During our telephone conversation of April 3, you sought an advisory opinion concerning the propriety of the denial. 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 (h) of the Law.

The record in question would appear to have been created in conjunction with the assessment of real property. Although the record identifies owners of real property in the Village, judicial decisions in my view indicate that such a record must be disclosed.

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. Nevertheless, 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 or equivalent records 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)(1)). 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 an assessment roll or its equivalent should be disclosed. I point out 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].

Similarly, in a recent decision, it was held that a list of "the names and addresses together with zip code of the property owners" of a particular school district must be disclosed, and that "[w]hatever manner the respondent is able to extract the information for its own mailings in connection with mailing labels should be made available to respondent", so long as "petitioner will bear the costs of obtaining or of transferring this information to a computer disk" (see attached, Samuel v. Mace, Supreme Court, Monroe County, December 11, 1991). Moreover, the court directed the agency to pay attorney's fees to the petitioner.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Brookville

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2064
FOIL-AO-7105

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 7, 1992

Ms. Mary Osgood Reynolds
Attorney at Law
5588 County Route 11
Alpine, NY 14805

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

Dear Ms. Reynolds:

I have received your letter of March 30 in which you requested guidance concerning the time within which minutes of meetings must be prepared and made available. In brief, you described a series of delays in your attempts to obtain minutes of meetings of the Board of Education of the Odessa-Montour Central School District.

In this regard, as you are aware, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, section 106 of that statute provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. 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 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

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 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."

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.

Finally, although you have received the index to advisory opinions, you asked whether you could obtain copies of the opinions. While the Committee lacks the resources to send complete sets of opinions to anyone who may want them, copies of individual opinions can be sent by requesting them by means of number or by key phrase. In addition, copies of opinions are sent to various law libraries, including the Cornell Law School Library, which is not far from 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

cc: Donald E. Gooley, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7106

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 7, 1992

Mr. Eric Richards
86-A-9021
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. Richards:

I have received your letter of March 25 in which you raised a question concerning access to records.

You wrote that you were assaulted by two correction officers at the Great Meadow Correctional Facility. Following the event, your family contacted the Department's Inspector General, who interviewed you and apparently conducted an investigation. Since you have not heard from the Inspector General concerning the outcome of the investigation, you asked whether you or your family have the "right to possess all copies of documentary papers, video tapes, etc."

In this regard, since I am unaware of 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 provisions that may be significant in determining rights of access to the records in question.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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), 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 a department of correction of individuals employed as correction officers...shall be considered confidential and not subject to inspection or review with the express written consent of such correction 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).

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". That provision 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 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 de- terminations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government... "

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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 the Department of Correctional Services and communicated within the Department would in my view fall within the scope of section 87(2) (g). Those records might include opinions or recommendations, for example, that could be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2067
FOIL-AO-7107

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 13, 1992

Ms. Patricia Fenick
W.A.T.C.H.
P.O. Box 123
Wingdale, NY 12594

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

Dear Ms. Fenick:

I have received your letter of April 1, as well as various materials and a tape recording pertaining to a meeting held by the Dover Town Board on November 12. You have questioned the propriety of an executive session held by the Board. In addition, you raised an issue concerning access to Town records.

With respect to the meeting, according to your letter and the materials, four agenda items were discussed in an executive session. In brief, those items involved complaints relating to the condition of a certain property, empty trailers, "an apparent auto body shop in a residential zone", a "septic problem", and the rental of an apartment in a single family residence. The Board indicated that an executive session could be held because the issues involved "an apparent personnel problem", and because they "might involve" litigation or "contemplated legal action". In addition, the minutes of the meeting indicate that the Board authorized "the parties who are allegedly violating the law" to join the Board in the executive session.

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except to the extent that a closed or executive session may be appropriately held. Further, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered behind closed doors.

Second, in view of the subject matter in question and the limited grounds for entry into executive session, it does not appear that any basis for conducting an executive session could, under the circumstances, have been justifiably asserted.

One of the reasons cited for holding the executive session involved a claim that it involved "an apparent personnel problem". As I understand the situation, none of the items involved personnel, i.e., officers or employees of the Town; rather they appear to have involved issues relating to the condition or use of real property. The so-called "personnel" exception, section 105(1)(f), 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..."

Based upon the materials that you forwarded, section 105(1) appears to have been inapplicable as a basis for entry into an executive session.

The other reason involved a claim that the items in question concerned possible litigation.

The provision that deals most closely with the issue is section 105(1)(d) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to

> both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since possible litigation could be the subject or result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a possibility of litigation, or because it involves a legal matter. Moreover, one of the decisions cited above, Concerned Citizens, supra, dealt with an executive session held by a public body with its adversary in litigation. As indicated above, the purpose of section 105(1)(d) is to enable a public body to discuss its litigation strategy in privacy. In that decision, due to the presence of the adversary in litigation at the executive session, it was found that an executive session could not legally have been held. Similarly, in this instance, the presence of the subjects of the discussion in my opinion would have resulted in an improper executive session.

The remaining area of inquiry relates to your claim that you "have been denied access to records". You wrote that, until recently, in order to seek zoning or building department records, the "procedure consisted of walking in and requesting such files and being handed them by either the secretary or the C.E.O." [code enforcement officer]. However, most recently, "[i]nstead of the file, they were handed a FOIL request and told this was the new procedure to acquire access to files."

In this regard, while an agency may respond to an oral request and respond instantly to such a request, section 89(3) of the Freedom of Information Law authorizes an agency to require that a request be made in writing and states that the agency has up to five business days from the receipt of a request to respond. More specifically, the cited provision states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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 and understanding of the Freedom of Information Law and the Open Meetings Law, a copy of this opinion will be forwarded to the Town Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7108

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 14, 1992

Mr. Albert Hoffmann
Middle Island Fire District
Box 203
Middle Island, NY 11953

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

Dear Mr. Hoffmann:

I have received your letter of April 2 and the materials attached to it.

In your capacity as a newly elected member of the Board of Fire Commissioners of the Middle Island Fire District, you expressed concern relating to the District's response to requests for records, specifically vouchers and bills. You referred to various restrictions on access, a subject that was considered in an opinion addressed to Gerald Dasch and Gregory Quigley on March 27. You also wrote that "on President's Day one of the fire commissioners, the district treasurer, and the lawyer spent the day in the board room going over the vouchers that Mrs. Dasch could see", that you "personally saw them taking the originals putting labels over the names on the top and the signatures on the bottom", and that Mrs. Dasch "saw only photo copies with things blanked out". As such, it appears that she obtained photocopies of records which had various portions covered. The sample of the voucher that your forwarded is a photocopy with labels covering the name and address of the person to whom payment was made and the signature of the person to who authorized payment.

In this regard, I offer the following comments.

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

Second, in my opinion, a voucher, including the names of persons paid and persons authorizing payment, must be disclosed. In short, I do not believe that any of the grounds for denial could appropriately be asserted to withhold items covered by the labels, assuming that my assumptions concerning the nature of those items is accurate.

Third, if indeed portions of original records have been covered, those portions were denied, and an applicant would have the right to 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 thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

I hope that I have 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-7109

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 14, 1992

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 April 2 and the materials attached to it.

According to your correspondence, your colleague, Matthew Hastie, wrote in December of 1991 to the New York City Department of Housing Preservation and Development and expressed the understanding that the Department "is in the process of having COGIS tax block and lot files created by the New York City Planning Department converted from Odyssey to ArcInfo format". He asked to have a copy of the files "in computerized format" when the conversion is completed. Having received no response, Mr. Hastie appealed on February 26. It appears that a response to the request was sent prior to the receipt of the appeal, for in a letter of February 21, the Department's records access officer wrote that he had been advised "that the data, as [he had] requested it, does not exist in the files of the agency". However, in a determination of the appeal dated March 5, the appeals officer wrote that he had "been advised by the program personnel that it is impossible...to comply with [the] request for computer data without undertaking a re-programming of information contained in our database." Mr. Hastie contended that the statements offered by the records access and appeals officers "contradict one another", for "[o]ne can only conclude that the information...requested exists in the files of [the] agency. Otherwise, there is no way that re-programming would produce it."

You have sought my opinion on the matter.

In my view, there is a distinction between transferring data from one storage medium to another and "reprogramming". Further, for the following reasons, if the Department has the ability to provide or duplicate the files in a format that you requested, I believe that it would be required to do so. In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. 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 more than ten years 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)].

Second, 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. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. 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 or disk. 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 information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

One of the decisions referenced in the correspondence appears to be relevant if not analogous to the situation at issue. In Brownstone Publishers Inc. v. New York City Department of Buildings, the question involved 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 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.
>
> "Public Officers Law [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" [166 Ad 2d, 294, 295 (1990)].

In sum, assuming that the conversion of format has been accomplished, that the data sought is available under the Freedom of Information Law, and that the data can be transferred by the

Department from the format in which it is maintained to a format in which you requested it, I believe that the Department would be obliged to do so. Under those conditions, it does not appear that production would involve creating a new record or reprogramming, but rather merely a transfer of information into a format usable 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: Joseph Fiocca, Records Appeals Officer
Alfred Schmidt, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7110

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 14, 1992

Mr. Henry C. Young
[redacted]

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

Dear Mr. Young:

I have received your letter of April 3 in which you sought assistance concerning the Freedom of Information Law.

Your inquiry concerns delays that you have encountered in your attempt to gain access to records of the Town of Conquest., Although your correspondence is not completely clear, it appears that you have requested salary information for 1991 relating to Town employees.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direct in 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, 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.

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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries 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 [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. If no such list exists for a previous year, I believe that other existing records indicating employees' names and salaries must be disclosed for the same reasons.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kay O. Reich, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 2111

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 20, 1992

Mr. Nicholas W. Clark
Assistant General Counsel
UFCW
1775 K Street, N.W.
Washington, DC 20006-1598

The staff of the Committee 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. Clark:

I have received your letter of April 2 and the correspondence related to it. You have sought a "ruling" concerning "whether the City of Schenectady Industrial Development Agency (the 'Agency') and its agent, Connecticut National Bank, "have responded properly" to your requests made under the Freedom of Information Law for records relating to bonds issued by the Agency to the Golub Corporation.

It is noted that I received correspondence from you dated March 19 on the same subject. Those materials indicate that George C. Robertson, the Agency's Executive Director, directed Counsel to the Agency to "seek a ruling" on the matter from this office. I contacted Mr. Robertson on April 1 and informed him that I had not received any such request from Agency counsel. Although he indicated that counsel to the Agency would write to me, I have received no further correspondence, other than yours, on the issue.

By way of additional background, you wrote that bonds in the amount of $15 million were issued in 1987 and are due in 1994 "for use by Golub to purchase equipment for installation in its 'Price Chopper' grocery stores." You also wrote that,"[u]nder the bond document, all receipts for equipment purchased with bond funds were to be held by the Connecticut National Bank as trustee for the Schenectady IDA."

The requests by the union that you represent involved:

> "(a) financial documents submitted by Golub to the IDA as part of its bond application to demonstrate its fiscal soundness and ability to repay the bonds; and (b) the receipts for equipment purchased with funds from this bond."

As I understand the correspondence that you enclosed, the union's initial request was made to the Connecticut National Bank. An officer representing the Bank indicated that no action would be taken "without written direction" from the Agency, and it was contended that the Bank is not subject to the Freedom of Information Law. A second request was made to the Agency, but it appears that the Union's request has neither been granted nor denied.

In this regard, I offer the following comments.

First, it is emphasized at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee cannot render what could be characterized as a "ruling" that is binding, and this office is not empowered to compel an agency to grant or deny access to records. It is my hope, however, that an advisory opinion is educational, persuasive and that it serves to enhance compliance with law in a manner that obviates the need to initiate litigation.

Second, as you may be aware, 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."

Section 856 of the General Municipal Law deals generally with industrial development agencies, and subdivision (2) states in part that "[a]n agency shall be a corporate governmental agency, constituting a public benefit corporation". Section 66(1) of the General Construction Law states that a "public benefit corporation" is a "public corporation". Further, section 903-e of the General Municipal Law specifically established the "City of Schenectady Industrial Development Agency" as "a body corporate and politic" subject to the requirements of Article 18-A of the General

Municipal Law. Based on the foregoing, I believe that the entity in question is an "agency" required to comply with the Freedom of Information Law.

The Connecticut National Bank in my view is clearly not an "agency" as that term is used in the Freedom of Information Law. The Bank is located beyond the borders of New York, and it is not a governmental entity.

Third, however, the status of the Bank is not, in my opinion, the determining factor with respect to rights of access to the records that you requested. As indicated previously, the Freedom of Information Law pertains to agency records, and section 86(4) of that statute 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. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

I am unaware of any judicial decisions that deal with facts analogous to those presented in this situation. However, the definition of "record" includes not only documents that are maintained by an agency; it refers to documents are that are "kept, held, filed, produced or reproduced by, with or for an agency." Under the circumstances, it appears that the records sought, although in the physical possession of a Connecticut bank, are kept and produced for an agency, the City of Schenectady Industrial Development Agency.

Although different from the instant situation, an analogy might be made between this case and the judicial interpretation of the Freedom of Information Law concerning records prepared by outside consultants retained by agencies. When an agency lacks the resources, staff or expertise needed to develop opinions or obtain facts concerning a function to be carried out by government, it might retain a consultant to provide needed expertise. Even though consultants or consulting firms may be private entities rather than governmental entities, it has been found that the records prepared by those entities or firms should be treated as if they were prepared by an agency. As stated by the Court of Appeals:

> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material" even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD2d 981,

983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed in the same manner as a record prepared by the staff of an agency. I would contend that a consultant's report, information "produced for" an agency, would fall within the scope of the Freedom of Information Law even if it is in the physical possession of a consultant rather than the agency. Any other conclusion would, in my opinion, serve to negate the effect of the decision rendered by the Court of Appeals.

Moreover, in a decision cited earlier, the Court of Appeals discussed the scope and intent of the Freedom of Information Law and found that:

> "Key is the Legislature's own unmistakably broad declaration that, '[as] 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 go@last as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester-Rockland Newspapers, supra, at 579].

To be consistent with the intent of the Freedom of Information Law and its broad interpretation by the state's highest court, I believe that the Agency must give effect to the Law so as to "extend public accountability wherever and whenever feasible."

In sum, while I do not believe that the Connecticut National Bank is subject to the Freedom of Information Law or is required to

disclose records pursuant to a request made pursuant to that statute, insofar as the Bank maintains custody of records for the Agency, those records would in my view be subject to rights conferred by the Freedom of Information Law. If that is so, again, I do not believe that the Bank would be required to disclose records in response to a request; rather, as suggested by the Bank's representative, it would release records in its possession only at the direction of the agency. Alternatively, the Agency could obtain the records sought or copies thereof from the Bank for the purpose of reviewing the records and determining the extent to which the Freedom of Information Law would require disclosure.

Lastly, assuming that the materials sought constitute agency records subject to rights of access, 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 (h) of the Law.

Although some of the documentation that you requested, i.e., receipts for equipment purchased with bond funds, would likely be available, other aspects of the documentation, depending upon their contents and the effects of disclosure, might properly be withheld.

Specifically, 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."

In my opinion, the question under section 87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of the Golub Corporation. If, for example, the data could be used to ascertain the value of an entity's property or involves significant financial information, it might be contended that certain of the data might, if disclosed, cause substantial injury to its competitive position.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.).

In my view, the nature of the records and the area of commerce in which a profit-making entity is 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 enterprise. 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 entity to which the records relate.

In an effort to enhance understanding and compliance with the Freedom of Information law, copies of this opinion will be forwarded to interested parties.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: George L. Robertson, Executive Director
Kathy A. Larimore, Corporate Trust Officer
Arthur Malkin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-712

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 20, 1992

Mr. Anthony Rampino
88-T-0565
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. Rampino:

I have received your letter, which is dated March 8, but which reached this office on April 8.

According to your letter, you were convicted "on the basis of various taped conversations [you] allegedly had with an informer." Although the informer never testified at trial, the prosecution "played the tapes to the jury..." You added that "some of the tapes are alleged to be lost by the District Attorney", and that "the missing tapes are the ones believed to be the tapes that would have proved [your] defense of entrapment". You asked whether the Freedom of Information Law "allows [you] access to the tapes - even ones alleged to be lost," and whether you should direct your request to the New York City Police Department records access officer or the District Attorney's 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 is not required to prepare a record that is not possessed or maintained by the agency. Therefore, insofar as the tapes do not exist or are not maintained by an agency, the Freedom of Information Law would not apply.

Second, a request should be made to the agency or agencies that you believe would maintain the tapes. If you believe that the tapes in question may be maintained by either or both of the agencies to which you referred, requests could be made to both agencies.

Third, assuming that the records in question exist and can be found by an agency, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (h) of the Law. Since I am unaware of 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 provisions that may be significant in determining rights of access to 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". That provision 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 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.

Lastly, 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 o 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. It is also noted that your rights under the Freedom of Information Law may differ from your rights as a defendant under provisions of the Criminal Procedure 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-7113

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 22, 1992

Mr. Hans Luebbert
[redacted]

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

Dear Mr. Luebbert:

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

According to your letter, at a recent meeting of the Newburgh Town Board, reference was made to a report prepared for the Town by a consultant. In response to your request for the report, the Town denied access on the ground that it is "Inter-Office Confidential".

You have sought 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 (h) of the Law.

Second, 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.

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)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed based upon the standards as in cases in which records are prepared by the staff of an agency. It is emphasized that 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" (id. at 133).

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

I 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: Doris M. Greene, Town Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7114

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 22, 1992

Mr. Bill Falk
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. Falk:

As you are aware, I have received your letter of April 8 in which you sought an advisory opinion concerning an appeal that you are filing under the Freedom of Information Law.

By way of background, in your capacity as a reporter for Newsday, you submitted a request to the Suffolk County Department of Social Services for "all documents, including but not exclusive to, correspondence, memos, inspection reports and financial statements relating to the HELP Suffolk Tier II shelter in Suffolk County". You wrote that "HELP Suffolk is owned by the not-for-profit organization, Housing Enterprise for the Less Privileged, and houses 76 Suffolk social services families under contract with the County."

In response to your request, the Department's records access officer sent you "a package that consisted only of documents and memos written prior to the shelter's opening in September, 1990", with the exception of a single letter in which the Commissioner of the Department expressed gratitude to a departing HELP Suffolk director; there was no description of records that were withheld or the basis for a denial of access. Based upon a telephone conversation with the Department's records access officer, you were informed "that all documents after the shelter's opening were inter-agency communications expressing 'opinion' and were therefore...exempted..."

In this regard, I offer the following comments.

First, assuming that the Department maintains records falling within the scope of your request that were not made available to you, I believe that the response to the request was inadequate, for it neither referred to a denial of access to records nor your right to appeal a denial. Section 89(3) of the Freedom of Information Law requires that a denial of a request be made in writing, and the regulations promulgated by the Committee on Open Government, 21 NYCRR 1401.2, state that an agency's records access officer is responsible for assuring that requested records are made available or for denying access to the records "in whole or in part and explain[ing] in writing the reasons therefor". Similarly, 21 NYCRR 1401.7 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."

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 (h) of the Law.

Insofar as the records sought consist of communications with HELP Suffolk, I do not believe that those records could be characterized as "inter-agency" communications. 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 of other governmental 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 agency is an entity of state or local government; a not-for-profit organization would not constitute an agency. Therefore, communications between the Department and HELP Suffolk would not be inter-agency materials, and the provision authorizing a denial of those kinds of materials, section 87(2)(g), would not in my view serve as a valid basis for denial.

The State University at Stony Brook, whose School of Social Welfare is involved in the matter, would in my opinion constitute an agency, and the communications between that entity and the Department would be inter-agency materials. However, the characterization of records as inter-agency materials, without more, is not determinative of rights of access. On the contrary, due to the structure of section 87(2)(g), the contents of those materials determine the extent to which they must be disclosed or may be withheld.

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.

Again, 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 subject 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) 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 lve 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)].

Similarly, the Court of Appeals has 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).

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, based upon the facts that you provided, the records in which you are interested transmitted between the County Department of Social Services and HELP Suffolk would appear to be accessible, for HELP Suffolk is not an "agency" and those records would not constitute inter-agency materials. Further, while communications between the Department and the State University at Stony Brook would consist of inter-agency materials, I believe that those documents must be reviewed to determine the extent to which they must be disclosed under subparagraphs (i) through (iv) of section 87(2)(g).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frances C. Dawson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7115

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 22, 1992

Mr. Antonio Duprey
91-A-8799
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. Duprey:

I have received your letter of April 6 in which you wrote that your request for records of the Rockland County District Attorney's Office and the ensuing appeal were not answered. You have sought assistance in the matter.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth Gribetz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 7116

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 23, 1992

Mr. David Barton
81-C-0516
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. Barton:

I have received your letter of April 8 in which you sought clarification concerning the difference between parole "records" and a "case file". You also asked whether you can request records contained in your parole file "without being scheduled for a parole board appearance".

In this regard, I offer the following comments.

First, I am unaware of whether there is a distinction between parole records and a case file. However, irrespective of that issue, I point out that the Freedom of Information Law is applicable to all agency records. Section 86(4) of that statute defines the term "record" broadly to include:

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

Based upon the foregoing, irrespective of their characterization, all of the documentation to which you referred would constitute "records" 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.

Lastly, while I believe that you may seek parole records at any time, there may be situations in which certain records may be disclosed because of the pendency of a hearing or due to considerations of due process. It is suggested that you review the regulations promulgated by the Division of Parole, which appear in 9 NYCRR section 8000 et seq. The regulations can be found in your facility library.

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-7117

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 23, 1992

Mr. Edward M. O'Brien
Harris, Evans, Fox & Chesworth
Attorneys at Law
400 East Avenue
Rochester, NY 14607

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

Dear Mr. O'Brien:

I have received your letter of April 10 and the materials attached to it.

Your correspondence pertains to requests for records directed to the Monroe County Records Access Officer dated February 24. The records sought, in your view, can be readily located and retrieved. Nevertheless, in a letter dated March 2 acknowledging the receipt of the requests, the records access officer indicated that the requests would be "granted or denied, in whole or in part, by approximately June 2, 1992." In view of the decision rendered in Lecker v. New York City Board of Education [157 AD 2d 486 (1990)], you have sought a recommendation "as to how the intent of the Freedom of Information Law can be preserved..."

In this regard, as you are aware §89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of the receipt of a request. 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 §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, the court in Lecker, supra, invalidated that portion of the regulations on the ground that the statute does not include a time limitation within which agencies must determine to grant or deny access to records following the acknowledgement that a request has been received. As such, I agree with your inference that 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 period referenced above, I believe that they must determine rights of access in a manner that is reasonable and consistent with the intent of the Freedom of Information Law. Further, the Committee has recommended legislation based upon those considerations. In A.9519, which includes a variety of proposals, the provisions dealing with the issue would provide that, following the acknowledgement of the receipt of a request, an agency:

> "shall grant or deny such request expeditiously and within a reasonable time in view of factual and legal issues relating to the request, the need for consultation relating to the protection of personal privacy, the volume of the records sought, the search techniques needed to locate the records and the time needed to review them and an estimate, if possible, of the fee to be assessed."

In my view, the standards described above, which have been offered to reflect reality and reasonableness, should be applied under the existing law as well. If, under certain circumstances, rights of access cannot be determined for three months, that may be a reasonable time in which to render such a determination. However, if indeed records can be readily located, a delay of three months, as is the case in the situation at hand, would in my opinion be unreasonable. In that circumstance, I believe that a request may be considered to have been constructively denied and may be appealed in accordance with §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 thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further

> denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of an appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and rules [Floyd v. McGuire, 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 his or 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 within 30 days to the agency head as provided in Public Officers Law §89(4)(a) and, therefore, may not bring this proceeding.
>
> "The petitioner alleges that Public Officers Law §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 §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).

I hope that I have 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 S. Kassnoff, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7118

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 24, 1992

Mr. Tony Vallo
87-A-1848
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

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

Dear Mr. Vallo:

I have received your letter of April 10 and the correspondence attached to it.

As I understand the materials, you requested various records pertaining to your arrest and conviction from the New York City Police Department and the Office of the District Attorney of New York County. The Police Department denied the request, and the Office of the District Attorney apparently failed to respond.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time in which agencies must respond to 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, to the extent that records are maintained by an agency, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unaware of 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 provisions that may be significant in determining rights of access to 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". That provision 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 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 the Department and communicated within the Department or another agency 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 one of the decisions cited the Police Department, Scott v. Chief Medical Examiner (577 NYS 2d 861, A.D. 1 Dept. 1992), it was found that DD5's consist of intra-agency material "which are not final agency policy or determinations" (id., 862) and, therefore, may be withheld, and that a "police officer's memobook...remains the private property of those officers", and may be withheld under §87(2)(b) and (g) of the Freedom of Information Law. With respect to the DD5's, I believe that the court's reading of §87(2)(g) might have been unduly narrow. While "final agency policy or determinations" represents one of the categories of information available under §87(2)(g), specifically subparagraph (iii), insofar as information falls within subparagraphs (i), (ii) or (iv) of §87(2)(g) and no other basis for denial can be asserted, I believe that information contained in inter-agency or intra-agency materials would also be available. Further, in a different decision rendered by the same court approximately two weeks after Scott, it was found that memobook entries were subject to the Freedom of Information Law and had to be disclosed [Laureano v. Grimes, 579 NYS 2d 351 (A.D. 1 Dept. 1992)].

Lastly, 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 o 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
Susan R. Rosenberg
Nina Keller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7119

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 24, 1992

Mr. Dayle Wheelock
89-C-1224 B-1-43
Collins Correctional Facility
Helmuth, NY 14079

Dear Mr. Wheelock:

I have received your letter of March 31, which reached this office on April 13. You have sought assistance in obtaining various court records.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

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

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts or court records. Further, although the Freedom of Information Law includes certain procedural guarantees, such as the right to an administrative appeal of an initial denial [see §89(4)(a)], those kinds of provisions are inapplicable with respect to court records.

The preceding commentary is not intended to suggest that court records are not subject or rights of access, for statutes other than the Freedom of Information Law may be pertinent and may confer rights of access to court records (see e.g., Judiciary Law, §255).

Based on the preceding analysis, since the Freedom of Information Law is inapplicable, the matter is outside the jurisdiction or expertise of this office. It is suggested that you discuss the matter with your attorney.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7120

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 24, 1992

Mr. Brian Cullen
[redacted]

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

Dear Mr. Cullen:

I have received your letter of April 10 in which you sought assistance relating to a request for records of the Tuxedo School District.

According to your letter, you requested:

> "(1) 1986 → present - superintendent's salary and conferences & travel
>
> (2) person who received commission on 2.8 million dollar bond known as capital improvement program
>
> (3) rules & protocol for entry onto Board of Education
>
> (4) petitions of nominees with signatures."

In this regard, 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 §87(2)(a) through (i) of the Law. Unless otherwise indicated, I believe that the records in question must be disclosed.

Although the Freedom of Information Law generally does not require that agencies maintain or prepare records [see §89(3)], an exception involves payroll information. Specifically, §87(3) of the Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

While §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", 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].

Based upon the foregoing, it is clear in my view that records reflective of salaries of public employees must be prepared and made available. Similarly, records reflective of participation in work-related activities, such as attendance at conferences, as well as payments or reimbursements for expenses to public employees, would be available, for those records in my view would be relevant to the performance of one's official duties. Insofar as vouchers or related records include public employees' social security numbers or home addresses, for example, I believe that those items could be deleted from records based upon considerations of personal privacy, for they are largely irrelevant to the performance of one's duties.

With regard to payments involving purchases, commissions, services and the like, as a general matter, 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.

By "rules and protocol for entry onto Board of Education", it appears that you are seeking information concerning the procedures by which persons may seek to run for election to the Board of Education. If my assumption is accurate, I believe that the information in question would be found in statutes contained in the Education Law, particularly Article 41. Those provisions could likely be reviewed at a library. If the District has adopted its own policies or procedures on the subject, those records in my opinion would be available under §87(2)(g)(iii) of the Freedom of Information Law. That provision requires the disclosure of agency policies.

Finally, I believe that nominating petitions must be disclosed, because no basis for denial could appropriately be asserted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7121

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 24, 1992

Mr. Michael S. Kessler
89-C-1065
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. Kessler:

I have received your letter of April 9 in which you sought assistance relating to requests made under the Freedom of Information Law.

According to your correspondence, you requested various records in February and March from the City of Utica Chief of Police. As of the date of your letter to this office, you had received no response to the requests.

In this regard, I offer the following comments.

First, a request 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. If the Chief of Police is not the records access officer, I believe that he should have forwarded your request to the appropriate person for response.

Second, the Freedom of Information Law provides direction concerning the time 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)].

Third, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, which appear to relate to your arrest, or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the provisions that may be significant in determining rights of access to 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". That provision 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 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 and communicated within the department or to another agency 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 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 o 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: Chief of Police
Records Access Officer, City of Utica

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7122

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 24, 1992

Mr. William Grzyb
[redacted]

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

Dear Mr. Grzyb:

I have received your letter of April 13 and the materials attached to it. You have requested an advisory opinion concerning the propriety of a response by the Department of Transportation to a request made under the Freedom of Information Law.

By way of background, in August of 1991, you submitted a request to the Department's records access officer in which you sought the Department's final determinations of requests by employees to engage in political activities. The requests and determinations are made on a "Form PER-79", entitled "Notice of Extra Employment or Activity". Although the forms were made available, deleted from them were the employees' names and signatures, counties of residency, their regions and regional groups of bureaus, the municipalities in which they sought to engage in their activities, the names of their supervisors, and the names of the regional directors or assistant commissioners who finally approved or disapproved their requests. You appealed, and the appeal was largely affirmed on the ground that disclosure of items that could identify the employees would constitute "an unwarranted invasion of personal privacy".

Having reviewed the forms that you enclosed, with few exceptions, the employees sought to run for or continue serving in elective offices; the positions sought that do not appear to have been elective offices involve positions as municipal assessors, as a member of a traffic board, and as a commissioner of public works. Only one of the requests appears to have been disapproved.

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 only basis for denial of apparent relevance would involve the provisions cited by the Department concerning unwarranted invasions of personal privacy. In consideration of issues of privacy, I believe that several factors may be relevant in determining public rights of access.

One issue, in my view, would deal with whether a person seeking permission to engage in political activity is, at the time an application is made, merely considering the possibility of running for elective office or the possibility of being appointed to a municipal office or board. In those circumstances, where a person's name has not been submitted and filed for public inspection with a board of elections or municipal clerk, I would agree that disclosure would constitute an unwarranted invasion of personal privacy. Further, if a person is being considerd for appointment, that person's identity might not be publicly known, he or she might withdraw from consideration for appointment, or an entity may appoint a different person to a position. In those circumstances, I would agree with a determination that disclosure would constitute an unwarranted invasion of personal privacy.

However, if an individual holds public office, has submitted his or her name on a petition to run for public office, or has been nominated to run for public office, that person's identity is or can become known to the public by means of a variety of sources, such as boards of elections and municipal clerks' offices. In those circumstances, very simply, I do not believe that there is anything secret about their identities or the nature of their political activities; in fact, those persons would have taken affirmative steps to make their identities known to the public. Insofar as the records in question pertain to that class of employees, disclosure in my opinion would not constitute an unwarranted invasion of personal privacy, and their identities should have been disclosed.

Similarly, if approval to engage in political activity is given to a person who considers or is being considered for appointment to a municipal office or board, and that person is later appointed, I believe that his or her identity would be public at the time of appointment. In a manner analogous to the commentary offered in the preceding paragraph, once a person is appointed to serve as a municipal officer or on a municipal board, that person's participation is a matter of public record. Consequently, in such cases, disclosure in my view would constitute

a permissible rather than an unwarranted invasion of personal privacy.

If an employee's request to engage in political activity is disapproved, I would agree that records indicating that person's identity could be withheld as an unwarranted invasion of personal privacy.

Lastly, even if it would be assumed that the employees' names could properly be withheld, it is difficult to understand how disclosure of their regions, counties of residency, or names of regional directors or assistant commissioners could be used to identify the employees. The ability to identify a particular employee on the basis of those items would appear to be remote. If that is so, there would likely be no circumstances under which those items could properly have been deleted from the forms used by the Department.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas A. Boehm
James P. DelPrincipe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7123

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 27, 1992

Mr. Harry S. Gross
[redacted]

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

Dear Mr. Gross:

I have received your letter of April 13 in which you sought assistance relating to a request directed to the New York City Board of Education under the Freedom of Information Law.

According to your correspondence, your initial request was made on March 24. However, as of the date of your letter to this office you had received no response.

In this regard, the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my

opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

You also asked that I advise with respect to rights regarding the information sought. In my view, there are several issues of potential relevance.

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 a record in response to a request. Similarly, although the Freedom of Information Law requires that agencies respond to requests for records, it does not require that agency officials answer questions or prepare new records in response to requests for information. In the context of your request, there may be instances in which records do not exist or do not contain the information sought.

Second, section 89(3) also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 requests, I must admit to being unfamiliar with the Board's record-keeping systems; whether the Board has the ability to locate and identify all of the records sought in the manner in which you requested them is unknown to me. It is possible, however, that based upon its filing or indexing mechanisms, certain aspects of your request might not have reasonably described the records.

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

As I understand your request, the records sought in items 1 through 15 of your request would fall within the scope of section 87(2)(g). That provision states that an agency may withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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.

The remaining items requested involve complaints filed with the Office of the Inspector General concerning possible misconduct on the part of certain public employees. In my view, relevant is section 87(2)(g), which was discussed previously, as well as section 87(2)(b), which permits agencies to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, 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); 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); 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].

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.

As suggested earlier, records prepared in conjunction with an investigation would in my view constitute intra-agency materials. 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.

I hope that I have 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, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7124

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 28, 1992

Mr. John Anthony
[redacted]

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

Dear Mr. Anthony:

I have received your letter of April 11 and the correspondence attached to it.

By way of background, in a request dated March 30 addressed to the Records Access Officer for the Town of Bedford, you sought records concerning the removal of a tree at a particular location in the Town. As of the date of your letter to this office, it appears that you received no response to the 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)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this letter will be forwarded to the records access officer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Town of Bedford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1125

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 28, 1992

Mr. Mark Threat
80-B-1062
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

Dear Mr. Threat:

I have received your letter of April 23 in which you appealed a denial of a request for records of the Division of Parole 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 can neither determine appeals nor enforce the Freedom of Information Law.

The provisions concerning the right to appeal are found in section 89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

As such, although agencies in receipt of appeals must forward copies of appeals and determinations of appeals to the Committee, an appeal should be made to the head of the agency or a person designated to determine appeals by the head 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- 7126

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 28, 1992

Mr. William Ciraco
[redacted]

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

Dear Mr. Ciraco:

I have received your letter of April 17 in which you requested an advisory opinion.

According to your letter at the annual meeting of the boards of education within BOCES 1, the election of a BOCES board member was carried out by means of a secret ballot. It is your view that "members of any board of education, as public officials, elected by the people are subject to the laws concerning open government each time they meet." You have questioned the propriety of electing a member of the BOCES board by secret ballot.

In this regard, I offer the following comments.

First, the provisions concerning the election of members to BOCES boards is found in section 1950(2) of the Education Law, which states in part that: "Members of boards of education and school trustees, by a majority of those present and voting, shall elect the members of such board of cooperative education services".

Second, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although the Freedom of Information Law generally pertains to existing records and ordinarily does not require that a record be created or prepared [see Freedom of Information Law, section 89(3)], an exception to that rule involves voting by agency members. 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 members of an "agency", which is defined to include a state or municipal board [see section 86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Further, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "[t]he use of a secret ballot for voting purposes was improper", and that the Freedom of Information Law requires "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987), aff'd 72 NY 2d 1034 (1988)].

In this instance, it appears that each person voting would have been a member of a board of education, an "agency". As such, in my view, to comply with the Freedom of Information Law, I believe that a record must be prepared or maintained indicating how each member cast his or her vote. From my perspective, disclosure of the record of votes represents the only means under the circumstances by which the public could know how their elected representatives asserted their authority.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marie Pratz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7127

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 29, 1992

Mr. Hans Luebbert
[redacted]

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

Dear Mr. Luebbert:

I have received your letter of April 16 concerning an appeal made under the Freedom of Information Law following a denial of a request by the records access officer for the Town of Newburgh.

According to your letter, the Town Clerk was unaware of "any designation by the Town Board to the Supervisor having been delegated the responsibility of acting as the Town's FOIL Appeals Officer". As such, it is your view that the appeal should have been considered by the Town Board. You have asked that I "rule" on the matter.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to "rule" or render a binding determination. Nevertheless, I offer the following comments.

First, the provisions concerning the right to appeal are found in section 89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

> appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Second, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate rules and regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, section 87(1) requires the "governing body of each public corporation", i.e., a town board, to adopt rules and regulations consistent with the Law and the regulations promulgated by the Committee.

Third, section 1401.7(a) of the regulations states that:

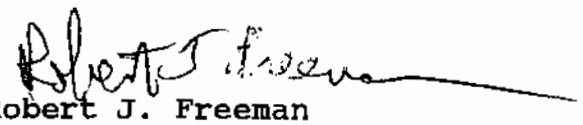
> "The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law."

Based upon the foregoing, I believe that the Town Board as the governing body of a public corporation, the Town of Newburgh, is required to determine appeals, unless the Board has designated a person or other body to render such determinations.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Supervisor and the Town Board.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Robert A. Kunkel, Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7128

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 29, 1992

Mr. Isaiah E. Rodriquez
85-A-2256 B-N-257
P.O. Box AG
Fallsburg, NY 12733

Dear Mr. Rodriquez:

Your recent letter addressed to the Superintendent of the Sullivan Correctional Facility and to Secretary of State Shaffer has been forwarded to the Committee on Open Government by the Secretary. The Committee, a unit of the Department of State upon which the Secretary serves, is authorized to advise with respect to the Freedom of Information Law.

You wrote that you have encountered a series of delays with respect 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)].

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 - 7129

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 29, 1992

Ms. April M. Vecchiarella
City Clerk
City of Salamanca
225 Wildwood Avenue
Salamanca, NY 14779

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

Dear Ms. Vecchiarella:

I have received your letter of April 15 and the materials attached to it.

According to your letter, on February 12, the Common Council of the City of Salamanca adopted a resolution authorizing an investigation of "past procedures of the Salamanca Indian Lease Authority". Consequently, a report was prepared for the City by a CPA firm, Lloyd and Company. The report which is "not considered to be an audit by the Mayor and Council", was delivered to the Mayor on March 20. You wrote that the Mayor "gave one copy of the report to the City Comptroller (informing her that it is confidential)" and had copies delivered to council members by the Police Department. Nevertheless, you added that the "City Comptroller immediately filed her copy with [you] as City Clerk and also made copies for the local news media as she felt the report was public information under the FOIL." In turn, you distributed copies to the news media with agendas for an upcoming Council meeting. You indicated that "Council members were very upset that the report had been released and said that it was "a confidential report until reviewed and released by them and further stated that they had not had time to review the report as they were entitled to do before release."

In conjunction with the foregoing, you raised the following questions:

> "1. Would you consider this report public information under FOIL?
>
> 2. Did I, as City Clerk/Information Officer for the City has a right to release this report?
>
> 3. Was the City Comptroller within her rights in filing the report with me and also commenting on the report?
>
> 4. Does the FOIL contain any provision for a report of this type to be kept confidential until reviewed."

While I cannot comment concerning the right of the Comptroller to file the report with you and to discuss its contents, I offer the following remarks as the issues relate to the Freedom of Information Law.

First, the Freedom of Information Law pertains to agency records, and section 86(4) of the Law defines the term "record" expansively to include:

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

Due to the breadth of the language quoted above, I believe that the report constituted a "record" subject to rights conferred by the Law as soon as it came into the possession of the City, i.e., when it was delivered to the Mayor.

Second, in my view, an assertion or 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 exempted from disclosure by statute.

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. Having reviewed the materials attached to your letter, I do not believe that any of the grounds for denial could appropriately have been asserted to withhold the report.

While I can understand that Council members might have wanted to read the report and become familiar with its contents prior to disclosure, again, from my perspective, there would have been no basis for withholding the report. Further, the contents of the report would remain the same irrespective of when or whether members of the Council received and reviewed it.

Lastly, as "information officer" for the City, it appears that you have been given the authority to make determinations to grant or deny access to records sought under the Freedom of Information Law. While the Law does not require that responses to requests or disclosure of records be accomplished instantly, there is nothing in the Freedom of Information Law that precludes the designated records access officer from quickly disclosing public 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-7130

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 29, 1992

Ms. Elizabeth 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 April 17 in which you sought my comments concerning the implementation of the Freedom of Information Law by the Town of Rotterdam.

In a memorandum transmitted by the Town Supervisor to Departments, new policy and procedures concerning the Freedom of Information Law were described. Relevant to your inquiry are two sections of the policy statement. Specifically, sections 1 and 10 state that:

> "1. There are (2) two record access officers - The Town Supervisor and the Town Clerk. Individuals seeking access to public records must obtain an application from either of the two access officers.
>
> "10. All requests for access to records by any member of the press or media must be directed to the Town Supervisor. The Town Supervisor, as access officer, will directly handle all requests for access to records by the press or media."

You asked whether the requirement that members of the news media seek records from the Supervisor represents a situation similar to that involving a recent controversy that arose in the Town of Clifton Park. You added that the Supervisor works part time and

asked whether the news media "have to access records only when the Supervisor is there and at his convenience."

In this regard, I offer the following comments.

First, I do not believe that an agency can require that a request be made on a prescribed form. 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 requests" [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 possesses 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 is unnecessarily serves to delay a response to or deny a request for records.

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 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 board of a public corporation, the Town of Rotterdam, is the Town Board, 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.

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."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, section 1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests.

Third, I do not believe that the policy could be equated with the situation that arose in Clifton Park, which, as you are likely aware, has been resolved. There, Town employees were barred from discussing Town business with reporters. However, the designation of the Supervisor as records access officer, based upon the terms of the policy, may in my view, be inappropriate. Section 1401.4(a) of the regulations referenced earlier states that "Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business." It is assumed that the Town and those employed at Town Hall have regular business hours. If the Supervisor is not present during those hours, but has the duty to "directly handle all requests" by members of the news media, it appears that the news media may be limited to making requests or acquiring records to those times when the Supervisor is present. If that is so, the policy would in my opinion be inconsistent with the regulations and the intent of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James A. Constantino, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7131

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 29, 1992

Ms. Pat Horwell
Editor
Lynbrook USA Newspaper
P.O. Box 116
Lynbrook, NY 11563

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

Dear Ms. Horwell:

I have received your letter of April 23 in which you requested an advisory opinion concerning access to certain records of the Village of Lynbrook.

By way of background, you wrote that the Village has been involved in protracted litigation and that "[p]eople in the community have been questioning the amount of money which the village has already spent in legal fees the first time around and many are asking how much is being spent now". You added that the Mayor has been advised by the Village Attorney that disclosure would be "strategically unsound" and that the records in question need not be disclosed under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial could appropriately be asserted in conjunction with a claim that disclosure would be "strategically unsound".

Second, with regard to expenses incurred, as a general matter, 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 specific 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 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 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 liable 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 CPR 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. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)

"There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys 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: Mayor, Village of Lynbrook

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7132

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 30, 1992

Mr. James E. Dering
Gleason, Dunn, Walsh & O'Shea
11 North Pearl Street
Albany, NY 12207

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

Dear Mr. Dering:

As you are aware, I have received your letter of April 15 and the correspondence attached to it.

You wrote that you represent the Mohawk Ambulance Service, of which James T. McParlton is Vice President, and that you and Mr. McParlton have submitted requests to the City of Schenectady under the Freedom of Information Law. Although some of the records sought have been disclosed, it appears that the City has not yet rendered a determination to grant or deny access to the remainder of the records falling within the scope of your requests and a subsequent appeal. You have sought 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 and appeal. 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 stated that:

> "The respondent contends that petitioner failed to appeal the denial of access to records within 30 days to the agency head as provided in Public Officers Law §89(4)(a) and, therefore, may not bring this proceeding.
>
> "The petitioner alleges that Public Officers Law §89(4)(a) is not applicable as petitioner's FOIL request 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 §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: L. John Van Norden, Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7133

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 30, 1992

Mr. William Randall
89-A-4526
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Randall:

I have received your letter of April 17 in which you sought assistance concerning a request made under the Freedom of Information Law.

According to your letter, you were recently informed by the New York City Teachers' Retirement System that your mother, a retired New York City teacher, had passed away. Soon thereafter, you submitted a request for your mother's social security number, correspondence the Retirement System received concerning your mother's death, and any correspondence it had received six months prior to her death. The request was denied on the basis of "sections 87 and 89" of the Freedom of Information Law, and you were not informed of the "appeal process".

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.

By citing sections 87 and 89 it appears that the agency based its denial on section 87(2)(b), which authorizes agencies to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy", and section 89(2)(b),

which provides examples of unwarranted invasions of personal privacy. I am unfamiliar with the contents of the records that may exist that fall within the scope of your request. It is possible that such records could be withheld from the public generally based upon considerations of privacy. However, if you could establish that you are the next of kin or provide proof of your relationship with the deceased, disclosure might be viewed as permissible rather than an unwarranted invasion of personal privacy.

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

Further, 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, to inform 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, New York City
Teachers' Retirement Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2073
FOIL-AO- 7134

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 30, 1992

Mr. J. Paul Kolodziej
Attorney & Counsellor at Law
19 West Fulton 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, unless otherwise indicated.

Dear Mr. Kolodziej:

I have received your letter of April 22 and the materials attached to it. You asked that I consider the letter an appeal relating to an alleged denial of access by the City of Gloversville.

By way of background, you made a request on April 6 to the City's records access officer for minutes of meetings of the Common Council held on March 23 and the Planning and Economic Development Committee held on March 18. Expansive minutes of a Common Council meeting of March 24 were made available on April 8. Although you referred in your request to a meeting held on March 23, it appears that minutes made available are those in which you are interested. With respect to the Committee meeting of March 18, you were furnished with brief minutes that were based on a Councilman's report to the Common Council on March 24. It appears that those minutes are the subject of your appeal, for you enclosed an appeal directed to the records access officer dated April 9 in which you referred to "a complete copy of the minutes" of the March 18 meeting.

In this regard, I offer the following comments.

First, since you characterized your letter to this office as an "appeal", 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 render determinations following appeals or enforce the Freedom of Information Law. The provisions concerning the right to appeal a denial of access are found in §89(4)(a) of the Freedom of Information Law.

Second, in order to obtain a clarification of the matter, I contacted Marie Keator, who serves as City Clerk and Records Access Officer. Based upon my conversation with her, the response to the request was proper, for there was no denial.

It is noted that provisions concerning the contents of minutes are found in §106 of the Open Meetings Law. Those provisions, in my view, prescribe minimum requirements concerning the contents of minutes. Specifically, §106 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.
>
> 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 account of what is said at a meeting. Further, in a technical sense, if no motions or proposals are made, and if there are no resolutions or actions taken during meetings, minutes need not be prepared.

Ms. Keator explained that the meeting of March 18 involved an "informal question and answer" session, and that none of the activities required to be recorded under §106 occurred. As such, I do not believe there would have been an obligation to prepare minutes. Nevertheless, Ms. Keator indicated a willingness to type notes concerning the meeting.

In sum, based upon my understanding of the matter, there was neither a denial of access to a record nor an obligation to prepare expansive minutes of the meeting in question.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marie Keator, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2135

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 30, 1992

Mr. Dennis J. Duffy
[redacted]

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

Dear Mr. Duffy:

I have received your letter of April 20 and the materials attached to it.

According to the correspondence, in a request dated March 15 addressed to the President of the Board of Education of the Lynbrook Union Free School District, you asked that a copy of the District's "Special Education Policy" be sent to you. Section 202(b) of the regulations promulgated by the Commissioner of Education requires that each board of education must adopt a written policy on the subject. In a response to your request by the Superintendent, you were asked to make an appointment with the District's records access officer to obtain the document. You have asked whether the District may require you to make an appointment to obtain records and questioned the propriety of the Superintendent's response.

In this regard, nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) specifically deals with requests made and responses given by mail. However, due to the size of the state, the inability of some people to physically travel to locations where records are kept, the reality that many people work and cannot travel to those locations, and in view of the intent of the Law, I believe that is implicit that agencies must respond to requests by mail. However, in addition to the fee for photocopying, an agency could in my view also charge for the cost of postage.

In sum, I do not believe that the District could require you to make an appointment to obtain records. Further, assuming that you remit the appropriate fee for copies, plus postage if the District chooses to include such charge, the District in my opinion would be required to send the documentation sought 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: William Metkiff, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7136

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 30, 1992

Mr. David Wong
84-A-5320
135 State Street
P.O. Box 618
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. Wong:

I have received your letter of April 19 and the correspondence attached to it.

The correspondence consists of a request made in 1988 to the Division of Parole for recommendations submitted by an office of a district attorney to the Parole Board in relation to parole release, as well as a denial of the request on the basis of section 87(2)(g) of the Freedom of Information Law. You asked whether you now have the right to obtain the records in question.

In this regard, I offer the following comments.

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

Second, as indicated in the denial, section 87(2)(g) of the Freedom of Information Law is relevant to a determination of rights of access to the records in question. 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 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. In my opinion, recommendations transmitted from one agency to another could appropriately be withheld.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2074
FOIL-AO-7137

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 30, 1992

Mr. Myron H. Blumenfeld
[redacted]

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

Dear Mr. Blumenfeld:

I have received your letter of April 20. In your capacity as Chairman of the Town of North Hempstead's Ecological Commission, which was created pursuant to §239-x of the General Municipal Law, you asked whether the Commission is subject to the Freedom of Information Law and the Open Meetings Law. Section 239-x pertains to the creation and functions of "conservation advisory councils".

In my view, the entity in question is subject to both statutes.

The Freedom of Information Law is applicable to agency records, and §86(4) 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 of other governmental 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 entity is a "municipal...commission" or council that carries out its statutory duties pursuant to §239-x of the General Municipal Law. Further, I believe that records produced or maintained by the Commission would fall within the scope of the

Freedom of Information Law, for §86(4) of the Law defines "record" expansively to include:

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

Based upon the definitions of "agency" and "record", I believe that the Freedom of Information Law would apply to the Commission and its records.

The Open Meetings Law is applicable to meetings of public bodies, and §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."

It is noted that recent decisions indicate generally that ad hoc 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)]. However, because the Commission was created through specific statutory authority conferred upon the Town, and because the Commission performs what appear to be governmental functions for the Town, I believe that the Commission constitutes a public body required to conduct its meetings in accordance with the Open Meetings Law. In referring to the tasks of a conservation advisory council, subdivision (1) of §239-x of the General Municipal Law states in part that:

> "(c) It may advertise, prepare, print and distribute books, maps, charts, plans and pamphlets which in its judgment it deems necessary for its work;
>
> (d) It shall keep an inventory and map as defined in section two hundred thirty-nine-y of this article, of all open areas within the municipality with the plan of obtaining information pertinent to proper utilization of such open lands including lands owned by the state, any other municipality within the state or by the particular municipality itself;
>
> (e) It shall keep an inventory and map of all open marsh lands, swamps and all other wet lands in a like manner, and may recommend to the governing body of the municipality a program for ecologically suitable utilization of all such areas;
>
> (f) It shall keep accurate records of its meeting and actions and shall file an annual report with the local legislative body of the municipality on or before the thirty-first day of December of each and every year. Once approved, such legislative body shall forward a copy of this report to the state commissioner of environmental conservation."

Further, under subdivision (2), a council is authorized to accept gifts, grants, money or property "in the name of the municipality." Subdivision (4) permits a local legislative body (i.e., a town board), to remove members of a council only "for cause, after a hearing", and to compensate council members.

In my opinion, in view of the foregoing, the Council performs a governmental function for a public corporation, the Town of North Hempstead, and constitutes a "public body" subject to the requirements 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-2138

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 1, 1992

Mr. Brian Cullen
[redacted]

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

Dear Mr. Cullen:

I have received your letter concerning "procrastination" on the part of the Tuxedo School District with respect to your 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Tuxedo School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2139

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 1, 1992

Mr. John Anthony
[redacted]

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

Dear Mr. Anthony:

I have received your letter of April 20 in which you sought advice concerning the Freedom of Information Law.

According to the materials, you requested from the Town of Bedford records relating to complaints made against taxi operators, minutes of meetings during which issues relating to the complaints were discussed, and by-laws governing issuance of permits to taxi operators. The "records management officer" for the Town denied your request on the ground that "this matter is presently in litigation in the United States District Court, and the requested records are not available at this time". Further, you pointed out that you were not informed of the right to appeal the denial and asked that I explain what a "records management officer" is.

In this regard, I offer the following comments.

First, unless records are prepared solely for litigation, in which case they could in my view be withheld [see Civil Practice Law and Rules, §3101(d) and Freedom of Information Law, §87(2)(a)], the fact that the records sought pertain to litigation is, in my view, irrelevant. As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and

Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

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

With respect to complaints, §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." When a complaint is made to an agency by a member of the public, it has generally been advised that the substance of the complaint is available, but that those portions which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §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 identify of the person who make the complaint is often irrelevant to the work of the agency.

Similarly, there may be portions of taxi operators' applications or permits that could be withheld due to considerations of privacy, i.e., social security numbers, dates of birth, home addresses, etc.

Minutes of open meetings would in my view be clearly available, for no ground for denial would apply. I believe that by-laws and rules adopted by the Town would also be available [see Freedom of Information Law, §87(2)(g)(iii).

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 of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further

> denial, or provide access to the record sought."

Further, 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, to inform 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.

Lastly, the phrase "records access officer" appears in the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) and refers to the person designated to coordinate responses to requests made under the Freedom of Information Law.

"Records management officer" is a phrase used in §57.19 of the Arts and Cultural Affairs Law. That person is responsible for the development and oversight of a program involving the "orderly and efficient management of records". In towns, the town clerk is the records management officer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Mary F. Hart

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2140

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 1, 1992

Mr. Daniel Lynch
82-A-6183
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. Lynch:

I have received your letter of April 19 in which you sought assistance concerning a request under the Freedom of Information Law.

According to the materials attached to your letter, on March 3 you directed a request to the records access officer at your facility to review the "I.C.A.S. Manual Procedures Handbook". The receipt of your request was acknowledged on March 6. However, as of the date of your letter to this office, it appears that you received no further response. It also appears that you are interested in reviewing portions of the manual involving "advancement of funds for legal mail".

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 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. I am unfamiliar with the contents of the manual in which you are interested. However, 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 scrupulous 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 manual might be deniable, others must in my opinion be disclosed 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
Executive Director

RJF:jm

cc: Kevin Hunt, Records Access Officer
Anthony Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2141

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 1, 1992

Mr. Julio Perez
88-T-1417
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. Perez:

I have received your letter of April 20 in which you sought advice concerning the Freedom of Information Law.

According to your letter and the correspondence attached to it, on March 16 you made a request to the Department of Correctional Services for records relating to "the approval and denial procedures governing the temporary release C.A.S.A.T. program". The receipt of your request was acknowledged on March 25 by Mark E. Shepard, who wrote that he is attempting to determine "what, if any, information is available concerning your request", and that he anticipated forwarding a response to you by April 17. You wrote that the "date anticipated came and went to no avail."

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
Executive Director

RJF:jm

cc: Mark Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2142

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 1, 1992

Mr. William B. O'Reilly
[redacted]

The staff of the Committee on Open 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'Reilly:

I have received your letter of April 20 in which you indicated that you are having difficulty obtaining medical records from your 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 grounds for denial appearing in §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 personnel could be characterized as "intra-agency materials" that fall within the scope of §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, §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. As such, it is suggested that a request for medical records cite that provision as the basis for the request.

To obtain additional information concerning access to medical records, you may write to:

Access to Patient Information Coordinator
New York State Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

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-2143

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 1, 1992

Mr. Alan M. Wolinsky
Wolinsky & Parnell
329 Hawkins Avenue
Lake Ronkonkoma, NY 11779

Dear Mr. Wolinsky:

I have received your letter of April 18 in which you suggested that an advisory opinion I prepared on March 27 at the request of Gerald Dasch and Gregory Quigley is inconsistent with advice given to you by phone.

The issue involved the number of persons who may "simultaneously review documents" maintained by the fire district that you represent. You wrote that, during our conversation, I suggested that your client use "common sense" in determining the number of those who may participate in reviewing records. Messrs. Dasch and Quigley referred to a "directive" stating that they, individually, "will not be permitted to have anyone assist [either] in reviewing" records.

In my view, there is no conflict regarding the advice given, and I believe that common sense and reasonableness serve as appropriate guides. I agree with your suggestion that five people reviewing records simultaneously could preclude the District from ensuring the integrity of its records, and that it would be reasonable to preclude a significant number of people from viewing records together. However, a directive that limits review to one person at a time in all circumstances would, in my opinion, be unreasonable. A person who inspects records might want to bring an attorney or accountant with him or her in order to obtain an expert's point of view; a person not fluent in English might need an interpreter to understand the contents of records.

In short, I continue to believe that common sense and reasonableness should be standards used to resolve the issue. My remarks to Messrs. Dasch and Quigley were intended to suggest that a policy of permitting review by one person alone may not be reasonable in all circumstances.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7144

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 4, 1992

Mr. Nasir Abdullah
79-A-3079
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, Ny 12589-0700

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

Dear Mr. Abdullah:

I have received your letter of April 23 in which you sought advice concerning the means by which you may obtain a copy of your pre-sentence report.

In this regard, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances, is §390.50 of the Criminal Procedure Law, 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 §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 §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

FOIL-AO-7145

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 4, 1992

Mr. Donald P. Michne
[redacted]

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

Dear Mr. Michne:

I have received your letter of April 22 in which you requested an advisory opinion.

You have raised the following questions:

> "Where members of component school districts' of a Board of Cooperative Educational Services (BOCES) convene pursuant to Education Law §1950(2) to elect members of such BOCES (by a majority vote of those present and voting), must each voting board member of the component district declare orally or in writing the person for whom such member voted as his/her choice for the BOCES Board? Must a record be made of each persons vote at such meeting including which candidate he/she selected?"

In addition, you sought my opinion concerning "the extent to which OML and FOIL would require that election results be made void if an Education Law §1950(2) election were held by secret ballot in violation of the OML and FOIL".

In this regard, I offer the following comments.

First, as you are aware, the provisions concerning the election of members to BOCES boards is found in §1950(2) of the Education Law, which states in part that: "Members of boards of education and school trustees, by a majority of those present and voting, shall elect the members of such board of cooperative education services".

Second, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although the Freedom of Information Law generally pertains to existing records and ordinarily does not require that a record be created or prepared [see Freedom of Information Law, §89(3)], an exception to that rule involves voting by agency members. Specifically, §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 members of an "agency", which is defined to include a state or municipal board [see §86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Further, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "[t]he use of a secret ballot for voting purposes was improper", and that the Freedom of Information Law requires "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987), aff'd 72 NY 2d 1034 (1988)].

In this instance, it appears that each person voting would have been a member of a board of education, an "agency". As such, in my view, to comply with the Freedom of Information Law, I believe that a record must be prepared or maintained indicating how each member cast his or her vote. From my perspective, disclosure of the record of votes represents the only means under the circumstances by which the public could know how their elected representatives asserted their authority.

Lastly, I believe that the action taken under §1950(2) of the Education Law remains valid unless and until a court renders a determination to the contrary. Presumably, a proceeding could be commenced under Article 78 of the Civil Practice Law and Rules to seek to compel those who voted to prepare the record or records required to be maintained pursuant to §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-1146

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 4, 1992

Mr. Gary Butler
88-A-1194
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. Butler:

I have received your letter of April 21 in which you sought advice concerning the Freedom of Information Law.

According to your letter, on several occasions since July of last year, you made requests to the Westchester County Jail and the County Medical Center, but the requests have been "ignored". You requested your "visiting list", and records indicating the names of the psychiatrist responsible for providing treatment in a particular unit and the superintendent at the County Jail.

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 the agency's response to requests for 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 Westchester County is the County Attorney, Marilyn J. Slaatten.

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 a visitation list identifying those who visited you exists and can be located, I believe that it would be available. Although such a list in my view could be withheld from the public on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)], you could not invade your own privacy and, therefore, such a list should be available to you.

The other items that you requested would in my view be available, for none of the grounds for denial would appear to be applicable.

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-1147

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 4, 1992

Mr. Derrick Corley
90-T-1984
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. Corley:

I have received your letter of April 22 in which you sought advice concerning the Freedom of Information Law.

According to your letter, you were recently the subject of a "tier III" hearing at your facility. You wrote that other inmates had separate hearings, and that you would like to obtain tape recordings of those hearings.

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 I am unaware of the content of the tape recordings in question, it appears that section 87(2)(b) of the Freedom of Information Law would serve as a basis for denial of access. That provision permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy".

Since you referred to the possibility of obtaining a "signed release from the inmates involved saying that [you] can purchase a copy of their tape", I point out that section 89(2)(c)(ii) of the

Freedom of Information Law states that disclosure shall not be construed to constitute an unwarranted invasion of personal privacy "when the person to whom a record pertains consents in writing to disclosure". Therefore, if the only basis for withholding the tape recordings involves the protection of privacy, a "signed release" by the subject of the hearing authorizing you to listen to or obtain the tape might enable you to gain access to the tapes. However, even with a release from the subject of a hearing, there may be privacy considerations pertaining to others who were named or who testified during a hearing. Further, there may be issues involving institutional safety and the application of section 87(2)(f) of the Freedom of Information Law. That provision enables an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person".

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7148

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 4, 1992

Mr. Peter M. Reynolds
Concerned Taxpayers for Tax Reform
P.O. Box 479
Galway, NY 12074

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

Dear Mr. Reynolds:

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

You have sought advice with respect to your request for a list of the names and salaries of officers and employees of the Galway Central School District. Although you were furnished with certain records, some of the information is "partially illegible" and "incomplete".

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 records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". However, payroll information has been found by the courts to be available under the Freedom of Information Law, and prior to the enactment of that statute [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765 (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, 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 2d 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2078
FOIL-AO-2149

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 4, 1992

Mr. Steve Laws
[redacted]

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

Dear Mr. Laws:

I have received your letter of April 23, as well as the materials attached to it. You have sought assistance in obtaining information from the Town of Salina.

In this regard, having reviewed your correspondence and for purposes of clarification, I offer the following comments.

First, with respect to your written request for "information", I point out that the title of the "Freedom of Information Law" may be somewhat misleading. The Freedom of Information Law is a vehicle under which the public may request existing records; it is not a vehicle that requires agencies to answer questions. Certainly agency officials may provide information by answering questions; however, the Law does not require that records be prepared in order to provide responses to questions. Section 89(3) of the Freedom of Information Law states that, as a general rule, an agency need not create or prepare records in response to requests.

In your letter of March 10, in five of the six items, you sought information, i.e., answers to questions. Only in the last item did you request a record, minutes of a meeting. Again, insofar as the information requested does not exist in the form of a record or records, the Freedom of Information Law in my view would be inapplicable.

Second, with respect to public participation at meetings, 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, §100). However, the Open Meetings Law is silent with respect to the issue of public participation. Consequently, if a public body does not want the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to permit public participation. If a public body does permit the public to speak, I believe that it may do so based upon reasonable rules that treat members of the public equally.

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 meeting, the Appellate Division found that such a rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information and Open Meetings Laws.

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-2150

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 5, 1992

Mr. Randy Mahone
90-T-3134
Green Haven Correctional Facility
Route 216
Stormville, NY 12582

Dear Mr. Mahone:

I have received your letter of April 25.

You wrote that you are in the process of appealing a conviction and that your attorney informed you that, in order for you to appeal, you must obtain copies of transcripts in the proceedings that led to your conviction. However, you indicated that you are indigent and cannot afford to pay the fees for copying. You asked whether there is a method by which you can obtain the transcripts at no cost.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

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

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts or court records. Further, although the Freedom of Information Law includes certain procedural guarantees, such as the right to an administrative appeal of an initial denial [see §89(4)(a)], those kinds of provisions are inapplicable with respect to court records.

The preceding commentary is not intended to suggest that court records are not subject or rights of access, for statutes other than the Freedom of Information Law may be pertinent and may confer rights of access to court records (see e.g., Judiciary Law, §255).

I believe that, in appropriate circumstances, a court may determine that an individual is a poor person and may order that copies of court records be made available free of charge. However, since I lack expertise on the subject, it is suggested that you confer with your attorney or perhaps a representative of Prisoners' Legal Services.

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- 2151

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 5, 1992

Mr. Richard DeGrijze
91-A-3056
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. DeGrijze:

I have received your letter of April 27 in which you asked that I intercede with respect to a request for a subject matter list directed to Prisoners' Legal Services.

In this regard, the Freedom of Information Law is applicable to agency records, and §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 of other governmental 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 or local government.

I believe that Prisoners' Legal Services is a not-for-profit corporation that is not part of the government or any governmental entity. If that is so, it would not be an "agency" required to comply with the Freedom of Information Law.

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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2152

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 5, 1992

Ms. Maura K. Manning
[redacted]

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

Dear Ms. Manning:

I have received your letter of April 30 in which you seek assistance concerning a request made under the Freedom of Information Law.

According to your letter, you submitted a request on March 23 for certain records to the Secretary of the Senate, who serves as the Senate's records access officer. The receipt of your request was acknowledged on March 30. On April 23, you spoke with an assistant to the Secretary of the Senate, but she "gave [you] no answers and a big run around." As of the date of your letter to this office, you had not received any documentation that you requested.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which entities subject to the Law 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: Stephen F. Sloan, Secretary of the Senate

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7153

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 5, 1992

Mr. Daniel Lynch
82-A-6183
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. Lynch:

I have received your letter of April 22 in which you seek an advisory opinion concerning requests made under the Freedom of Information Law.

By way of background, you requested what you have characterized as "genealogical information" concerning your great grandfather and grandfather from the New York City Fire Department. Both of those individuals worked for the Department, and the younger of the two died in a fire in 1949. In the initial response to your request, which is dated December 12, 1991, you were informed that the request would be honored, but that it might take a week to ten days to retrieve the records. Having received no further response, you wrote again and asked whether the request was being denied and, if so, you asked for the name of the person to whom an appeal could be directed. In a response to that letter dated March 13, your request was denied, and you appealed the denial on March 20. As of the date of your letter to this office, you had not received a determination of your appeal.

In this regard, I offer the following comments.

First, the Freedom of Information Law requires that an agency respond to an appeal within ten business days of its receipt. Specifically, §89(4)(a) of that statute states in relevant part that:

> "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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 §87(2)(a) through (i) of the Law.

Although §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, I believe that records indicating the fact or dates of person's public employment would be available. The standard concerning privacy is flexible and may be subject to conflicting interpretations. However, the courts have provided substantial direction regarding the privacy of public employees, and 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. Further, 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); 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); 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 my view, records reflective of the initial date or period of one's public employment should be made available, for those records are relevant to the performance of public employees' official duties.

The other items that you requested are home addresses of your grandfather and great grandfather during the periods of their employment. Based upon §89(7) of the Freedom of Information Law, I believe that an agency has discretionary authority to disclose present or former employees' home addresses, but that there is no requirement that they must do so. The cited provision states in relevant part that "[n]othing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system." While the home addresses of your forebears may be withheld, since they died long ago, there would appear to be no relevant issue concerning their privacy.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Clinton
Edwin Ayala

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2154

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 6, 1992

Mr. Frank De Chirico
90-A-8568
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. De Chirico:

I have received your letter of April 28 in which you sought assistance concerning access to records.

According to your letter, you requested various records concerning medical treatment from your facility on January 8. The receipt of your request was acknowledged on January 10, and it was stated that the facility medical director would respond within ten business days. You were seen by the medical director a few weeks later, and it appears that he was unfamiliar with your request. You appealed the constructive denial of your request on January 27. In response to the appeal, Assistant Counsel Richard E. Doling informed you in a letter of February 5 that the request was being processed and that you would receive the information sought "in the near future". Consequently, he wrote that your appeal "will be deemed moot". As of the date of your letter to this office, 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 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

cc: Mr. Weaver
Richard E. Doling

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7155

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 6, 1992

Mr. James Cliff
92-A-2300 3-B-4
Box F
Fishkill, NY 12524-0445

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

Dear Mr. Cliff:

I have received your letter of April 28. As in the case of your previous correspondence, your letter deals with possible methods of learning whether claims that your attorney provided ineffective representation have been made.

You suggested that there may be two sources of information relating to the issue. One suggestion involves asking the courts to "turn over any claims of ineffective representation against [your] attorney"; the other involves seeking similar information from the Legal Aid Society, your attorney's employer.

In this regard, although you may attempt to acquire information in question from the two sources that you identified, neither in my opinion would be subject to the Freedom of Information Law.

The Freedom of Information Law is applicable to agency records, and §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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities

> thereof, except the judiciary or the state legislature."

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

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

Based on the foregoing, the courts and court records fall beyond the scope of the Freedom of Information Law. Further, since the Legal Aid Society is not a governmental entity, it would not constitute an agency. Therefore, the Legal Aid Society would not be required to disclose records under the Freedom of Information Law.

While the courts and court records are not covered by the Freedom of Information Law, other statutes often confer rights of access to court records (see e.g., Judiciary Law, section 255). However, it is unknown to me whether the courts would keep the kinds of claims in which you are interested in a manner in which they can locate or retrieve any such records. Further, the attorney in question might work in several courts, thereby presenting an additional difficulty in attempting to locate any such claims.

Lastly, the address of the agency that performs duties similar to those of the Committee on Open Government is:

> Connecticut Freedom of Information Commission
> 97 Elm Street (Rear)
> Hartford, CT 06106

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-2085
FOIL-AO-2156

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 6, 1992

Ms. Victoria 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 Ms. Siegel:

I have received your recent letter, which reached this office on May 4.

You have raised a series of issues concerning meetings of the Board of Trustees of the Village of Bayville. You wrote that the Board conducted executive sessions on 22 occasions between July of 1990 and January of 1992, but that minutes of the meetings do not indicate actions that might have been taken during the executive sessions. In addition, you have been told "to shut up" when you attempted to speak at meetings and have been informed that "the Board does not have to listen to what [you] have to say." Finally, at a recent meeting reference was made to litigation and a stipulation of settlement. When you raised questions concerning the settlement, Village officials refused to answer.

You have asked whether the practices described above are consistent with the requirements of the Open Meetings Law. In this regard, I offer the following comments.

First, by way of background, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Second, §106 of the Open Meetings Law pertains to minutes, and subdivision (2) of that provision deals with minutes of executive sessions and states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

In addition, subdivision (3) of §106 provides that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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 on the foregoing, when a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. It is noted, however, that if a public body merely 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.

Second, with respect to public participation at meetings, 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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer questions or permit 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 answer questions and permit public participation, and many do so. If a public body does permit the public to speak, I believe that it may do so based upon reasonable rules that treat members of the public equally.

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 meeting, the Appellate Division found that such a rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

Finally, while the Board in my view was not obliged to answer questions relating to the stipulation of settlement, I believe that you could seek information concerning the matter under the Freedom of Information Law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, a stipulation of settlement would be available, for none of the grounds for denial would appear to be applicable. Further, it has been held judicially that a stipulation of settlement involving a municipality and a litigant is accessible under the Freedom of Information Law (Malman v. Supervisor and Town Board of the Town of Islip, Supreme Court, Nassau County, August 20, 1981).

I hope that I have 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7157

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 6, 1992

[redacted]
P.O. Box 2000
Pine City, NY 14871

Dear [redacted]:

I have received your recent letter, which reached this office today.

You have requested records and assistance from the Committee concerning your ability, as an adopted person, to locate your biological parents. In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to access to records. The Committee does not maintain records generally, and it is not empowered to acquire records on behalf of the public or compel government agencies to grant or deny access to records.

Second, as you may be aware, §114 of the Domestic Relations Law pertains to orders of adoption and generally requires that records pertaining to adoption be kept sealed and confidential. Those kinds of records may be disclosed only upon an order of a court based on a showing of good cause. Enclosed is a copy of §114 for your review.

Lastly, even if you could obtain the names of your biological parents, due to the passage of time, it may be difficult if not impossible to locate them.

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-2158

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 6, 1992

Mr. Eugene Paul
91-R-5757
Mohawk Correctional Facility
6100 School Road
P.O. Box 8450
Rome, NY 13440

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

Dear Mr. Paul:

I have received your recent letter, which reached this office today.

According to your letter, you requested minutes of your trial from the New York County Supreme Court. As of the date of your letter to this office, you received no response and you have asked for assistance regarding the matter.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

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

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

Based on the foregoing, the Freedom of Information Law does not apply to courts or court records. Further, although the Freedom of Information Law includes certain procedural guarantees, such as the right to an administrative appeal of an initial denial [see §89(4)(a)], those kinds of provisions are inapplicable with respect to court records.

The preceding commentary is not intended to suggest that court records are not subject to rights of access, for statutes other than the Freedom of Information Law may be pertinent and may confer rights of access to court records (see e.g., Judiciary Law, §255).

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

PPPL-AO-135
FOIL-AO-2159

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 12, 1992

Ms. Barbara Covel
Room 11D40
Cultural Education Center
Albany, NY 12230

The staff of the Committee 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. Covel:

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

You have questioned the propriety of a response to a request for records contained within a "folder" pertaining to you. During a recent telephone conversation, you indicated that you requested the records under both the Freedom of Information Law and the Personal Privacy Protection Law. Although several records were found to be available to you, you were informed that "you will not be permitted access to notations made by Yvonne Hall which contain opinions, evaluations, observations, conclusions, recommendations and other subjective matter." Those records were withheld on the ground that they consist of "intra-agency documents" that may be denied pursuant to §87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records, and 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 §87(2)(a) through (i) of the Law. One of the exceptions to public rights of access is §87(2)(g), which pertains to inter-agency and intra-agency

materials. Specifically, that provision permits an agency to withhold records that:

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

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

Second, the Personal Privacy Protection Law, which is applicable only to state agencies, pertains to a class of records, those that include personal information that can be retrieved by means of an individual's name or other personal identifier. In brief, the Personal Privacy Protection Law generally requires that state agencies disclose records about data subjects to those persons. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §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" [§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" [§92(9)].

Under §95 of the Personal Privacy Protection Law, a data subject has the right to obtain from a state agency records pertaining to him or her, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of

that section. I point out that none of those exceptions is comparable to §87(2)(g) of the Freedom of Information Law concerning inter-agency and intra-agency materials. Further, based upon my understanding of the general content of the records that have been withheld, the exceptions do not appear to be applicable as the basis for a denial.

Although I am unfamiliar with the specific contents of the records, since they are contained in a folder bearing your name, they would in my opinion be subject to the Personal Privacy Protection Law. If my assumptions are accurate, I believe that the response to your request was incomplete, for it failed to deal with your rights of access under the Personal Privacy Protection Law. Further, in my view and for reasons expressed in the preceding paragraph, those records would likely be accessible to you under that statute, except to the extent that disclosure would result in an unwarranted invasion of personal privacy with respect to a person or persons other than yourself who may be identified in the records.

Lastly, although the response to your request indicates that you have the right to appeal a denial, it does not specify the time within which you may appeal. In this regard, §§89(4)(a) of the Freedom of Information Law and 95(3) of the Personal Privacy Protection Law state that a denial of a request may be appealed within thirty days.

I hope that I have 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 Earle
Eugene Snay, Records Access Officer
Deborah Glasbrener, Office of Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7160

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 12, 1992

Mr. C. Scott Amann
Gogick & Seiden
26 Broadway
New York, NY 10004

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

Dear Mr. Amann:

I have received your letter of May 7 in which you sought assistance relating to requests made under the Freedom of Information Law.

In your capacity as the attorney for Maric Piping, Inc. ("Maric"), you wrote that Maric was awarded a contract in 1985 by the New York City Health and Hospitals Corporation ("HHC"). Having performed the required work, Maric demanded payment, but the HHC refused to make full payment and allegedly owes Maric approximately $260,000. Consequently, Maric commenced a lawsuit to recover the balance due. Through pretrial discovery, you learned that the HHC's Office of Inspector General conducted an investigation of the matter. It is your belief that "upon completion of this investigation, the Inspector General made a final report to the appropriate HHC executives, which summarizes and itemizes HHC's improper conduct and ultimately directs liability for the delay in contract payment to HHC." As such, you requested records prepared by the Inspector General and those sent to the Inspector General by the Corporation relating to the matter. The initial request was denied in its entirety pursuant to paragraphs (e) and (g) of §87(2) of the Freedom of Information Law. You appealed the denial and, in addition, asked for "an itemized list of the requested documents with the corresponding exemptions claimed by HHC relative to each document requested, along with the sufficient factual or evidentiary support necessary to sustain HHC's burden of proof in denying access to the materials." In response to the appeal,

although 77 pages of statistical and factual data were made available, you wrote that those documents "are irrelevant" to the matter. The remainder of the records sought were denied pursuant to §87(2)(g). It was explained in the determination of the appeal that "[a]ny conclusions reached or recommendations made by [the HHC's] Inspector General are issued to senior corporate officials with suggestions for action, where appropriate. It is not within the Inspector General's power to compel acceptance of or compliance with their findings." As such, it was stated that the reports "are not final agency determinations", but rather are "predecisional intra-agency documents" that could properly be withheld. Further, the appeals officer contended that the Freedom of Information Law does not require the preparation of the "itemized list" of records withheld that you requested.

In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In my opinion, the phrase quoted in the preceding sentence indicates that a single record or report might contain both accessible and deniable information. That phrase also imposes an obligation on agencies to review records sought in their entirety to determine which portions, if any, may properly be withheld and to disclose those portions that do not fall within any exception.

Second, according to the determination rendered in response to your appeal, the only relevant exception is §87(2)(g), which pertains to inter-agency and intra-agency materials. In this instance, the determination was based upon a contention that the records in question constitute intra-agency materials. Although I am unaware of the content of the records, I point out that the characterization of records as intra-agency materials, without more, is not determinative of rights of access. On the contrary, due to the structure of §87(2)(g), the contents of those materials determine the extent to which they must be disclosed or may be withheld.

Specifically, §87(2)(g) enables an agency to withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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.

Again, the contents of materials falling within the scope of §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 subject 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) 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 lve 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)].

Similarly, the Court of Appeals has 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 Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

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 §89(4)(a) of the Freedom of Information Law requires that a determination of an appeal must "fully explain in writing...the reasons for further denial", I am unaware of any decision requiring the preparation of an itemized list analogous to that which you requested. 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 could endanger the lives or safety of certain

> individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

When a denial is challenged by means of a judicial proceeding, §89(4)(b) of the Freedom of Information Law provides that an agency has the burden of proving that records were properly withheld, and the Court of Appeals has held that "[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)]. However, in a footnote relating to the passage quoted above, it was stated that "[b]oth the statute itself, and our case law interpreting it, speak only of the agency's burden of proof when its denial of disclosure to a FOIL applicant is challenged in an article 78 proceeding." In sum, while an agency bears the burden of defending secrecy in a judicial proceeding brought under the Freedom of Information Law, I do not believe that the same burden must be met in a determination of an administrative appeal rendered under §89(4)(a) of the Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Edna Wells Handy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 716/

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 13, 1992

Captain Eduardo Nieves
Town of Hunter
Department of Police
Town Hall
P.O. Box 70
Tannersville, NY 12485

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

Dear Captain Nieves:

I have received your letter of May 5 in which you sought my opinion concerning the disclosure of records described in Article 720 of the Criminal Procedure Law, which pertains to "Youthful Offender Procedure."

Your inquiry was precipitated by a letter sent to you by the Greene County Public Defender. He complained that the name of an apparently eligible youth "appeared in the Police Blotter of the Mountain Eagle", a local newspaper. In brief, he contended that the disclosure of a name of an apparently eligible youth undermines the intent of Article 720.

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 §87(2)(a) through (i) of the Law.

Second, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." While records concerning youthful offenders might at some point fall within a statutory exemption from

disclosure, that point is reached, in my view, only when or after a court adjudicates that a person is a youthful offender.

Most relevant to the issue in my view is §720.15 of the Criminal Procedure Law which, as amended by Chapter 411 of the Laws of 1979, provides that:

> "1. When an accusatory instrument against an apparently eligible youth is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public.
>
> 2. When a youth is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and which the defendant's consent, be conducted in private.
>
> 3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law."

Based upon the foregoing, it is clear in my opinion that only a court has the authority to seal an accusatory instrument that identifies "an apparently eligible youth". Further, subdivision (3) of §720.15 narrows the applicability of subdivisions (1) and (2) and the capacity to seal records or conduct private proceedings by distinguishing between apparently eligible youths charged with felonies from others. As such, I do not believe that records pertaining to eligible youths become "exempted from disclosure" by statute unless or until a court adjudicates them as youthful offenders. Further, under §720.15(3), the provisions regarding the sealing of an accusatory instrument are not applicable, at least for a time, if a youth has been charged with a felony.

It is possible that records pertaining to an apparently eligible youth charged with a felony may at some point be adjudicated a youthful offender, in which case the records pertaining to that person may be sealed under §720.35 of the Criminal Procedural Law. However, until that occurs, I believe that the records and proceedings concerning such an individual would be open to the public to the same extent as similar records or proceedings concerning adults.

I hope that I 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-7162

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 13, 1992

Ms. Joan Brock
[redacted]

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

Dear Ms. Brock:

I have received your letter of May 7, in which you sought an opinion concerning rights of access to records.

You wrote that you requested certain statistics from the East Ramapo School District, but the District "refused to give access to these numbers." The statistics involve the following information:

> "1. How many students from Chestnut Ridge attend East Ramapo schools?
>
> 2. How many students from Chestnut Ridge attend each of the East Ramapo schools - school by school?
>
> 3. How many students in East Ramapo from Chestnut Ridge attend private schools?
>
> 4. The numbers of the ethnic makeup of the students attending East Ramapo schools from Chestnut Ridge?"

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 that statute states in part that an agency, such as a school district, is not required to create or prepare a record in response to a request. Therefore,

insofar as the figures in which you are interested have not been prepared or are not maintained by the District, District officials, in my opinion, would not be obliged to prepare those figures on your behalf in response to a request.

Second, to the extent that the statistics or numbers that you are seeking do not exist, I believe that they must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could properly be asserted to withhold the figures in question. Moreover, §87(2)(g)(i) of the Freedom of Information Law specifies that "intra-agency materials", those prepared by and for agency officers or employees, consisting of "statistical or factual tabulations or data" must be disclosed.

Lastly, it is noted as an aside that education records identifiable to students are generally confidential under a federal law, the Family Educational Rights and Privacy Act (20 U.S.C. §1232g). However, if the records that you seek are not identifiable to students, but rather consist of numbers or statistics, that statute would not be applicable.

In sum, to the extent that the information in which you are interested exists in the form of a record or records, I believe that it must be disclosed under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, East Ramapo School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1163

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 13, 1992

Ms. Aimee J. Fitzgerald
Co-President
Tag/Taxpayers Action Group
P.O. Box 629
Highland Mills, NY 10930

The staff of the Committee 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. Fitzgerald:

I have received your letter of May 6 in which you sought an opinion concerning the Freedom of Information Law.

Your inquiry relates to the same subject as that considered in an advisory opinion addressed to you on March 10, specifically, rights of access to records indicating wages paid to employees of the Monroe-Woodbury School District. In your most recent letter, you indicated that your efforts in obtaining the records was initially "met with silence". You also wrote that the Superintendent has contended that if the District must "delete SS numbers, addresses or other personal information" from records, "that it is the same as creating a document, and that FOIL does not cover their having to do so."

In this regard, I offer the following comments.

First, having reviewed the opinion of March 10, there is little that I can add to it. As stated on page 2 of that opinion, §87(2) of the Freedom of Information Law refers to an agency's authority to withhold "records or portions thereof" that fall within the grounds for denial. That phrase clearly indicates that, where appropriate, an agency may make deletions from records while being obliged to disclose the remainder. Deleting certain details, such as social security numbers or home addresses, from records

that are otherwise available could not in my view be equated with creating new records, and the courts in many instances have found that "portions" of accessible records must be disclosed following the deletion of deniable information. Further, in a recent decision concerning a denial of access to W-2 forms was preceded by the preparation of an opinion by this office in which the analysis offered to the petitioner was essentially the same as that given to you on March 10. The court relied upon that opinion and found that: "As Mr. Freeman observed, it would not be unduly burdensome if Respondent [the agency] develops a stencil to block out personal, confidential information before the W-2's are copied (Pub. Off. L. §89 subdiv. 2.(a) authorizes deletions) and Respondent asserts no (other) sufficient privilege/exemptions" (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

Lastly, since you wrote that your initial requests were ignored, 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."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the

receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 within 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: Terrence Olivo, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7164

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 14, 1992

Mr. Arthur Becchoefer
Friends of Keuka Lake, Inc,
1128 East Bluff Drive
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. Becchoefer:

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

By way of background, you wrote that the Yates County Legislature conducted a public hearing on May 6 for the purpose of reviewing "three contracts for leasing, access, and management of airport properties". Prior to the hearing, on April 6 and April 15, you made requests on behalf of your organization to the County's records access officer for three categories of records. The records sought include, first, documents indicating the transfer of "property, easements, air rights, or other ownership to the County"; second, "supporting documents...justifying proposed compensation for each property, lot, building, easement, or other items of value"; and third, "agreements and documentation relating to commitments of the County to purchase management and related services for operating and maintaining the airport..." The County referred the requests to an attorney in Rochester, which is "some 70 miles from Yates County", and you were informed that the attorney was its records access officer with respect to records pertaining to the airport.

You wrote that you received no response to the requests until May 8, two days after the hearing, when a letter from the attorney dated May 4 reached you. In his response, with respect to the first category of the records sought, the attorney wrote that certain records "are being transmitted to the Clerk of the County

Legislature". With respect to the second, he asserted that "[t]hese documents were specifically prepared in anticipation of litigation, and therefore, the County is unable to provide the same for review". With respect to the third, he wrote that a copy of a pending agreement was "[p]resent in the Yates County Legislature's office". Although the attorney denied access to certain of the records requested, he did not inform you of the right to appeal the denial or to whom an appeal could be made.

In view of the attorney's response, you wrote that, from your perspective:

> "the County ***must have developed supporting documentation*** not related to an anticipated litigation in order to arrive at a fair amount to pay for management of the airport by Seneca Flight Operations and to be paid for lease of the property to the Penn Yan Flying Club. It is true that there is pending litigation on related matters, including a recently filed petition for Article 78 review of the negative declaration of adverse environmental impact under the provisions of the State Environmental Quality Review Act (SEQRA). But if all the supporting documentation is deemed part of litigation, some of which hasn't even been initiated, I fail to see how anyone would be able to respond intelligently to the proposed contracts. In fact, I fail to see how any competent official in the County could prepare a contract without knowing what it is going to cost to run the business" (emphasis yours).

In conjunction with the foregoing, you sought a "ruling" on the following issues:

> "1. Did the County have a right to withhold certain records relating to the proposed contracts from public view?
>
> 2. If the County did not have a right to withhold the requested documents, would this act have nullified the public hearing on the contracts, convened on May 6?
>
> 3. Is it proper for the County to designate Mr. Sortino and his Rochester law firm the records access officer and place for storing records relating to the Airport? To our

information and belief, no other County records are kept in Rochester."

In this regard, I point out that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee cannot enforce the Freedom of Information Law or issue a "ruling" that is binding. It is my hope, however, that opinions rendered by this office are educational and persuasive. Further, since the second question that you raised involves the propriety of conducting a hearing, despite the inability of the public to engage in a review of records relevant to the hearing, rather than the interpretation of the Freedom of Information Law, I cannot effectively respond. Nevertheless, I offer the following comments concerning the other issues raised in the correspondence, for they involve 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.

The initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §3101(d) of the Civil Practice Law and Rules, which exempts material prepared for litigation from disclosure. It is emphasized, however, that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)]. While some of the records falling within the scope of the second category of your request might possibly have been prepared solely for litigation, based upon the description of those records, it appears unlikely that all such records were prepared solely for litigation. To that extent, I believe that the records would subject to rights conferred by the Freedom of Information Law.

Further, as stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is

as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Also of potential significance is §87(2)(c) of the Freedom of Information Law, which permits an agency to withhold records insofar as disclosure would "impair present or imminent contract awards..." Based on the facts that you provided, it is questionable whether §87(2)(c) could appropriately be asserted. By conducting a public hearing during which various details concerning the matter would presumably be disclosed, it would appear that such disclosure would not "impair" the process of reaching an agreement.

Second, with respect to the designation of the attorney in Rochester as the records access officer, it is noted that §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, §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 Yates County Legislature, 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, §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."

As such, the County Legislature has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. If the attorney was not designated a records access officer by the County Legislature, I do not believe that he could validly function in that capacity. Section 153(1) of the County Law states that "A power of the county, whether in terms vested in the county or in the board of supervisors shall, except as otherwise expressly provided, by exercised through a local law or resolution duly

adopted by the board." In addition §1401.3 of the Committee's regulations requires that an agency "shall designate" in its rules and regulations "the locations shall be available for public inspection and copying". I would conjecture that the County's regulations promulgated pursuant to the Freedom of Information Law designate a county office or offices as the location or locations where records can be inspected or copied. Even if a local law or resolution had been adopted by the County Legislature designating the attorney as records access officer, or that records could be inspected and copied at his office, such designation would in my opinion be inconsistent with the intent of the Freedom of Information Law and the Committee's regulations. It has been held in a variety of contexts that agencies' actions and rules must be reasonable and must give reasonable effect to the intent of law. In this instance, it would be unreasonable in my opinion to designate a person as records access officer when the records maintained by that person are kept 70 miles from the County. Similarly, I believe that it would be unreasonable to expect or require members of the public to travel that distance to inspect or copy records. I do not believe that there is a requirement that county records be kept continuously in county offices. However, it has been held that records may be kept elsewhere "as long as they are accessible to the public" [Town of Northumberland v. Eastman, 493 NYS 2d 93, 95 (1985)]. Since the Freedom of Information Law provides the right to inspect and copy records, and in view of the distant location where the records were kept in this instance, designation of the attorney as records access officer would in my view have been unreasonable, contrary to law, and perhaps inconsistent with rules adopted by the County under the Freedom of Information 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)].

Further, the regulations promulgated by the Committee 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 short, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform 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.

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 Legislature
Anthony M. Sortino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2089
FOIL-AO-1765

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 18, 1992

Ms. Marie A. Perkins
[redacted]

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

Dear Ms. Perkins:

I have received your letter of May 5, which reached this office on May 11.

Your letter and the materials attached to it relate to an annexation study involving the Ripley and Westfield Central School Districts. Your inquiry pertains to a "dinner meeting" held at the request of the BOCES District Superintendent, Gary Barr, during which members of the Ripley and Westfield Boards of Education were present. According to your letter, a Ripley School District administrator stated that "this was Gary Barr's meeting, not the Board of Education, and it was his understanding the meeting is not open to the Press or Public." You also asked whether the cost of the dinner meeting was "pre-approved in the BOCES Budget" and raised related questions concerning the manner in which and amounts of payment that might have been made in conjunction with the meeting.

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" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

The court also dealt with the characterization of meetings as "informal," stating that:

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

Based upon the direction given by the courts, if a majority of a board of education gathers to discuss school district business, in their capacities as board members, any such gathering, in my

opinion, would constitute a "meeting" subject to the Open Meetings Law.

If a majority of the members of a public body gather to engage in a social function, or to have dinner, and if there is no intent to discuss public business, I do not believe that the Open Meetings Law would be applicable. However, if the same people gather with an intent to have dinner and discuss public business, collectively, as a body, such a gathering would in my view be a meeting that falls within the requirements of the Open Meetings Law.

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)], and that in a recent decision, it was held 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 District Superintendent, I believe that it was a meeting, assuming that a quorum of the Board was present for the purpose of conducting public business.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must 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 of the time and place 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.

Lastly, I believe that the Freedom of Information Law would serve as a vehicle by which you could obtain records relating to expenditures. In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 expenses incurred by an agency, as a general matter, 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.

I hope that I have 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, Ripley School District
Richard E. Miga, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7166

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 18, 1992

Mr. Melvin M. James
82-A-0787
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. James:

I have received your letter of May 7, which reached this office on May 13.

Your first question involves the ability to obtain a copy of an individual's criminal history record or "rap sheet" from the Division of Criminal Justice Services. In this regard, although the regulations promulgated by that agency permit an individual to obtain his or her own criminal history record, it has been held that criminal history records maintained by the Division of Criminal Justice Services are exempted from disclosure and cannot be obtained under the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989].

Your second question is as follows:

> "Are criminal attorneys assigned to represent a person under New York State's 18B assigned counsel statute a public agency as defined by the FOIL statute, and if so, is such a lawyer required to provide information upon request, information pertaining to his or her representation?"

"Article 18-B" encompasses §§722 to 722-f of the County Law. Under §722, the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to 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-2162

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 18, 1992

Mr. Warren Overbaugh
91-A-2926
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. Overbaugh:

I have received your letter of May 9. You have sought assistance concerning unanswered requests directed to the Middletown Police Department, the Orange County Office of the District Attorney, and the clerk of a court in Orange County.

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to agency records, and §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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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

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

Based on the foregoing, while I believe that a police department and an office of a district attorney are "agencies" required to comply with the Freedom of Information Law, the courts and court records are beyond the coverage of that statute. This is not to suggest that court records are not accessible, for other statutes (see e.g., Judiciary Law, §255) often require the disclosure of court records. It is recommended that you resubmit your request for court records to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

Second, with regard to your requests for agency records, I point out that a request should generally be made to an agency's designated "records access officer". The records access officer has the duty of coordinating an agency's response to requests.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of

Information Law, the appellant has exhausted his or her 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-2168

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 19, 1992

Hon. Marjorie Tillow
Town Clerk
P.O. Box 87
Machias, NY 14101

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

Dear Ms. Tillow:

As you are aware, your letter of May 5 addressed to the State Comptroller has been forwarded to the Committee on Open Government. The Committee is authorized to advise with respect to the Freedom of Information Law.

According to your letter, the Machias Town Board adopted a resolution stating that the Town will charged fees of twenty-five cents per photocopy and one dollar "for reimbursement to the town for the Town Clerk's time". You have questioned the propriety of the resolution.

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 records or for a clerk's time, no such fee may be assessed.

By way of background, §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 of 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 is 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 states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (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. Therefore, insofar as the resolution authorizes the assessment of a fee other than a maximum fee of twenty-five cents per photocopy, I believe that it is invalid.

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)].

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-7169

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 19, 1992

Mr. Bob Shah
President
Data Niche Associates
117 South Milwaukee Avenue
Suite D-3
Libertyville, IL 60048

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

Dear Mr. Shah:

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

You have sought an advisory opinion concerning the propriety of a denial of access to "Medicaid paid claim data" by the Department of Social Services. You specified that you "are not interested in any recipient information or medical records", but rather "provider information and factual data regarding drugs dispensed". The information in question is found in the "NYS Medical Assistance (Title XIX) Program Pharmacy Claim Form", and you requested those portions of forms indicating the names of providers (pharmacists), the drugs or medical supplies made available, the amounts charged, and similar related information. The forms also include the names and identification numbers of recipients. The information contained in the forms is apparently stored on computer tapes, and it is your view that the Department is obliged to disclose the information sought following the deletion of those details that could identify recipients. The Department's records access appeals officer wrote, however, that the data is specifically exempted from disclosure by the Social Services Law. In addition, earlier correspondence indicates that "[y]our specific request would require significant programming time."

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 §87(2)(a) through (i) of the Law.

Second, relevant in my opinion is the initial ground for denial, section 87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." The data that you are seeking has been prepared pursuant to Title 11 of Article 5 of the Social Services Law, entitled "Medical Assistance for Needy Persons" (§§363-369). Included in Title 11 is §369(3), which provides that:

> "Any inconsistent provision of this chapter or other law notwithstanding, all information received by public welfare and public health officials and service officers concerning applicants for and recipients of medical assistance may be disclosed or used only for purposes directly connected with the administration of medical assistance for needy persons."

Based upon the foregoing, it appears that the Department has no ability to disclose the information that you have requested, for §369(3) specifies that the information in question may be disclosed only for purposes directly involved in the administration of the program. In my view, when a class of records or data is specifically exempted from disclosure by statute, an agency is not required to delete portions of records, to protect privacy, for example; rather, the records or data are considered to be exempt from disclosure in their entirety [see Short v. Board of Managers of Nassau County Medical Center, 57 NY 2d 399 (1982)]. If §369(3) had not been enacted, and if no analogous statute existed, I would agree that the Department, assuming it had the capacity to do so, would be obliged to delete identifying details pertaining to recipients and disclose the remainder of the data. However, since §369(3) encompasses "all information" received by the Department concerning recipients of medical assistance, I do not believe that the Department has the authority to disclose the information sought.

Lastly, the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency need not create a record in response to a request. When information is maintained electronically, 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. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. 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 or disk. 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 information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

I hope that I have 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 V. Demers, Records Access Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 2170

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 19, 1992

Mr. Leslie J. Kyser
86-C-0109
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Kyser:

I have received your letter of May 13. As I understand your commentary, a request for records was made under the Freedom of Information Law and directed to the West Seneca Town Clerk, but you received no response. Consequently, you have appealed what appears to be a constructive denial of your request by the Town to this office.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, the Committee cannot render a determination following an appeal or otherwise compel an agency to comply with the Freedom of Information Law.

The provisions pertaining to the right to appeal a denial of access to records are found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

Based upon the foregoing, an appeal should be made to the head or governing body of an agency, or the person or body designated to determine appeals. In the case of a town, an appeal should be made to the town board or to the person or body designated by the town board to determine an appeal.

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- 2091
FOIL-AO- 7171

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 26, 1992

Mrs. Norma Gonyea
Secretary of the Supervisor
Town of North Greenbush
2 Douglas Street
Wynantskill, NY 12198

The staff of the Committee 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. Gonyea:

I have received your letter of May 19 in which you requested an advisory opinion concerning the Freedom of Information Law.

Based upon your letter and our telephone conversation, the issue involves the application of the Freedom of Information Law with respect to tape recordings of meetings of the North Greenbush Town Board that are made by the Town Clerk with her own tape recorder and cassettes as an aid in the preparation of minutes. Your questions are whether the tape recordings are subject to the Freedom of Information Law and, if so, how long they must be kept and "how long one must wait to hear the tapes once the tapes have been requested."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" to include:

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

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

Since the tape recordings are produced by the Clerk in the performance of her official duties for the Town, I believe that they constitute "records" subject to rights of access. I point out by means of analogy that, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

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

Third, it is noted that there are laws and rules dealing with the retention of records. Specifically, pursuant to §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 scheduled adopted by the Commissioner, or 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.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Therefore, an agency must respond to a request within five business days of the receipt of a request. If, for example, the clerk is using a tape recording to prepare minutes, and if the tape would be in use beyond five business days from the receipt of a request, I believe that the receipt of the request could be acknowledged, indicating an approximate date when the tape can be made available. Presumably that date would represent the time when preparation of the minutes has been completed. I point out, too, that §106(3) of the Open Meetings Law states that minutes of meetings "shall be available to the public...within two weeks from the date of such 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 2172

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 26, 1992

Mr. Kenneth Place
90-T-3861
Clinton Correctional Facility
P.O. Box 2002
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. Place:

I have received your recent letter and the materials attached to it.

As I understand your commentary, you requested the names of officers employed by the Putnam County Sheriff's Department who have certain badge numbers identified in the request. Your request was denied on the basis of subparagraphs (i) and (iii) of §87(2)(e) of the Freedom of Information Law. You have sought the assistance of this office in the matter. In this regard, I offer the following comments.

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

Second, the provisions that serve as the basis for the denial state that an agency may deny access to records that:

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

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

In my opinion, a record or records indicating officers' names and badge numbers must be disclosed. From my perspective, such records would have been prepared in the ordinary course of business rather than for a "law enforcement purpose". Further, even if those records could be characterized as having been compiled for law enforcement purposes, I cannot envision how disclosure of such basic information could interfere with an investigation, identify a confidential source or reveal confidential information. In short, if records exist containing the information sought, I believe that the Freedom of Information Law would require disclosure.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert D. Thoubboron, Sheriff
Patrick Brody, Captain

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7173

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 27, 1992

Mr. Ricardo A. DiRose
85-C-773
Elmira Correctional Facility
Box 500
Elmira, NY 14902

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

Dear Mr. DiRose:

I have received your letter of May 13, which reached this office on May 26.

Attached to your letter is a denial of a request made under the Freedom of Information Law by the Senior Parole Officer at the Elmira Correctional Facility. Your request involved six exhibits presented by you or your defense counsel in conjunction with a parole revocation hearing held in October of 1990. In his response to your request, you were advised that "information contained in a parole folder is available only pursuant to an active appeal of a parole board decision or pending appearance before the Parole Board." Since neither of those situations currently exists, the request was denied.

In this regard, I offer the following comments.

First, I have reviewed the regulations promulgated by the Division of Parole that relate to the issue. Although §8000.5(c) appears to restrict access by inmates or releasees to particular times relating to appearances before the Board or a hearing officer, or in conjunction with an appeal, I believe that the provisions of that section are intended to pertain to routine disclosures made in relation to those events. Other aspects of the Division's regulations, particularly Part 8008, relate to the procedural implementation of the Freedom of Information Law and

requests made under that statute. In my opinion, the latter aspects of the regulations do not restrict or limit the ability to make requests to those situations relating to the kinds of events described in response to your request. Moreover, from my perspective, insofar as an agency's rules and regulations may be inconsistent with the requirements of a statute, such as the Freedom of Information Law, I believe that they would be of no effect. Further, nothing in the Freedom of Information Law restricts the ability of any person to request records, and I believe that the Division of Parole would be required to give effect to the Freedom of Information Law irrespective of whether a request is made in relation to an appearance, an appeal, or a hearing.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Under the circumstances, since the records in question were submitted by yourself or your counsel, I do not believe that any ground for denial could appropriately be asserted.

Lastly, a person denied access has the right to appeal pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

The person designated to determine appeals at the Division of Parole is Counsel to the Division, and it is suggested that you appeal to that person.

Also, as requested, enclosed is a copy of "Your Right to Know", as well as the letter denying your request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Timothy B. Wolcott, Senior Parole Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 7174

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 1, 1992

Mr. Frederic 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 May 22 in which you sought assistance relating to a request made under the Freedom of Information Law directed to the Syosset Central School District.

According to your letter, at a meeting held to discuss the budget, the Board of Education "voted to delete the Driver Education Program from the budget for 1992-93 without divulging the anticipated savings." Consequently, you requested records indicating the cost of the driver education program for 1991-92 and the projected savings resulting from the elimination of the program in the ensuing school year. In response to your request, you were told that no report currently exists that contains the information sought. The response, however, does include reference to various codes and monies allocated by means of certain "budget lines", and you were informed that "[a] portion of the monies allocated to these codes include expenses for the Driver Education Program." It was also asserted that the Freedom of Information Law "does not permit us to generate reports which do not already exist." However, you contend that "[s]ince the Board voted to remove the Driver Ed. Program from the proposed budget, they had to have a dollar amount", and that the information sought "was factual and statistical relating to an agency determination."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency

need not create a record in response to a request. Therefore, if the District maintains no figures reflective of the information sought, I do not believe that District officials would be required to prepare new records on your behalf. It is emphasized, however, that §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 more than ten years 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)].

Second, 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. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. 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 or disk. 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 §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)].

In sum, although the information sought might not exist in printed form, if it could be generated electronically based upon existing computer programs, it is my view that the District would be required to produce the information in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William J. Scarola, Administrative Assistant for Business

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7175

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 1, 1992

Mr. Jerome P. Lackner
[redacted]

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

Dear Mr. Lackner:

I have received your letter of May 11 and the correspondence attached to it.

According to the materials, following an initial denial of access to records by the State Department of Health, you appealed the denial on February 12 to Peter Slocum, the person designated to determine appeals at the Department. As of the date of your letter to this office, you had not yet received a determination of your appeal.

In this regard, I have attempted on several occasions without success to reach Mr. Slocum in an effort to ascertain the status of your appeal. Irrespective of whether the records sought may be withheld or must be disclosed, the Freedom of Information Law requires that a response to an appeal be rendered within a specific period. Section 89(4)(a) of that statute states in relevant part that:

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

I point out that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Slocum

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7176

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 1, 1992

Mr. Kennard R. Strutin
Staff Attorney
New York State Defenders Association, Inc.
11 North Pearl Street
18th Floor
Albany, NY 12207

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

Dear Mr. Strutin:

I have received your letter of May 26 and the correspondence attached to it.

According to the materials, you requested copies of current resumes of the forensic scientists who serve in the "State Police Forensic Consultant Unit." The Division of State Police denied your request on the basis of §89(2)(b)(i) of the Freedom of Information Law. You have sought an opinion on the matter. In this regard, I offer the following comments.

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

Second, in my opinion, the only relevant basis for denial is §87(2)(b), which authorizes an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first of which was cited as the basis for denial. That provision states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

In my opinion, the provisions cited above might serve to enable an agency to withhold some aspects of a resume. Nevertheless, it is likely that other aspects of a resume must be disclosed.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard 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 a their 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); 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); 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].

With respect to access to a resume or application of a public officer or employee, if, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications 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 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 §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.

In some instances, resumes might include a variety of other information, such as descriptions of publications authored by individuals, as well as references to public presentations and other public events. I believe that those aspects of resumes would also be public, for disclosure of those kinds of information would pertain to items or events that have been or could be known by the general 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: Raymond G. Dutcher, Lieutenant Colonel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7177

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 1, 1992

Mr. Harold M. Voris
[redacted]

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

Dear Mr. Voris:

I have received your letter of May 21, as well as the correspondence attached to it.

By way of background, as the president of a senior citizen club, you wrote that you have been "denied tax exempt status by the State." Nevertheless, you contend that other similar clubs in your community have been given tax exemptions. Consequently, you asked that the Department of Taxation and Finance investigate. In response to that request, you were informed that the Department would look into the matter upon the submission of the names and addresses of the clubs, but that "due to the Secrecy Provision of the Tax Law, we [the Department] will be unable to inform you of the outcome."

You asked whether you are "entitled by the Freedom of Information Law to have access to any information derived from any investigation by the New York State Tax Department." 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 potential significance is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is §697(e) of the Tax Law, which requires the confidentiality of records maintained by the Department of Taxation and Finance whose source is a filed tax return or report. Therefore, records submitted by taxpayers (individuals or entities), such as tax forms, as well as information derived from those records, would be exempt from disclosure and beyond the scope of the Freedom of Information Law. However, if no tax return has been filed, and if a failure to file results in an investigation, I believe that records relating to that kind of inquiry would be subject to the Freedom of Information Law [see Kooi v. Chu, 129 AD 2d 393 (1987)]. That is not to suggest that all such records would be accessible to the public, but rather that the records would not be exempted from disclosure by statute or removed entirely from rights conferred by the Freedom of Information Law.

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

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7178

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 2, 1992

Ms. Sharon M. Billings
District Clerk
Cohoes City School District
20 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. Billings:

I have received your letter of May 29 in which you sought an advisory opinion concerning a request made under the Freedom of Information Law.

According to your letter, the request involves videotapes of meetings of the Cohoes City School District Board of Education. The tapes are filed in your office, and it is your view that they are public and that you must fulfill the request. You added, however, that "Central Office does not have a TV/VCR set-up for viewing of such tapes." As such, you suggested that "[i]t would seem that [your] options would include the following: 1) Make arrangements for TV/VCR set-up here at Central Office whenever [you] receive such a request and/or 2) Give the option of purchasing a copy of the tape."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" to include:

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

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

Since the videotapes are produced and maintained by the District, I believe that they constitute "records" subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a videotape of an open meeting should be accessible, for none of the grounds for denial would apply. Moreover, by means of analogy, I point out that there is case law indicating that an audio 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].

Third, in addition to the two options that you described, which are appropriate in my opinion, I believe that there may be another option. In one's capacity as an agency's designated records access officer, that person has the duty of coordinating the agency's response to requests [see regulations promulgated by the Committee on Open Government, 21 NYCRR 1401.2(b)]. Although there may not be a "TV/VCR set-up" at the District's Central Office, presumably, that equipment exists at one or more other locations within the District. If that is so, one means of coordinating the response might involve temporarily transferring a videotape to the site of the equipment in order that the applicant could view the tape at that location.

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- 1179

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 2, 1992

Mr. Terry M. Williams
91-A-3772, F-1/13T
P.O. Box 480
Gouverneur, NY 13642

The staff of the Committee on Open 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 May 29. In brief, you wrote that a request was made under the Freedom of Information Law to the records access officer for the New York City Police Department. As of the date of your letter to this office you had received no response to the request. Consequently, you have asked for the name and address of the person to whom an appeal may be made.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 person designated to determine appeals at the New York City Police Department is Susan R. Rosenberg, Assistant Commissioner Civil Matters, Room 1406, 1 Police Plaza, New York, NY 10038.

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- 7180

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 3, 1992

Mr. Carl Knight
90-A-6022
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

Dear Mr. Knight:

I have received your letter of May 22 and the materials attached to it. You have appealed what appears to be a constructive denial of a request for records directed to the Middletown Police Department.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to render a determination following an appeal or to compel an agency to grant or deny access to records.

The provisions concerning the right to appeal a denial are found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

Based on the foregoing, an appeal, under the circumstances, should be made to the Middletown City Council or the person or body designated by that entity to determine appeals.

Since your appeal is apparently based upon a failure to respond to your requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §89(4)(a) of the Freedom of Information Law, which was quoted above.

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice 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: Thomas L. Lopez, Chief of Police
City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7181

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 3, 1992

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:

I have received your letters of May 20 and May 26 and various materials related to them. You asked that I prepare an advisory opinion upon receipt of determinations of your appeals by Jacqueline Papatsos, Mayor of the Village of Island Park.

Since the issues relating to the appeals are essentially the same, for purposes of clarity and example, the ensuing comments will focus upon the initial series of facts.

By way of background, the materials indicate that on March 4, you requested vouchers and itemized bills for fiscal years 1989-90 and 1990-91. The receipt of your request was acknowledged on March 12, when you were informed that the request would be granted or denied on approximately April 8. On April 10, your request was approved to inspect the records on May 13, from 10 a.m. to 11 a.m. Since you did not complete your inspection of the records during that period, you submitted a new request for the same records, apparently pursuant to the Village's regulations, on May 13. On May 23, you were informed that "This request will be granted or denied on approximately June 5th."

You appealed on the basis of that response and suggested to the Mayor that "this type of action is nothing more than being unreasonable and to stonewall the freedoms of this country." You also referred to an issue that has been raised on several

occasions, the prohibition in the Village's rules from using your own copy machine.

I recently received a copy of the Mayor's determination. She denied your appeal and wrote that "[y]ou have not been denied access to records." She also indicated that the "rules and regulations of the Village of Island Park do not allow the use of personal copy machines", and that you have been so advised "many times."

In this regard, the issues that have been raised are not new. Although they have been considered in previous correspondence, I offer the following comments.

Central to each of the issues in my opinion is the general notion of reasonableness in view of the intent of the Freedom of Information Law and the Village's attitude toward the implementation of the Law as reflected in its rules and regulations and its the responses to your requests and appeals. As indicated in previous correspondence, §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." As the Court of Appeals, the State's highest court has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

As stated in the past, §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. Based upon those conditions, it is my view that a prohibition concerning the use of one's photocopier is inconsistent with the intent of the Law as expressed in §§84 and 87(2).

Second, the facts and the chronology of events relating to your request in my view indicate that the Village, by failing to give reasonable effect to the Freedom of Information Law, has in effect denied access to records. The request involves vouchers and itemized bills -- records that are routine in nature which should, in any efficient government, be readily retrievable. It was initially made on March 4, nearly three months ago, and the Village, by virtue of its rules and regulations, has chosen to provide you, during the course of that period, with one hour to inspect the records. Further, although a second request was made on May 13 for the same records, it was acknowledged with a statement that additional time was needed to determine whether to grant or deny access to the records. Based upon the initial determination that the records are available under the Freedom of Information Law, rights of access to the records could not have been an issue. On the contrary, the continual postponements in my opinion represent an unjustifiable method of delaying and, therefore, constructively denying access to the records.

In my view, the Village's rules, which were reviewed in an advisory opinion dated December 16, 1991, 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 (21 NYCRR Part 1401). 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." From my perspective, 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 its 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 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 may serve 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 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.

As requested, copies of this opinion will be forwarded to the Board of Trustees, the Mayor, the Village Attorney and the Village Clerk.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Hon. Jacqueline Papatsos, Mayor
Ann Leonard, Village Clerk
Jules St. Germain, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7182

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 4, 1992

Mr. Tony Steel
84-A-3505
Attica Correctional Facility
P.O. Box 419
Attica, NY 14011-0419

Dear Mr. Steel:

I have received your letter of May 25. You have asked for the name and address of the person to whom an appeal may be made following a denial of a request by the Monroe County Clerk under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records of an agency, and the term "agency" is defined in §86(3) of that statute to include:

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

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

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

As such, the 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, §8020) and "other than as clerks of court" (see Civil Practice Law and Rules, §8021). Therefore, I believe that some records of county clerks may be considered court records, while others are not.

If a county clerk denies access to court records, the clerk would be performing duties outside the scope of the Freedom of Information Law. Therefore, in that circumstance, the provision pertaining to the right to appeal found in §89(4)(a) of the Freedom of Information Law would not apply. If, however, the county clerk denies access to agency records subject to the Freedom of Information Law, an applicant would have the right to appeal pursuant to the provision cited in the preceding sentence. In such a situation, having contacted the Office of the Monroe County Clerk on your behalf, I was informed that an appeal may be directed to:

Charles Turner, County Attorney
307 County Office Building
39 West Main Street
Rochester, NY 14614

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-7183

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 5, 1992

Nicole Fischer, Research Assistant
Bob Shah, President
Data Niche Associates
1117 South Milwaukee Avenue
Suite D-3
Libertyville, NY 60048

The staff of the Committee 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. Fisher and Mr. Shah:

I have received your letter of May 28 in which you expressed disagreement with an advisory opinion rendered on May 19 concerning the propriety of a denial of access to "Medicaid paid claim data" by the Department of Social Services. You also asked that I respond to certain questions that you raised, for you continue to contend that the information sought must be disclosed under the Freedom of Information Law.

Before responding to your questions, as stated at the beginning of opinions rendered by this office, 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. An agency may disagree with or even ignore an opinion of the Committee, and certainly you have the option of disagreeing and challenging an agency's denial of access by initiating a judicial proceeding.

My opinion of May 28 was based largely upon my understanding of §369 of the Social Services Law. To reiterate, subdivision (3) of that statute, which is included among various provisions relating to "Medical Assistance for Needy Persons", states that:

> "Any inconsistent provision of this chapter or other law notwithstanding, all information received by public welfare and public health officials and service officers concerning applicants for and recipients of medical assistance may be disclosed or used only for purposes directly connected with the administration of medical assistance for needy persons."

Notwithstanding the foregoing, you asked that I explain "why [y]our request is so different" from that made by a reporter for Newsday who prevailed in a lawsuit brought under the Freedom of Information Law against the NYS Department of Health. You stated that both your request and that made by Newsday "seek state agency records on Medicaid providers". In short, your statement is erroneous. The request that led to the decision to which you referred [Newsday, Inc. and David Zinman v. New York State Department of Health, Supreme Court, Albany County, October 15, 1991] involved data regarding cardiac surgery performed by surgeons and whether the surgeons' names had to be disclosed; the issue involved the quality of care and had nothing to do with Medicaid providers or the expenditure of public funds, and §369 of the Social Services Law was inapplicable and irrelevant.

Your second area of questioning involves your contention that Short v. Board of Managers [57 NY 2d 399 (1982)] is irrelevant to your request. It appears that your view is that Short pertained to medical records relating to claims for Medicaid reimbursement, while you are seeking "claims data". My understanding is that the data identifying recipients of assistance and the claims data in which you are interested are contained in the same record or database. If that is so, I believe that Short would apply. The Court engaged in a lengthy and detailed discussion of §89(2)(a), which authorizes the deletions of identifying details from records that would otherwise be available to protect against unwarranted invasions of personal privacy, and §87(2)(a), which pertains to records that "are specifically exempted from disclosure by statute". It was determined that §369 of the Social Services Law is such a statute, and that §89(2)(a) has no application when records are exempted in their entirety from disclosure. The Court, in fact, alluded to the kind of contention that you have made and rejected it as follows:

> "That an underlying purpose - that of preservation of individual confidentiality - may be served by deletion of identifying details is perhaps a predicate on which to ground an argument to the Legislature that the statute should be amended to extend the use of

> deletion to remove records from other categories of exception in addition to that for unwarranted invasion of personal privacy; it provides no basis, however, for judicial revision of the statute" (id., 406).

Further, your contention that identifying details regarding recipients be deleted under §89(2)(a) of the Freedom of Information Law and the application of §369 of the Social Services Law were specifically addressed in that decision. The Court found that the records sought, "even if identifying details were to be deleted" would remain "sheltered by section 369 of the Social Services Law" (id., 405-406).

Finally, you inferred that preparing a new computer program to segregate data identifiable to recipients of assistance from the data that you are seeking could be readily accomplished. Having discussed that issue with a representative of the Department, I was informed that the process would be costly and time consuming. Moreover, for the reason offered at the end of the opinion of May 19, I do not believe that the Department would be required to engage in that process, even if the records sought were not exempted from disclosure.

In short, assuming that §369(3) of the Social Services Law is applicable with respect to the information sought, your contentions are, in my view, without legal merit.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7184

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 9, 1992

Mr. Eric J. Lerner
Tompkins County Board of Representatives
Courthouse
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 Mr. Lerner:

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

According to your letter, "Tompkins County maintains the fiscal records on an IBM mainframe computer", and you requested a copy of the County budget "on a floppy disk in a format that can be read by [your] IBM-compatible personal computer". The County's data processing director informed you that "the task was possible", and you "agreed on a mutually acceptable data transfer format", subject to authorization from the County Administrator. Although the Administrator indicated that a "paper printout" would be made available, your request for the data in electronic form was denied. You appealed to the Budget and Administration Committee, which sustained the denial.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. 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 more than ten years 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)].

Second, 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. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. 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 or disk. 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 information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

A recent decision appears to be relevant if not analogous to the situation at issue. In Brownstone Publishers Inc. v. New York City Department of Buildings, the question involved 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 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.
>
> "Public Officers Law [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" [166 Ad 2d, 294, 295 (1990)].

Further, in a more recent decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

In sum, assuming that the conversion of format can be accomplished, that the data sought is available under the Freedom of Information Law, and that the data can be transferred from the format in which it is maintained to a format in which you requested it, I believe that the County would be obliged to do so. Under those conditions, it does not appear that production would involve creating a new record or reprogramming, but rather merely a transfer of information into a format usable 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: Tompkins County Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2097
FOIL-AO- 7185

102 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 12, 1992

Mr. David Woodward
[redacted]

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

Dear Mr. Woodward:

I have received your letter of June 1 and the materials attached to it.

Your first area of inquiry relates to a contract agreement reached by the Peekskill School District and the Peekskill Faculty Association. You expressed the belief that "all discussion [was] held in executive session, plus an approving vote, all done without minutes or recording of how each member voted." You asked whether the foregoing constitutes "a basis for finding agreement unlawful - null and void." With respect to your second question, having attended executive sessions as a member-elect prior to beginning your term as a member of the Board of Education, you asked whether "a recorded vote, by present members, [was] required."

In this regard, I offer the following comments.

First, it appears that the agreement to which you referred was the result of collective bargaining negotiations. If that is so, I believe that the discussions leading to the agreement could properly have been discussed during executive sessions. Section 105(1)(e) of the Open Meetings Law permits a public body to enter into executive session to discuss or engage in collective bargaining negotiations.

Second, as indicated in an opinion of June 3 that was addressed to you, §106 of the Open Meetings Law pertains to minutes and states that:

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

It was also noted that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. To reiterate, 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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, 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.

With regard to "a recording of how each member voted", I direct your attention to the Freedom of Information Law. 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 §86(3)], such as a school board, a record must be prepared that indicates the manner in which each member who voted case his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §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 §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."

I point out 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 §87[3][a]; §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)], which involved a board of education in Westchester County, 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 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 aware 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, reaches agreement on a particular subject, I believe that the minutes should reflect the actual votes of the members.

In contrast, a so-called "straw vote", which is not binding and does not represent members' action that could be construed as final, could in my view be taken in executive session when it represents a means of ascertaining whether additional discussion is warranted or necessary. If a "straw vote" does not represent a final action or final determination of the Board, I do not believe that minutes including the votes of the members would be required to be prepared.

Lastly, if action is taken in violation o the Open Meetings Law, a court in certain circumstances may nullify that action. Section 107(1) of the Open Meetings Law states in part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action

or part thereof taken in violation of this article void in whole or in part."

Similarly, some decisions involving the interpretation of §1708 of the Education Law indicate that courts have invalidated action taken in private. However, it is emphasized that action taken by a public body remains valid unless and until a court renders a determination to the contrary, and that the authority to invalidate is discretionary on the part of the Court.

I hope that I have been of some assistance.

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-7186

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 15, 1992

Mr. David Lockhart
92-A-2411
Downstate Correctional Facility
Box F
Fishkill, NY 12524-0445

<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. Lockhart:

I have received your letter of May 27 in which you sought advice concerning the means by which you may obtain a copy of your pre-sentence report.

In this regard, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances, is §390.50 of the Criminal Procedure Law, 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 §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 §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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7187

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 15, 1992

Mr. Donald E. Lynn
Associate Corporation Counsel
City of Jamestown
Municipal Building
Jamestown, NY 14701

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

Dear Mr. Lynn:

As you are aware, your letter of May 18 addressed to the Office of the State Comptroller has been forwarded to the Committee on Open Government for response to the second of two issues that you raised. The Committee is authorized to advise with respect to the Freedom of Information Law.

The issue involving the duties of this office is whether a city department "may charge in excess of its own reproduction costs when making copies of public records for members of the general public." You added in your letter that "there is a proposal to impose a fee of ten dollars ($10.00) for copies of all deeds and maps on file in the Jamestown City Assessor's Office, which fee is significantly greater than the actual reproduction costs."

In this regard, by way of background, §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 up to nine by fourteen inches or the actual cost of reproducing other records, unless a different fee is 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, 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 up to nine by fourteen inches or a fee that exceeds the actual cost of reproducing larger records or records that cannot be photocopied (i.e., computer tapes). Moreover, a judicial decision confirmed that a fee of more than twenty-five cents per photocopy may be assessed only pursuant to authority conferred by a statute, an act of the State Legislature [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Similarly, in Szikszay v. Buelow [436 NYS 2d 558 (1981)] it was found that an agency could establish a fee concerning the duplication of tax maps based on the actual cost of reproduction. Consequently, unless an act of the State Legislature authorizes an agency to charge fees inconsistent with the Freedom of Information Law, an agency could not in my view assess such fees.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7188

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 15, 1992

Mr. Keith J. Larsen
COMPS Inc.
84-23 108th Street
Richmond Hill, NY 11418

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

Dear Mr. Larsen:

I have received your letter of June 2, as well as the materials attached to it. You have requested an advisory opinion concerning your right to obtain computer tapes of assessment rolls.

In this regard, I offer the following comments.

First, 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 (h) of the Law.

Second, of potential significance is §87(2)(b), which 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. Nevertheless, 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 or equivalent records 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)(1)). 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 an assessment roll or its equivalent should be disclosed. I point out 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].

Similarly, in a recent decision, it was held that a list of "the names and addresses together with zip code of the property owners" of a particular school district must be disclosed, and that "[w]hatever manner the respondent is able to extract the information for its own mailings in connection with mailing labels should be made available to respondent", so long as "petitioner will bear the costs of obtaining or of transferring this information to a computer disk" (see attached, Samuel v. Mace, Supreme Court, Monroe County, December 11, 1991). Moreover, the court directed the agency to pay attorney's fees to the petitioner.

In an effort to enhance understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the

offices of the Towns of Babylon and Huntington identified in your correspondence.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bryan J. Monaghan
Janice A. Stamm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2100
FOIL-AO- 7189

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 15, 1992

Mr. Michael De Vitto
[redacted]

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

Dear Mr. De Vitto:

I have received your letter of May 20. For reasons unknown, it did not reach this office until June 5.

In your capacity as a member of Community Board #2 on Staten Island, you questioned the propriety of the Board's procedure for entering into executive sessions. Attached to your letter is a copy of an agenda relating to a recent meeting of the Board. One of the references on the agenda indicates that an executive session "was scheduled to be one of the last pieces of business the Board would discuss". In conjunction with the foregoing, you wrote that:

> "By the time the Board advanced to item V - Acceptance of agenda there were about 41 members present and 7 members absent. After a voice vote (no actual count was taken) on the acceptance of the agenda, the Chairman declared the agenda accepted. The meeting progressed until it was time for the executive session, at which point the Chairman requested all those that were not members of the Board to leave the room. The Chairman began the executive session. The Chairman was then questioned by a member as to whether a vote had to be taken to go into executive session. The Chairman responded that no vote was required since the earlier vote to accept the agenda sufficed. He stated that since the

> executive session was noted on the agenda, the members' voice vote to accept the agenda made a separate executive session vote unnecessary."

You asked whether that is so, or whether "an actual-count/roll call vote [would] have been required before going into executive session."

In this regard, I offer the following comments.

First, in a technical sense, a public body cannot schedule an executive session in advance of a meeting. The Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Since a public body cannot know in advance of a meeting that a motion to enter into executive session will be approved, technically, an executive session should not be scheduled. I believe, however, that a public body could schedule a motion to enter into an executive session in its agenda.

Second, the agenda attached to your letter refers to topics to be discussed during the meeting. While reference is made to an executive session, there is no indication in the agenda of the topics intended to be discussed during the executive session as required by §105(1). Although a motion was carried to approve the agenda, that motion in my view merely approved the scope of the subjects intended to be considered; that motion was in my view separate and distinct from a motion required to be made and carried to enter into an executive session pursuant to §105(1) of the Open Meetings Law. Further, since the notation in the agenda to an executive session did not refer to the subject or subjects to be discussed behind closed doors, the members could not have known of the basis for entry into executive session. In short, I believe that an executive session must always be preceded by accomplishing the procedure described in §105(1) of the Open Meetings Law.

Third, with regard to "an actual-count roll call vote", I direct your attention to the Freedom of Information Law. 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 §86(3)], such as a community board, a record must be prepared that indicates the manner in which each member who voted case his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §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 §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."

It is noted 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 §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)]. While the Board may not have engaged in a secret ballot vote, I believe that the requirements of §87(3)(a) would be applicable.

Moreover, in a decision that dealt 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 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, if indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, reaches agreement on a particular subject, I believe that minutes should reflect the actual votes of the members.

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- 7190

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 15, 1992

Marilyn F. Macchia, Esq.
[redacted]

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

Dear Ms. Macchia:

I have received your letter of June 4, as well as a recent issue of the Sound View News, a local newspaper.

Your comments focus upon the publication by that newspaper of an alphabetical listing of teachers employed by the Mamaroneck School District which identifies them by name and includes their salaries, degrees, step and longevity. Although the Superintendent explained that he was required to disclose the list, it is your view that names of teachers could have been withheld pursuant to §87(2)(b) of the Freedom of Information Law.

Based upon the following commentary, I disagree with your contention.

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 §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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed for the following reasons.

As you suggested, one of the grounds for denial, §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)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, 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. Based upon the language of the Freedom of Information Law and its judicial interpretation, I agree with the Superintendent's conclusion that he was required to disclose the names and salaries of teachers.

I hope that I 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- 2099
FOIL-AO- 7191

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 15, 1992

Ms. Ellen Simpson
Director
Valley Cottage Library
Route 303
Valley Cottage, NY 10989

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

Dear Ms. Simpson:

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

Your inquiry involves "distinctions concerning Association and Public Libraries as they relate to the Freedom of Information Law and the Open Meetings Law." It is apparently the view of certain of your colleagues that "any entity receiving any tax money must provide salary schedules, telephone bills or any other type of operating expense to any member of the public demanding such" (emphasis yours).

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §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 of other governmental 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 maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Valley Cottage within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities

> cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

With regard to the Open Meetings Law, which is codified as Article 7 of the Public Officers Law, I believe that statute is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

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

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7192

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 16, 1992

Hon. Helen A. Bartone
County Clerk
County of Montgomery
County Office Building
P.O. Box 1500
Fonda, NY 12068-1500

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

Dear Ms. Bartone:

I have received your letter of June 4. You asked that I review the form that the County has devised for use by applicants for records under the Freedom of Information Law.

Having reviewed the form, I offer the following comments.

It is likely in my view that the form was designed several years ago, for some aspects of the form are out of date or incomplete. First, near the top of the form is a portion indicating an applicant's desire to "inspect" records; no reference is made to the possibility that an applicant might seek copies of records. Second, there are several possible reasons listed in the portion of the form that pertains to denials of requests. One of those reasons, "part of investigatory files", is out of date, for the quoted phrase has not appeared in the Freedom of Information Law since 1977. Since there are nine grounds for denial, rather than listing them, it may be more appropriate to provide two or three lines on which the reasons for denials could be stated. Third, although the notice near the bottom of the form indicates that a person denied access to records may appeal to the head of the agency, that person is not identified by name or address. Further, the form does not state that a person denied access has thirty days to appeal. And fourth, the form states that a determination of an appeal will be rendered within seven days of receipt of an appeal. Section 89(4)(a) of the Freedom of Information Law provides that an appeal must be determined within ten business days of its receipt.

Aside from the foregoing, I do not believe that an agency can require that a request be made on a prescribed form. 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 requests" [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 possesses 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 is unnecessarily serves to delay a response to or deny a request for records.

Lastly, having reviewed the County's rules promulgated under the Freedom of Information Law, I believe that they are appropriate.

As you requested, enclosed are two copies 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7193

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 16, 1992

Mr. Edward P. Morrissey
[redacted]

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

Dear Mr. Morrissey:

I have received your letter of June 4 in which you questioned your rights of access to your relatives' student records.

Specifically, you wrote that you are seeking to engage in a "family genealogy research project" in an attempt to "re-locate five long-lost children (and their descendants) from [your] great grandfather's first marriage..."

In this regard, I offer the following comments.

First, as a general matter, in order to request records, I believe that an applicant must have some notion of which schools or school districts would maintain the records in question. Similarly, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate and identify the records.

Second, most significant in my view is a provision of federal law, the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g. FERPA is applicable to all educational agencies or institutions that participate in federal education funding programs. As such, it applies to virtually all public educational institutions, such as public school districts, as well as many private colleges and universities. 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.

Students acquire the rights of their parents when they reach the age of eighteen. Concurrently, it generally requires that education records be kept confidential, unless the parents or students, as the case may be, waive the right to confidentiality. Therefore, federal law generally prohibits an educational agency from disclosing records identifiable to students absent consent to disclose from parents or from students who have reached the age of majority.

An exception to the rule of confidentiality in the FERPA involves "directory information." Directory information is defined in the regulations promulgated by the U.S. Department of Education to include:

> "...any 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" (34 C.F.R. 99.3).

Prior to disclosing directory information, educational agencies must provide notice to parents of students or eligible students as the case may be in order that parents or students are given an option to 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. Based upon discussions with school district officials over the course of years, my impression is that relatively few districts have adopted policies concerning directory information. If no such policy has been adopted, I do not believe that a school district could disclose a record identifiable to a student, unless it would be proven that the student is deceased.

Lastly, I have in the past discussed the status of what might be characterized as historical student records with a representative of the U.S. Department of Education. Although the value of the records was recognized, it was advised that, under federal law, student records could not be disclosed without the

prior consent of the persons to whom the records pertain, again, unless it could be shown such persons are deceased.

To obtain additional information regarding FERPA, you may do so by telephoning (202) 732-1807 or by writing to:

FERPA Office
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-4605

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- 1194

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 16, 1992

Mr. Kenneth Place
90-T-3861
Clinton Correctional Facility
P.O. Box 2002
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. Place:

I have received your letter of June 5. As in the case of previous correspondence, the matter involves a request for the names of officers employed by the Putnam County Office of the Sheriff whose badge numbers appear on your arrest report.

By way of background, your initial request was denied on the basis of subparagraphs (i) and (iii) of §87(2)(e) of the Freedom of Information Law. Following the receipt of your request for an advisory opinion concerning the propriety of the denial, I expressed the view that the records should be disclosed. Nevertheless, your appeal to the Sheriff was denied on the basis of §87(2)(e) and (f). Specifically, the Sheriff wrote that:

> "Disclosure of the requested information may well endanger the life or safety of the subject deputies. Further, the information you seek is confidential information relating to the criminal investigative techniques or procedures of the Putnam County Sheriff's Department and disclosure of same will interfere with law enforcement investigations."

In this regard, I offer the following comments.

Section 87(2)(e) provides agencies with the capacity to withhold "records compiled for law enforcement purposes" under certain circumstances. It was advised in the earlier opinion that records indicating officers' names and badge numbers would likely have been prepared not for law enforcement purposes, but rather in the ordinary course of business. If that is so, §87(2)(e) would not serve as a basis for denial.

The Sheriff appears to have relied upon a different aspect of §87(2)(e), specifically subparagraph (iv). That provision permits an agency to withhold records compiled for law enforcement purposes which, if disclosed, would "reveal criminal investigative techniques and procedures, except routine techniques and procedures." I do not believe that the assignment of a badge or badge number to an officer could be characterized as a "criminal investigative technique [or] procedure." Further, even if it could be so characterized, such assignment would appear to be "routine". If my assumption is accurate, §87(2)(e)(iv) of the Freedom of Information Law could not in my opinion appropriately be asserted to withhold the records sought.

The remaining ground for denial offered by the Sheriff, §87(2)(f), enables an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person." In many instances, officers' names and badge numbers are worn and are in plain sight. In such cases, I do not believe that §87(2)(f) would serve as a basis for denial. Even if names and badge numbers are not in plain sight, those items would appear to be in the nature of those that are routinely made known. If that is so, in my view, there would be no basis for denial.

It is suggested that you discuss the matter with your attorney.

As you requested, I am returning the determination of your appeal rendered by the Sheriff.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert D. Thoubboron, Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7195

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 17, 1992

Mr. S. Chris DeStephano
[redacted]

Dear Mr. DeStephano:

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

The materials relate to your continuing efforts to obtain records from or pertaining to the Orange County Privacy Industry Council. You have asked for advisory opinions concerning "Article 78 of the Civil Practice Law and Rules in relation to errors and failures relating to the Freedom of Information Law."

In this regard, it is unclear what you mean by "errors and failures". Over the course of years, I have prepared thousands of opinions relating to what might be characterized as "errors and failure relating to the Freedom of Information Law". If you are referring to the time periods within which agencies must respond to requests and appeals, §89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my

opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 the Committee's most recent annual report. One of the appendices to the report consists of summaries of every judicial decision rendered under the Freedom of Information Law of which this office is aware. A review of the summaries, which include citations that enable you to review the decisions, may be useful to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Geoffrey E. Chanin
M. Kevin Coffey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 7196

Committee Members

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Executive Director

Robert J. Freeman

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 17, 1992

Mr. William G. Farrar
[redacted]

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

Dear Mr. Farrar:

I have received your letter of June 9 and the materials attached to it.

In brief, your inquiry involves your unsuccessful efforts to obtain the qualifications of the person appointed and those of others who applied for a position with the Village of Mineola. You also sought the criteria used to select the person hired. In response to several aspects of your request, including that portion involving the criteria used to choose an applicant, you were informed that no records exist. The Village did, however, receive resumes from applicants. In denying access to those records, the Village Clerk wrote that:

> "Since a resume is tailored to identify a particular unique individual, it can be contended that all information contained therein identifies the individual. It therefore, could be argued that since all information on a resume identifies the particular individual described, the resume is not discloseable."

You wrote that the response by the Village "seems to be written from a presumption of non-disclosure" and would "be at odds" with the decision rendered by the Court of Appeals in Capital Newspapers v. Burns [67 NY 2d 562 (1986)].

In this regard, I offer the following comments.

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

Second, §89(7) of the Freedom of Information Law states in part that nothing in that statute "shall...require the disclosure of name or home address...of an applicant for appointment to public employment." Similarly, §87(2)(b) 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 in part that an agency may delete identifying details from records that are otherwise available to protect against an unwarranted invasion of personal privacy. Further, §89(2)(c) states that disclosure shall not be construed to constitute an unwarranted invasion of personal privacy "when identifying details are deleted."

Although resumes submitted by applicants may be unique, I disagree with the Village Clerk's contention that "all information" on a resume would necessarily be unique or identifiable to an individual or, therefore, deniable based on considerations of personal privacy. The decision which in my view is most analogous to the issue at hand is Harris v. City University of New York [114 AD 2d 805 (1985)]. Harris, a professor, wanted to compare his qualifications with those of other faculty members who had been promoted to full professor during the preceding five years by reviewing their resumes, or "curricula vitae". In determining the issue, it was held that:

> "the deletion of such identifying information as names, addresses and Social Security numbers will not impede petitioner's ability to compare his credentials to those of other professional employees, yet will protect the individual involved from an unwarranted invasion of their privacy" (id., 805-806).

As such, the court ordered the disclosure of the resumes, following the deletion of the kinds of identifying details described in the passage quoted above. Based upon that decision and the language of the Freedom of Information Law, I believe that the Village is required to engage in the same process, and that it must disclose the resumes after identifying details have been deleted.

Since you alluded to the judicial view of the intent of the Freedom of Information Law, I stress that the 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 one that you cited, 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 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" (Capital Newspapers v. Burns, supra, 565-566).

Lastly, the response by the Village suggests that "permission" might be needed to disclose information contained in a resume, and that "the Village potentially faces claims for invasion of privacy" if it discloses. Although the Freedom of Information Law authorizes an agency to withhold records or delete identifying

details in certain circumstances, there is no obligation to do so. As the Court of Appeals specified in Capital Newspapers:

> "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, although the Village may delete identifying details from records in appropriate circumstances to protect against an unwarranted invasion of personal privacy, the Freedom of Information Law does not require that such deletions be made.

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
Richard M. DeVoe, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7197

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 18, 1992

Mr. Robert D. Houghtalen
[redacted]

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

Dear Mr. Houghtalen:

I have received your letter of June 8 as well as the materials attached to it. You have asked for assistance concerning your requests for information directed to the City of Binghamton.

Having reviewed the materials, I offer the following comments.

It is emphasized at the outset that the title of the Freedom of Information Law may be somewhat misleading. That statute is a vehicle under which any person may request and obtain records to the extent required by law. Stated differently, the Freedom of Information Law pertains to existing records, and §89(3) of that statute specifies that an agency is not required to create or prepare records in response to a request in order to comply with the Law.

In your requests, you sought "information" by raising questions. Based upon the correspondence relating to your requests, in many instances, records did not exist that would contain the information sought. To that extent, the Freedom of Information Law in my opinion would not be applicable. Agencies' obligations under the Freedom of Information Law involve providing access to existing records, rather than providing information by answering questions. Certainly agency officials may provide information in response to questions; nevertheless, when they do, I believe that they would be performing duties above and beyond the requirements of the Freedom of Information Law. For example, as the First Assistant Corporation Counsel, Linda Kingsley, indicated in a letter of June 1 addressed to you, some of your questions "do not involve any specific documents". Her attempt to provide

information by answering your questions in my opinion was appropriate but not required by the Freedom of Information Law.

In short, it appears that the City of Binghamton has complied with the Freedom of Information Law relative to your requests, and that its efforts to provide information to you likely exceeded the requirements of the law.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law. If you have questions on the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Linda Kingsley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7198

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 18, 1992

Mr. Robert Austin
85-A-5882 C-18-34
Auburn Correctional Facility
P.O. Box 618
135 State Street
Auburn, NY 13021

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

Dear Mr. Austin:

I have received your letter of June 3, which reached this office on June 11.

You wrote that you are attempting to obtain records indicating the "psychiatric history" of the complaining witness in your trial, as well as any "police record" relating to that person.

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 §87(2)(a) through (i) of the Law.

Second, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is §33.13 of the Mental Hygiene Law, which requires that records concerning patients or clients treated at mental health facilities be confidential. In addition, §87(2)(b) of the Freedom of Information Law authorizes agencies to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2)(b) provides examples of unwarranted invasions of personal privacy, one of which pertains to medical histories. In short, I do not believe that you could

obtain a person's psychiatric history under the Freedom of Information Law.

With respect to a "police record" or criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §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]. It is also noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to those events are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

Since you asked for "information helpful to prepare a foil request", enclosed is "Your Right to Know", which may be useful to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 7199

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 19, 1992

Ms. Cynthia Ahlgren Shea
Town Attorney
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, unless otherwise indicated.

Dear Ms. Shea:

As you are aware, I have received your letter of June 5 in which you requested an advisory opinion concerning the Freedom of Information Law.

By way of background, you wrote that:

> "The East Hampton Town Police Department (the 'Department') responded to a call for medical assistance. Upon arriving at the scene, the police saw contraband in plain view. The police obtained a search warrant, returned to the house and arrested the woman who had originally called for medical assistance. Consistent with the Department's long standing policy, this call was entered on its activity log as a call for medical assistance. The police blotter was not changed to indicate that she had been arrested. The woman was freed on bail and cooperated with the Department's investigation in this matter, including assisting in locating her boyfriend who was subsequently arrested.
>
> "The police did not notify the local newspaper, the East Hampton Star, of the woman's arrest until they had arrested her

> boyfriend, sixteen days after the original call for medical assistance. The Star has objected to the Town's failure to record this arrest on its police activity log when it occurred, apparently arguing that the police must make a contemporaneous entry on its blotter for each arrest."

You added that you are aware of the case law concerning police blotters on activity logs, citing Sheehan v. City of Binghamton [59 AD 2d 808 (1977)], and that the Town "has always made its blotter available for inspection." Nevertheless, in view of the Star's complaint, you raised the following question:

> "Under laws of the State of New York, including the Freedom of Information Law, is the Police Department of East Hampton Town required to make a contemporaneous record open to the public of every arrest and the name of the person arrested?"

Based on our recent discussion concerning my attempt to ensure that I understood the question, it is assumed that the term "make" is intended to mean "create".

In this regard, I offer the following comments.

First, it is noted that the phrase "police blotter" is not defined in any provision of law, and the nature of information contained in police blotters varies among police departments and other law enforcement agencies. In Sheehan, it was found, based upon custom and usage, that a police blotter is a log or diary in which events reported by or to a police department are recorded, that a blotter essentially consists of a summary of events or occurrences, and that it contains no investigative information. However, often police blotters, depending upon the department, may contain more or different information than that described in Sheehan.

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create or prepare a record to comply with its provisions.

Based upon the foregoing, although an agency must disclose existing records to the extent required by law, I am unaware of any provision of law that would require a police department to maintain its police blotter in any particular manner or that would require a police department to make an entry in a police blotter. While the facts described in your letter may have been unusual and the failure to place an entry in the blotter may have been an

aberration from the Department's usual practice, the Freedom of Information Law in my view would not have required that such an entry be made. Further, the Freedom of Information Law requires that agencies disclose records in response to requests; it does not require agencies, on their own initiative, to take affirmative action to disclose records that have not been 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- 7200

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 19, 1992

Mr. Eddie Hunter
89-A-1241 11-3-B5
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Hunter:

I have received your letter of June 9. You have asked for information concerning the means by which you may seek records pertaining to yourself from your facility.

In this regard, I offer the following comments.

First, according to the regulations promulgated by the Department of Correctional Services concerning access to Department records, a request for records kept at a correctional facility may be made to the facility superintendent or his designee.

Second, §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 you are seeking.

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

It is suggested that you review the regulations referenced above, a copy of which is enclosed.

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- 7201

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 19, 1992

Mr. Kevin A. Luibrand
Tobin and Dempf
100 State Street
Albany, NY 12207

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

Dear Mr. Luibrand:

I have received your letter of June 11. You have asked that I review copies of responses to your requests for records of the Towns of Halfmoon and Waterford. Both involved copies of vouchers submitted by a particular engineering firm and checks paid by each of the municipalities to that firm.

The response to your request by the Halfmoon Town Clerk indicated that, having reviewed the files, the records sought were voluminous. Consequently, she wrote that, prior to making photocopies, the Town would "require a deposit of $500.00 to cover the estimated cost of duplicating at 25 cents per page." In this regard, it has been held that an agency may require payment in advance of photocopying records when the request involves a voluminous number of records (Sambucci v. McGuire, Sup. Ct., New York Cty., Nov. 4, 1982). Assuming that the clerk's estimate of the number of records sought is reasonable, I believe that her response was appropriate.

The Waterford Town Clerk wrote that you could "pick up the documents" anytime after 9 a.m. on June 15, and that a "charge of $1.00 per page will be payable at that time."

In my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for searching for records or for a clerk's time, no such fee may be assessed, and the fee that can be charged is limited to twenty-five cents per photocopy.

By way of background, §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 of 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 is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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 states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (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. Therefore, insofar as the resolution authorizes the assessment of a fee other than a maximum fee of twenty-five cents per photocopy, I believe that it is invalid.

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)].

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: Mary J. Pearson, Halfmoon Town Clerk
Barbara J. Plummer, Waterford Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7202

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 19, 1992

Mr. A. F. Logallo
90-B-1210
Box 2000
Pine City, NY 14871

<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. Logallo:

I have received your letters of June 10 and June 12, both of which reached this office on June 15.

In the former, you requested copies of advisory opinions, which are enclosed. In the latter, you raised questions concerning the unsealing of adoption records.

It is noted in this regard that the first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §114 of the Domestic Relations Law, which generally requires that adoption records be sealed and confidential. As such, the Freedom of Information Law would not be applicable to those records. Section 114 states in part that:

> "No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and

to such additional persons as the court may direct."

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- 7203

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 19, 1992

Hon. Shirley Murray
Town Clerk
Town of Wilton
20 Traver Road
Ganesvoort, NY 12831-9127

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

Dear Ms. Murray:

I have received your letter of June 15 in which you requested an opinion concerning the Freedom of Information Law.

You wrote that suggestions have been made in the Town of Wilton "that the hourly rates charged to the town by a professional engineering firm under contract with the town might not be disclosed as public information under the Freedom of Information Law."

In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 appropriately be asserted to withhold a record or records indicating payment or the rate of payment made by a municipality to a person or firm involved in a contractual relationship with the municipality.

As a general matter, 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. Even in the case of payments to attorneys retained by agencies, while the communications between an attorney and client are generally privileged, 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, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990)].

In short, records containing the kind of information that you described would in my opinion be available.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7204

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 22, 1992

Mr. Steve Broder
[redacted]

Dear Mr. Broder:

As you are aware, a copy of your letter addressed to the Superintendent of the Massapequa School District has been forwarded to this office by Frank R. Fioramonti of the Department of Law. The Committee on Open Government is authorized to advise with respect to the Freedom of Information Law.

One aspect of your letter deals with a request directed to the District some six months ago that has apparently 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, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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)].

Although I am unfamiliar with your request, I point out that the Freedom of Information Law pertains to existing 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.

Enclosed is a copy of "Your Right to Know", which describes both the Freedom of Information Law and the Open Meetings Law.

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: Dr. James Brucia

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 1205

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 22, 1992

Mr. Carl Knight
90-A-6022
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. Knight:

I have received your letter of June 15. As in the case of your earlier correspondence, the issue involves your difficulty in obtaining records from the City of Middletown Police Department. Specifically, you asked to whom or to what governing body you may appeal a denial of access to records.

To reiterate a portion of my response to you on June 3, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal. 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 thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Based on the foregoing, I believe that an appeal may be made to the Middletown City Council, which is the governing body of the City, or to the person or body designated by the City Council to render determinations following appeals. I am unaware of whether the City Council determines appeals or whether it has designated a person or body to do so on its behalf. Therefore, it is suggested that you

appeal to the City Council, asking that, if that body does not determine appeals under the Freedom of Information Law, your appeal be forwarded to the appropriate person or body.

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- 7206

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 22, 1992

Mr. Jimmie Lee Allen
80-A-1633
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. Allen:

I have received your recent letter, which reached this office on June 17.

You have asked for assistance concerning requests for records of the New York City Police Department that have been denied. The materials attached to your letter indicate that the request involves records relating to your arrest.

In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, which appear to relate to your arrest, or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §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". That provision 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 §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 §87(2)(e).

Another possible ground for denial is §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 §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 and communicated within the department or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Lastly, 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 o 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.

As you requested, the materials attached to your letter have been returned to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan R. Rosenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7207

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 22, 1992

Ms. Elizabeth 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 June 15, which pertains to the implementation of the Freedom of Information Law by the Town of Rotterdam.

Your comments involve a letter to the editor sent by James Constantino, Town Supervisor, to a local newspaper, and you have focused on the following statement:

> "Once a citizen request has been received in writing, the town has five days to indicate if it approves or denies the request.
>
> "Once a request is approved, the town has another five days to provide the information or request a finite extension of time."

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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..."

Based upon the foregoing, within five business days of the receipt of a request, an agency must "make the record available", deny the request in writing, or if more than five business days is needed to grant or deny access, the agency may acknowledge the receipt of the request within that period. If the receipt of the request is acknowledged, the acknowledgement must include "a statement of the approximate date when such request will be granted or denied."

You also referred to a portion of a form used by the Town and asked whether "a simple X mark, in front of the category, RECORD NOT MAINTAINED BY THIS AGENCY [is] adequate to fulfill..." the requirement that the reasons for a denial be explained in writing. In my view, that notation is adequate when an agency does not maintain the records sought. First, the reason would be given in writing in that circumstance. Second, in a technical sense, a response to that effect is not a denial, for an agency can neither grant nor deny access to records that it does not maintain.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James A. Constantino, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7208

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 22, 1992

Mr. Melvin H. James
82-A-0787
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. James:

I have received your letter of June 15 in which you raised questions concerning access to records.

The first question involves a failure to reply to a request that you directed to the Nassau County Clerk. The second involves a right to obtain a pre-sentence report from a county probation department concerning a person who testified at your trial. And third, having been informed that sentencing minutes were court records outside the coverage of the Freedom of Information Law, you asked how they can be obtained.

I believe that the first and third questions are related, and in this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records of an agency, and the term "agency" is defined in §86(3) of that statute to include:

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

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

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

As such, the 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, §8020) and "other than as clerks of court" (see Civil Practice Law and Rules, §8021). Therefore, I believe that some records of county clerks may be considered court records, while others are not. Although court records are not subject to the Freedom of Information Law, other provisions of law often grant access to those records. For example, §255 of the Judiciary Law often grants access to court records. As a general matter, a request for court records should be directed to the clerk of the court in which a proceeding is conducted.

When records sought are subject to the Freedom of Information Law, I point out that that statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 a county clerk denies access to court records, the clerk would be performing duties outside the scope of the Freedom of Information Law. Therefore, in that circumstance, the provision pertaining to the right to appeal found in §89(4)(a) of the Freedom of Information Law would not apply. If, however, the county clerk denies access to agency records subject to the Freedom of Information Law, an applicant would have the right to appeal pursuant to the provision cited in the preceding sentence.

With regard to pre-sentence reports, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances, is §390.50 of the Criminal Procedure Law, 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 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 §390.50 of the Criminal Procedure 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- 7209

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 22, 1992

Mr. John O'Keeffe
91-A-0730
Marcy Correctional Facility
Box 3600
Marcy, NY 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.

Dear Mr. O'Keeffe:

I have received your recent letter, which reached this office on June 16. You have sought assistance concerning requests for records at your facility.

According to your letter, when you requested a subject matter list you "got the one for the facility and not the one on [your] file." It is unlikely that a subject matter list exists concerning your file, and, in my view, there is no requirement that such a record be prepared concerning that file. Section 87(3)(c) of the Freedom of Information Law requires that each agency maintain:

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

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. It is suggested that you review §5.13 of the regulations promulgated by the Department of Correctional Services, which pertains to its subject matter list.

You also wrote that you were informed that you could not obtain a copy of the probation report from the facility. It is assumed that you are referring to your pre-sentence report. If that is so, I point out that although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, 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 §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 §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, you asked that I "help [you] correct errors in [your] records". In this regard, while the Freedom of Information Law often provides access to records, that statute does not deal with the correction of records. It is noted, however, that the

regulations referenced earlier contain provisions that enable inmates to "challenge the accuracy" of certain records pertaining to them (see §5.50 et seq.).

Enclosed is a copy of the regulations promulgated by the Department of Correctional Services concerning access to its records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7210

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 24, 1992

Mr. Edward K. Christianson
77-D-0093
Auburn Correctional Facility
135 State Street
Box 618
Auburn, NY 13021

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

Dear Mr. Christianson:

I have received your letter of June 15 in which you requested an opinion concerning the Freedom of Information Law.

Your question is:

> "whether an agency Records Access Officer, after having received a formal application for access to records, refuses to respond to said application and further delays the proceeding by leaving in the mind of the applicant an expectation the application will be responded to at a time after the five day limitation period, is subject to sanction by order of the appellate bureau of the agency, or to a court, to disclose all records sought, without regard to status of any of the records."

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, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, there is nothing in the Freedom of Information Law that would require, by means of a "sanction", that all records requested be disclosed in the event that agency officials fail to respond to a request within the prescribed time limitations. It is noted that in the Supreme Court decision rendered in Floyd, it was found that the failure to respond to an appeal required "that the custodian provide access to the material" [437 NYS 2d 886, 888 (1981)]. However, in reviewing that decision, the Appellate Division held that:

> "...as a policy matter, we do not think the statute should be interpreted so rigidly to require the result directed by Special Term. We recognize the importance of prompt response by the agency to the request for information. Such responsiveness and accountability are the

> very point of FOIL. But the same statute also expresses the public policy that some kinds of material should be exempt from disclosure" [87 AD 2d 388, 390 (1982)].

As such, the Appellate Division remanded the matter to Supreme Court "to determine whether and to what extent petitioner is or is not entitled to these materials" and to "determine whether the material falls within one of the exemptions specified in the Freedom of Information Law" (id.). Based upon the foregoing, I do not believe that an agency's failure to respond in a timely manner would automatically or necessarily result in disclosure of requested records.

Lastly, enclosed are copies of the regulations promulgated by the Committee on Open Government and its latest annual report. The report includes summaries of every judicial decision rendered under the Freedom of Information Law of which this office is aware.

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-7211

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 24, 1992

Mr. Jitendra Lakram
92-A-2581
Elmira Correctional Facility
Box 500
Elmira, NY 14902

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

Dear Mr. Lakram:

I have received your recent letter, which reached this office on June 19. In brief, you have sought assistance concerning the means by which you may seek and obtain records.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law is generally applicable to records maintained by entities of state and local government in New York, such as police departments or offices of district attorneys.

Second, a request should be made to the "records access officer" at the agency or agencies that you believe would maintain the records in which you are interested. The records access

officer has the duty of coordinating an agency's response to requests.

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

Since you referred to motions and related documents, I point out that the courts and court records are not subject to the Freedom of Information Law. However, those kinds of records may be available under other provisions of law (see e.g., Judiciary Law, §255) by seeking them from the clerk of the court in which the proceeding was conducted.

Lastly, enclosed is "Your Right to Know", which describes the Freedom of Information Law in detail 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-1212

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 24, 1992

Mr. David F. Collins
91-B-2169
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. Collins:

I have received your letter of June 16 and the materials attached to it.

In brief, you requested various records pertaining to yourself from the City of Fulton Police Department. The records apparently relate to your arrest and eventual conviction. In response to the request, you were informed that "records of law enforcement agencies are exempted from disclosure", but that the Department would comply with a court order.

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 provide advice concerning the Freedom of Information Law. The Committee is not empowered, however, to enforce that statute or compel an agency to grant or deny access to records.

Second, I disagree with the statement that "records of law enforcement agencies are exempted from disclosure". All agency records, including those of law enforcement agencies, fall within the scope of the Freedom of Information Law. That is not to suggest that all such records must be disclosed, but rather that they are subject to rights conferred by the Freedom of Information Law.

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

of the contents of the records in which you are interested, which appear to relate to your arrest, or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §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". That provision 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 §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 §87(2)(e).

Another possible ground for denial is §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 §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 and communicated within the department or to another agency would in my view fall within the scope of §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 o 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, a person whose request is denied has the right to appeal the denial. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Michael K. Stafford
Investigator Mark A. Spawn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7213

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 24, 1992

Mr. Linda J. Chapman
[redacted]

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

Dear Ms. Chapman:

I have received your letter of June 15 pertaining to difficulty you have encountered in an attempt to obtain records from a volunteer fire company, the Meridian Fire Department, Inc.

In this regard, I offer the following comments.

First, 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.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, I point out the Freedom of Information Law pertains to existing records, and §89(3) of the Freedom of Information Law states in part that an agency need not create records in response to requests.

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.

To the extent that the records that you requested exist, with one exception, I believe that they would be available, under the Freedom of Information Law, for none of the grounds for denial would apply. The one aspect of your request which could in my opinion be denied involves the residence addresses of members.

Section 87(2)(b) of the Law permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy", and I believe that members' home addresses could be withheld on that basis.

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 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: Meridian Fire Department, Inc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7214

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 24, 1992

Mr. George Clementi
79-A-1638
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. Clementi:

I have received your letter of June 16 in which you requested assistance in gaining access to records relating to a homicide that occurred in 1973 and which resulted in a trial in 1979. The incident occurred in the Bronx, and you wrote that you requested records from the New York City Police Department "without any results".

In this regard, I offer the following.

First, since the event occurred several years ago, it is possible that some of the records in which you are interested may no longer exist. However, requests could be made under the Freedom of Information Law to any agency that you believe would maintain records pertaining to the matter.

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 §87(2)(a) through (i) of the Law. Since I am unaware of 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 provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §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". That provision 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 §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 §87(2)(e).

Another possible ground for denial is §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 §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 and communicated within the department or to another agency would in my view fall within the scope of §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 o 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. Further, although the courts are not subject to the Freedom of Information Law, court records are often available under other provisions of law (see e.g., Judiciary Law, §255) from the clerk of the court in which a proceeding was conducted.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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.

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- 7215

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 24, 1992

Mr. Edward Duffin
89-C-0399
Clinton Correctional Faciltiy
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. Duffin:

I have received your letter of June 14 in which you requested assistance concerning the Freedom of Information Law.

In brief, approximately two months ago while you were at the Wende Correctional Facility, you were informed that copies of certain records that you requested would be made available upon payment of fifty cents. You sent that amount but received records that you did not seek. After explaining the problem to the records access officer at the facility, you were informed that copies would be made available upon payment of $1.50. You forwarded that amount and were transferred to a different facility two weeks later. As of the date of your letter to this office, you had not yet received the records.

In this regard, I offer the following suggestions.

First, you could write to the records access officer to remind him of your request or to attempt to ascertain the status of the request.

Second, under the circumstances, since the records sought have not been made available, it appears that you could consider your request to have been denied. In such case, you may appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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-7216

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 24, 1992

Mr. Danny Anderson
[redacted]

The staff of the Committee 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. Anderson:

As you are aware, I have received your letter of June 15 and copies of the correspondence attached to it.

Your inquiry relates to a request for records of the Town of Islip that pertains to two parcels, 8 and 10 Cherry Street in Bayshore, which you apparently own. Although the Town granted access to records maintained by its Building and Zoning Departments, the records maintained by the Fire Prevention Bureau were withheld pursuant to §87(2)(e)(i) of the Freedom of Information Law. As indicated by the Assistant Town Attorney, that provision permits an agency to withhold records "compiled for law enforcement purposes" when disclosure would "interfere with law enforcement investigations or judicial proceedings."

Based upon our recent conversation, however, it is your view that the records in question were not "compiled for law enforcement purposes." Although I am unaware of the functions of the Fire Prevention Bureau, you expressed the view that it maintains records concerning the properties in question only in conjunction with its oversight of housing that consists of six or more units. You added that, while your request relates to five summonses, none involve any criminal activity. Further, you stated that the records sought relate to routine reports of inspections that occurred before and after your ownership of the properties, and that they were prepared prior to any "investigation" or the issuance of the summonses.

If your contentions are accurate, that the records withheld were prepared in the ordinary course of business rather than for

law enforcement purposes, I would agree that §87(2)(e) would not serve as an appropriate basis for denial. This is not to suggest that those records would necessarily be available in their entirety, but rather that §87(2)(e) would not be applicable.

I point out, too, that it had been claimed in the past that building code inspection records could be withheld on the ground that they involved investigatory files compiled for law enforcement purposes. 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)].

In an effort to assist you, a copy of this opinion will be forwarded to the Assistant Town Attorney who denied your request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce P. Vetri, Assistant Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7217

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 25, 1992

Robert J. Flavin, President
Local 1170
1451 Lake Avenue
Rochester, NY 14615

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

Dear Mr. Flavin:

I have received your letter of June 17, as well as the correspondence attached to it.

As I understand the materials, you have attempted since February to obtain records from the Town of Greece reflective of the payment of legal fees by the Town to an attorney and/or law firm during particular years. As of the date of your letter to this office, the records had not yet been made available, and 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 and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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.

With regard to expenses incurred, as a general matter, 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 specific 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 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 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 liable 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 CPR 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. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name

> of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys should be disclosed.

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: Town Board
Janet Gwen DiPalma, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 1218

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 25, 1992

Mr. Brandon M. Stickney
Union Sun & Journal and
Tri-County News
459-491 S. Transit Street
Lockport, NY 14094

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

Dear Mr. Stickney:

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

You have questioned the propriety of a denial of access to records by Niagara County. The records in question involve cellular telephone calls made by the County Parks Commissioner during a certain period.

In this regard, I offer the following comments.

First, all agency records are subject to rights conferred by the Freedom of Information Law, and §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

It is noted that the Court of Appeals has construed the definition as broadly as its specific language suggests [see e.g., Westchester

Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980) and Washington Post v. Insurance Department, 61 NY 2d 557 (1984)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. The denial appearing in §87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In my opinion, the phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part. I believe that the quoted phrase also imposes an obligation on agency officials to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

Second, in my view two of the grounds for denial are likely relevant to the issue.

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 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.

I believe that the records in question could be characterized as intra-agency materials. Nevertheless, in view of their content, they would apparently consist of statistical or factual information accessible under §87(2)(g)(i) unless another basis for denial applies. As such, §87(2)(g) would not, in my opinion, serve as a basis for denial.

The other ground for denial that is relevant is §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 may be subject to conflicting interpretations, 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); 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); 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].

When a public officer or employee uses a mobile telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to the officer or employee serving as a government official.

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 employee

who initiated the call, but rather with respect to the recipient of the call.

There is but one decision of which I am aware that deals with the issue. In Wilson v. Town of Islip, one of the categories of the records sought involved bills involving the use of cellular telephones. In that decision, it was found that:

> "The petitioner requested that the respondents provide copies of the Town of Islip's cellular telephone bills for 1987, 1988 and 1989. The court correctly determined that the respondents complied with this request by producing the summary pages of the bills showing costs incurred on each of the cellular phones for the subject period. The petitioner never specifically requested any further or more detailed information with respect to the telephone bills. In view of the information disclosed in the summary pages, which indicated that the amounts were not excessive, it was fair and reasonable for the respondents to conclude that they were fully complying with the petitioner's request" [578 NYS 2d 642, 643, ___ AD 2d ___ (1992)].

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 thought 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 might 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 §87(2)(f) of the Freedom of Information Law.

I would conjecture that, in the case of calls made by a commissioner of parks, phone calls may be made to a great variety of persons in a broad variety of contexts. Unlike the caseworker who routinely phones a class of persons having a particular status (i.e., recipients of public assistance), it is likely that the calls made by a commissioner would involve an array of issues and persons who do not fall within any special identifiable class or status. If my assumption is accurate, disclosure of a phone number would not alone signify a person detail involving the recipient of a call. Further, as indicated previously, disclosure of the number would not necessarily indicate who received the call, nor would it disclose anything about the nature of a conversation.

In sum, subject to the unusual kinds of exceptions discussed earlier, it appears that the records sought should in my opinion be disclosed under the Freedom of Information Law.

I point out, too, that the Court of Appeals on several occasions has found that an agency cannot merely assert a basis for denial; rather, it has been held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In the same decision, it was 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 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" (id., 565-566).

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

cc: Edwin Shoemaker, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7219

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 25, 1992

Ms. Carolyn James
Executive Editor
Massapequa Post
1045B Park Boulevard
Massapequa, NY 11762

The staff of the Committee on Open 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:

I have received your letter of June 16 in which you requested an advisory opinion concerning the Freedom of Information Law.

Your inquiry concerns rights of access to police blotters, particularly those maintained by the 7th Precinct of the Nassau County Police Department. Following two verbal requests, you were told that you could not review the blotters because they contain confidential information. In response to a written request, you were informed by Sgt. Thomas J. King, Deputy Commanding Officer of the Department's Legal Bureau, that the Freedom of Information Law "does not provide for the browsing through or general review of a Police Blotter." He also wrote that:

> "Pursuant to the Freedom of Information Law, this Department will provide a copy of a specific entry in a blotter, upon receipt of a written request from a party in interest, or a person having an authorized release from an party in interest. Therefore, if you wish to request a copy of a specific blotter entry, submit a written request, along with an authorized release..."

In addition to your concerns with respect to Sgt. King's response, you wrote that the Department "has offered what they believe is an alternative to having reporters review the blotters." You indicated that:

> "They currently distribute to the media a list of incidents compiled by police officers in each precinct. In addition to the reports being less timely and often without important details, they are an interpretation of the information a police officer who, is paid by the Nassau County Police Department, believes is important to [your] readers."

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 §87(2)(a) through (i) of the Law.

I point out, too, that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of one or more of the grounds for denial that follow. Based on the quoted language, I believe that there may be situations in which a single record might be both available or deniable in part. Further, the same language, in my opinion, imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. As such, even though some aspects of a police blotter or other record might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

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

Third, the phrase "police blotter" is not specifically defined in any statute. It is my understanding that it is a term that has been used, more than anything else, based upon custom and usage. Further, the contents of what might be characterized as a police

blotter may vary from one police department to another. As you may be aware, it has been held that police blotters are available under the Freedom of Information Law [Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. The court in Sheehan determined that, based on custom and usage, a police blotter is a log or diary in which any event reported by or to a police department is recorded. The decision specified that a traditional police blotter contains no investigative information, but rather merely a summary of events or occurrences and that, therefore, it is accessible under the Freedom of Information Law. When a police blotter is analogous to that described in Sheehan in terms of its contents, I believe that the public would have the right to review or "browse through" it.

It appears that the blotters maintained by the Nassau County Police Department may be more expansive than the traditional police blotter described in Sheehan. If that is so, although those records are subject to rights of access, portions of the blotter might be withheld, depending upon their contents and the effects of disclosure. Several grounds for denial may be relevant, and it is emphasized that many of them are based upon potentially harmful effects of disclosure. The following paragraphs will review the grounds for denial that may be significant.

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

Also of potential significance is §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, such as domestic disputes, complaints that neighbors' dogs are barking, or where a record identifies a confidential source or a witness, for example.

The next ground for denial of relevance is §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 opinion, a police blotter containing the kind of information described in Sheehan could likely be characterized as a record compiled in the ordinary course of business, rather than a record "compiled for law enforcement purposes". When that it so, §87(2)(e) would not be applicable. More detailed blotters or records relating to a blotter entry such as investigative reports would likely fall within the scope of §87(2)(e). Those records would be accessible or deniable, depending upon their contents and the effects of disclosure.

Another ground for denial of possible relevance is §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 §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 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.

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

In sum, for reasons described earlier, I do not believe that the Department could require an applicant to request specific entries in a police blotter in conjunction with particular incidents. That kind of requirement potentially results in a "catch-22" and would, in my view, be inconsistent with the standard that an applicant must "reasonably describe" the records sought. Further, the fact that some aspects of a blotter might properly be withheld does not enable an agency to withhold the blotter in its entirety. Rather, I believe that an agency must disclose the blotter, or any record, to the extent required by the Freedom of Information Law, perhaps after having made deletions in accordance with the grounds for denial appearing in the Law.

Lastly, with respect to the practice of choosing the information to distribute to reporters, the Department, from my perspective, is essentially engaging in judgments regarding newsworthiness. In general, it is my belief that members of the news media, not the government, should have the ability to determine what is newsworthy.

As you requested, a copy of this opinion will be forwarded to Sgt. King.

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. Thomas J. King. Deputy Commanding Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2110
FOIL-AO- 7220

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 26, 1992

Ms. Darlene Humphrey
Village of Lancaster
49 Laverack Avenue
Lancaster, NY 14086

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

Dear Ms. Humphrey:

I have received your letter of June 18 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, the Lancaster Village Board of Trustees conducted an executive session relating to the discipline of a police officer. After a lengthy discussion, a vote was taken and entered into the minutes of the executive session. You wrote, however, that "it was unclear to the Board what information the Mayor was required to give to the public in regards to what transpired in the executive session." You indicated that you "took the position that to leave executive session and discuss publicly the details of that session defeats the purpose of the executive session", and you assumed that the Board was "not obligated to announce the discussion or the vote."

In this regard, I offer the following comments.

First, §106 of the Open Meetings Law pertains to minutes and provides what might be viewed as minimum requirements concerning the contents of minutes. Subdivision (2) of §106 deals with minutes of executive sessions and states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter

> which is not required to be made public by the freedom of information law as added by article six of this chapter.

In addition, subdivision (3) of §106 provides that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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 on the foregoing, when a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. Additional detail is not required to be included or disclosed. It is also noted that if a public body merely discusses an issue or issues during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared. Although the discussion to which you referred might have been lengthy, minutes of the executive session may be brief. Further, while public bodies may and many do announce their action in public following action taken during an executive session, in a technical sense, I do not believe that a disclosure must be made until minutes are prepared and made available. Again, that must occur one week of the executive session.

Second, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Since a village board of trustees is an "agency" as that term is defined in the Freedom of Information Law [§86(3)], I believe that a record must be prepared that indicates how each member cast his or her vote when final action is taken. Ordinarily, the record of votes is part of the minutes.

Lastly, since the issue related to a police officer, if such officer was found to have engaged in misconduct, I believe that minutes identifying that person would be public. If, however, the Board determined that there was no misconduct and that no

disciplinary action should be imposed, and if that person's name had not been previously disclosed, his or her name could in my view be withheld or deleted from the minutes.

If you would like more detailed information concerning records relating to the discipline of police officers, that issue can be considered separately and in detail.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7221

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 26, 1992

Sara Pines, M.S.W., Ph.D.
[redacted]

Dear Dr. Pines:

Your letter of June 24 addressed to Secretary Shaffer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State upon which the Secretary serves as a member, is authorized to advise with respect to the Freedom of Information Law.

Your inquiry pertains to the Community Action Program of Cortland County (CAPCO). According to your letter, you contacted CAPCO in an effort to obtain the names and addresses of the members of its Board. Since you received no response, you have questioned whether you are entitled to that information.

In this regard, the New York Freedom of Information Law pertains to agency records, and §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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government. It is my understanding that community action agencies are not-for-profit corporations. Although it appears that they perform a governmental function, it is questionable whether they constitute "governmental entities" or, therefore, agencies subject to the Freedom of Information Law.

It is also my understanding that community action agencies are created by means of the authority conferred by the Economic Opportunity Act of 1964. According to §201 of the Act, the general purposes of a community action agency are:

> "to stimulate a better focusing of all available local, State, private and Federal resources upon the goal of enabling low-income families, and low-income individuals of all ages, in rural and urban areas to attain the skills, knowledge, and motivations and secure the opportunities needed for them to become fully self-sufficient..." [§201(a)]
>
> "to provide for basic education, health care, vocational training, and employment opportunities in rural America to enable the poor living in rural areas to remain in such areas and become self-sufficient therein..." [§201(b)].

When community action agencies are designated, §211 indicates that they perform a governmental function for the state or for one or more public corporations. It is noted that a public corporation includes a county, city, town, village, or school district, for example. As such, by means of the designation as community action agencies, those agencies apparently perform their duties for the state or at least one public corporation.

Section 213 of the enabling legislation expresses an intent to enhance public participation as well as disclosure of information regarding the functions and duties of community action agencies. Specifically, subdivision (a) of §213 states in relevant part that:

> "[E]ach community action agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. Each community action agency shall also provide for reasonable public access to information, including but not limited to public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible..."

Again, while it is unclear that the Freedom of Information Law applies to records maintained by a community action agency, I believe that the federal legislation quoted above indicates an intent to ensure accountability to the public by providing "reasonable public access to books and records of the agency."

Whether the Freedom of Information Law applies or otherwise, I believe that it offers guidance concerning the disclosure of the information sought.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is noted that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence in my opinion indicates that a single record might be accessible or deniable in whole or in part.

Second, of likely relevance under the circumstances in terms of the authority to withhold is §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 details of individuals' lives.

In my opinion, while the names of members of the CAPCO Board should be disclosed, even if the Freedom of Information Law applies, I believe that their home addresses could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. It is noted that §89(7) specifies that home addresses of current or former public officers and employees need not be disclosed under the Freedom of Information Law.

Lastly, since the Department's Division of Economic Opportunity maintains legal relationships with community action agencies, I contacted the Division of on your behalf and obtained the enclosed document. It is my understanding that the document is submitted as part of a refunding application package. The document includes the names of the members of the CAPCO Board, but I have deleted their addresses in conjunction with comments made in the preceding paragraphs.

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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7222

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 26, 1992

Hon. Vivian Kelly
Town Clerk
Town of Poestenkill
Poestenkill, NY 12140

Dear Ms. Kelly:

I have received your letter of June 19 and the news article attached to it.

The article pertains to a request made under the Freedom of Information Law in which the applicant was charged "25 cents per page in copying fees and $10 an hour for 10 hours of labor" by the Town of Brunswick.

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 records or for labor, no such fee may be assessed.

By way of background, §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 of 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 is 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 states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or

> (3) any certification pursuant to this Part" (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. Therefore, insofar as an agency assesses a fee other than a maximum fee of twenty-five cents per photocopy, I believe that it is invalid.

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)].

I hope that I have 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 of Brunswick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7223

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 26, 1992

Mr. Glenn A. Debrosky
[redacted]

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

Dear Mr. Debrosky:

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

Your inquiry focuses upon a series of requests directed to the Superintendent of the Rondout Valley Central School District involving the number of classes taught by teachers and the number of students in each class. In the initial response to the request, you were informed that the information sought "is not a record maintained except as a hand-written anecdotal working paper -- whose numbers change daily -- and which is maintained by the principal of the building." You have expressed "disagreement" with the claim that only "anecdotal" records exist containing the information sought for the following reasons:

> "* Teachers must be given class schedules and the number of students attending each class.
>
> * Guidance counselors [you] assume, need this information when preparing student schedules.
>
> * Daily attendance is mandated for each class.
>
> * Per contract with teachers a committee on teacher loads is described that consist of Superintendent of Schools, board members, teachers and administrators who assist the board in developing a plan that meets contract verbiage. [You are] not sure if this really happens, but it is a negotiated clause in the contract.

> * Last, in order to present a realistic budget, teacher load must be a major consideration, in fact in a newsletter to the District the President of the Board of Education mention the boards review of teacher loads when determining the budget."

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

First, it is emphasized that the Freedom of Information Law pertains to all records of an agency, such as a school district. 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, documentation or information maintained in some physical form by the District would in my view constitute "records" subject to rights conferred by the Freedom of Information Law, including those characterized as "anecdotal".

Second, the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency need not "prepare any record not possessed or maintained by such entity." Therefore, if indeed the information sought does not exist in the form of a record or records, the District would not in my opinion be required to create new records on your behalf. I point out that, when an applicant for records is informed that the records sought are not maintained by the agency, that person may seek a certification to that effect. Specifically, in a situation in which records purportedly are not maintained by an agency, §89(3) 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." It is suggested that you might consider seeking such a certification.

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 it is determined that the records in which you are interested exist, I believe that they would be available, 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
Executive Director

RJF:jm

cc: H. Ross O'Sullivan, Superintendent of Schools
Melvin H. Osterman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7224

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 7, 1992

Mr. Brian Moolenaar
92-A-0944
Sing Sing Correctional Facility
Ossining, NY 10562

Dear Mr. Moolenaar:

I have received your letter of June 23. You wrote that on May 20 you requested records under the Freedom of Information Law from the clerk of the Supreme Court, New York County. However, as of the date of your letter to this office, you had received no response, and you have sought assistance in the matter.

In this regard, the Freedom of Information Law pertains to records of an agency, and the term "agency" is defined in §86(3) of that statute to include:

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

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

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

As such, the courts and court records are not subject to the Freedom of Information Law.

It is suggested that you resubmit your request citing a provision of law concerning access to court records (see e.g., Judiciary Law, §255) or that you discuss the matter with your attorney.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7225

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 7, 1992

Mr. Kenneth Boykin
90-A-3645
Altona Correctional Facility
P.O. Box 125
Altona, NY 12910

The staff of the Committee on Open 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 June 23. You asked whether you may obtain records from your trial lawyer under the Freedom of Information Law.

In this regard, the Freedom of Information Law is applicable to records of an agency. 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 of other governmental 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, as a general matter, the Freedom of Information Law pertains to records maintained by an entity of state or local government in New York. Therefore, unless your trial lawyer is employed by an agency, the records in which you are interested would in my opinion fall beyond the scope 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- 7226

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 7, 1992

Mr. Brevard Griffin
89-A-1801
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Griffin:

I have received your recent letter in which you requested various records relating to your arrest and conviction from this office, as well as another letter dealing with an appeal of your conviction.

In this regard, the Committee on Open Government is authorized to advise with respect to access to records. I cannot provide access to records that you requested, because this office does not possess those records. Further, your questions concerning an appeal are beyond the scope of the jurisdiction or expertise of this office, and it is suggested that you discuss the matter with your attorney.

With respect to access to records, I point out initially that the Freedom of Information Law pertains to agency records, and §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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law is generally applicable to records maintained by entities of state and local government in New York, such as police departments or offices of district attorneys.

Second, a request should be made to the "records access officer" at the agency or agencies that you believe would maintain the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests.

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

Since you referred to court records, it is noted that the courts and court records are not subject to the Freedom of Information Law. However, those kinds of records may be available under other provisions of law (see e.g., Judiciary Law, §255) by seeking them from the clerk of the court in which the proceeding was conducted.

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-7227

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 8, 1992

Mr. Ralph Preston
[redacted]

Dear Mr. Preston:

As you are aware, your letter of June 16 addressed to the Department of Law has been forwarded to the Committee on Open Government. The Committee is authorized to provide advice concerning the Freedom of Information Law.

According to your letter, when you requested copies of laws recently enacted by the Town of Groveland, you were informed that you would be required to pay for copies. You indicated that other towns do not charge and questioned whether the Town of Groveland may do so.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all records of an agency, such as a town, and §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, all documents maintained by a town, including local laws, constitute "records" that fall within the scope of the Freedom of Information Law.

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

While the Committee's regulations specify that no fee may generally be charged for inspection of or search for records, the Law permits agencies to charge up to twenty-five cents per photocopy when duplicates of records are requested.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7228

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Brian Kiesel
92-A-0354
Suite B-Y-551
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. Kiesel:

I have received your letter of June 20 in which you sought assistance concerning access to records.

In brief, you alleged that nearly everyone involved in the work release program at the Queensboro Correctional Facility is informed that their property has been lost. You wrote that you are interested in obtaining records concerning "so called 'lost property'", particularly I-64 forms. You indicated that the form consists of "an itemized list of what was packed up..."

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, if an individual requests the itemized list that you described concerning property belonging to that person, I believe that such a record should be disclosed under the Freedom of Information Law, for none of the grounds for denial could, in my view, be properly asserted. If a request is made for I-64 forms generally, it is likely in my view that names or other identifying details could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(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-7229

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Pat Castaldo
[redacted]

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

Dear Mr. Castaldo:

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

You have asked that "the FOIL laws be enforced" with respect to requests directed to the New York City Police Department. Specifically, according to the materials, your requests made on February 6 and April 20 have not apparently been answered. You sought the Department's rules and regulations concerning the destruction of evidence, "all records" involving Paul Miller, his indictment, his trial in 1981, "loggings" pertaining to evidence used in judicial proceedings involving that individual, records indicating dates of destruction and saving of, or access by technicians to evidence in that case.

In this regard, I offer the following comments.

First, it is emphasized at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee cannot enforce the Law or compel 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, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals at the Department is Susan R. Rosenberg, Assistant Commissioner.

Third, 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. Since the proceedings in which you are interested occurred more than ten years ago, it is possible that some of the records sought may no longer exist.

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 §87(2)(a) through (i) of the Law. Since I am unaware of 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 provisions that may be significant in determining rights of access to the records in question.

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Since you did not provide information regarding the

outcome of Mr. Miller's trial or ensuing proceedings, I point out that if a person is charged and the charges are later dismissed in his favor, records concerning the matter are generally sealed pursuant to §160.50 of the Criminal Procedure Law. If the records sought were sealed, they would be exempted from disclosure.

Assuming that the records have not been sealed, of potential significance is §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". That provision 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 §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 §87(2)(e).

Another possible ground for denial is §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 §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 and communicated within the department or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld. However, factual information, such as the date of the destruction of evidence, would be available under §87(2)(g)(i), unless a different ground for denial could be asserted.

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 o 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. Further, although the courts are not subject to the Freedom of Information Law, court records are often available under other provisions of law (see e.g., Judiciary Law, §255) from the clerk of the court in which a proceeding was conducted.

Lastly, §89(3) states in part 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 requests, I must admit to being unfamiliar with the Department's record-keeping systems; whether the Department has the ability to locate and identify all of the records sought in the manner in which you requested them is unknown to me. It is possible, however, that based upon its filing or indexing mechanisms, certain aspects of your request might not have reasonably described the records.

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

FOIL-AO-1230

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Richard C. Dolan
[redacted]

Dear Mr. Dolan:

I have received your letter of July 8 in which you appealed an alleged denial of access to records by the Town of Keene. The records sought relate to the assessment of real property and include property record cards and real property transfer report forms #5217, and you indicated that you intend to use the records in question in conjunction with the judicial review of your assessment.

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 is not empowered to determine appeals, enforce the law or compel an agency to grant or deny access to records.

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

As such, in the case of a town, I believe that an appeal may be made to the town board or the person designated by the town board to determine appeals.

I also offer the following additional comments.

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Therefore, if, for example, there is no "list of land-and-house sales in [y]our neighborhood...used to arrive at [y]our assessment", Town officials would not, in my view, be required to prepare such a list 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. Moreover, 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 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

With respect to the forms that you requested, §574(5) of the Real Property Tax Law states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced above are usually called "EA 5217" forms, and they include the selling price of a parcel when real property is transferred. Although those forms may often be considered confidential, they are available "for purposes of administrative or judicial review of assessments." Therefore, if those records are maintained by the Town, since you are seeking them for use in a judicial review of your assessment, I believe that they must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Clarence Miner, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7231

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Frank Perrella
86-A-7876 E-3-30
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 June 18. You raised a series of questions concerning a situation in which the records sought consist of more than 6395 documents, and that those documents are "subject to redaction."

Your first question is whether it can be ascertained whether "this voluminous police agency file contains trial transcripts". In my view, the simplest and most direct method of so doing would involve asking, by means of a letter, whether or the extent to which the records include trial transcripts.

Second, you asked whether an applicant may seek to obtain records "on a piecemeal basis, considering he is indigent. I believe that if a request for copies is made, an applicant may ask for as few or as many as he believes he can afford or which would be of interest.

Third, you asked whether an agency must allow inspection of records by a relative or agent. In this regard, if records are available to the public generally, I believe that any person would have the right to inspect them. If records could be withheld from the public on the ground that disclosure would result in an unwarranted invasion of personal privacy, but would be available to the subject of the record, that person could authorize disclosure to an agent pursuant to §89(2)(c) of the Freedom of Information Law. That provision states in relevant part that:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
> ii. when the person to whom a record pertains consents in writing to disclosure..."

If, however, portions of records may be withheld from the public generally as well as the applicant, there may be no way of permitting inspection of records other than by preparing photocopies, from which appropriate deletions could be made. In such situations, I believe that an agency may charge a fee for photocopying. Unless a statute other than the Freedom of Information Law so specifies, an agency can charge no more than twenty-five cents per photocopy [see §87(1)(b)(iii)].

Fourth, you asked whether an applicant has "legal standing under the circumstances (his indigence) to obtain a reduced copying fee for a large file". 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

Lastly, since you referred to a "Vaughn" index, as you may be aware, 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 a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme

> Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that 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-7232

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Wallace S. Nolen
RS Paralegal & Recovery Services
122 Cannon Street
Poughkeepsie, NY 12601-3321

The staff of the Committee 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 June 23, as well as a response to your request by Stephen Del Giacco, Records Access Officer for the Commission of Correction. In addition, under separate cover and as required by §89(4)(a) of the Freedom of Information Law, a copy of a determination of your appeal was forwarded to this office by Mark Bonacquist, Acting Counsel to the Commission. You have sought an advisory opinion concerning the propriety of the denial.

According to that determination, the records withheld include:

> "internal staff memoranda; the Poughkeepsie Police Department lockup log dated 10/28/88; a Police Department Report of Personnel Change dated 7/10/90; and a copy of the Dutchess County Grand Jury Report regarding the arrest and detention of two individuals by the Poughkeepsie Police Department in March 1990 and April 1990."

The internal staff memoranda and lockup log were denied pursuant to §87(2)(g) of the Freedom of Information Law; the report of personnel change was denied in accordance with §§50-a of the Civil Rights Law and 87(2)(a) and (b) of the Freedom of Information Law; the Grand Jury report was denied under the Criminal Procedure Law, §§190.85 and 87(2)(a) and (b) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, with respect to the internal memoranda, §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 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.

Second, the lockup log also consists of intra-agency material. Having discussed that kind of record with Mr. Del Giacco, he said that lockup logs may differ in content from one facility to another. In this instance, he indicated that a separate sheet is prepared regarding each inmate. Each sheet includes an inmate's name, details concerning that person's arrest, the time of an officer's inspection of cell, a description of findings and the condition of an inmate, and perhaps commentary concerning the officer's observations. In my view, the content of those records would determine the extent to which they must be disclosed or may be withheld. I believe that those portions of the logs identifying inmates, the dates of their arrests, the time of an inspection and the like would be available, for they consist of factual information accessible under §87(2)(g)(i). It is possible, however, that details concerning the condition of an inmate and similar information could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Some commentary may not be factual in nature but rather reflective of an officer's opinion and could be withheld under §87(2)(g). There may also be concerns relating to security, in which case §87(2)(f) may be relevant. That provision permits an agency to withhold records

to the extent that disclosure would "endanger the life or safety of any person."

Third, with respect to a record of personnel change, §50-a of the Civil Rights Law exempts from public disclosure personnel records pertaining to police and correction officers that are "used to evaluate performance toward continued employment or promotion". Insofar as the records in question are used for such evaluation, I believe that they could properly be withheld. However, if such a record merely indicates an officer's appointment or promotion, it would, in my view, be available.

Lastly, §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."

As such, I believe that grand jury reports are generally confidential and exempted from disclosure by means of the Criminal Procedure Law and §87(2)(a) of 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

cc: Stephen Del Giacco, Records Access Officer
Mark Bonacquist, Acting Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2112
FOIL-AO- 7233

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Anthony S. Derico
[redacted]

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

Dear Mr. Derico:

I have received your letter of June 26, which pertains to public participation at meetings of the Halfmoon Town Board.

According to your letter, the Board permits members of the public to speak for up to three minutes during each of two portions of its meetings. One of those opportunities involves the ability to comment concerning subjects listed on an agenda. However, you wrote that the agenda is not available until the day of the meeting. The second opportunity involves the ability to comment on issues other than agenda items. Nevertheless, it is your view that three minutes may be inadequate "to answer the lengthy and often inaccurate rebuttals of Town Officials."

You have asked whether "the failure to provide the public with a timely and adequate copy of the Agenda represent[s] a deliberate attempt by the Town not to comply with its own meetings procedures -- procedures established by the Supervisor at the Town's organizational meeting."

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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to permit 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, and many do so. When a

public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally, which would appear to be so in this instance. By authorizing the public to speak during two portions of its meetings, the Board appears to be acting beyond the requirements of the Open Meetings Law.

As in the case of public participation, the Open Meetings Law is silent with respect to agendas. Neither the Open Meetings Law nor any other statute of which I am aware requires that agendas be prepared or specifies when they must be disclosed. Most public bodies prepare agendas based upon practice, policy or rule, rather than pursuant to any statutory requirement.

In my view, once an agenda has been prepared, it constitutes a "record" subject to rights conferred by the Freedom of Information Law [see Public Officers Law, §86(4)]. Further, since they are disclosed on the day of a meeting, I believe that agendas would be available to the public, essentially as soon as they exist, even if they are prepared prior to the dates of meetings.

Lastly, although you referred to procedures established at the Board's organizational meeting, you did not describe any such procedures in relation to the issue that you raised. If, for example, one aspect of the Board's procedures requires that agendas be prepared or disclosed at least three days prior to meetings, a failure to do so would in my opinion be inconsistent with its own rules. It is noted, however, that such inconsistency would not represent a violation of the Open Meetings Law; again, that statute does not deal with the preparation or disclosure of agendas.

I hope that I have 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- 7234

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Julius Davis
87-A-7553
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. Davis:

I have received your letter of June 23 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you made a request to the Erie County District Attorney for records "maintained within [your] criminal investigation file". Further, because you are unaware of the specific records within the file, you also requested " a detailed current list of all records/documents in the file." In response to the request, you were informed that the Office of the District Attorney does not maintain a list of records maintained in the file and that he could not comply with the request "due to lack of specificity."

In this regard, I offer the following comments.

First, I point out that §89(3) of the Freedom of Information Law states in part that, with certain exceptions, an agency is not required to create a record not maintained or possessed by the agency. One of the exceptions to that general principle pertains to §87(3)(c), 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 required to be maintained under §87(3)(c) 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 need not be 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. In short, while I believe that the District Attorney must maintain a reasonably detailed list of the kinds of records maintained by his office, there is no requirement that a list be prepared that identifies each record within a file.

Second, §89(3) states in part 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. Even though records located in that case involved more than two thousand pages, it was found that the request reasonably described the records sought. If there is a "file" consisting of the records concerning your criminal investigation, and if that file can be located, I do not believe that additional specificity would be required to make an appropriate request. In that circumstance, as in Konigsberg, the agency would in my opinion be obliged to review the records within the file to determine the extent to which the Freedom of Information Law requires disclosure.

I hope that I have been of some 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- 7235

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Dennis Villaronga
90-A-9556
Wallkill Correctional Facility
Box G
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. Villaronga:

I have received your letter of June 25 in which you asked that I provide an opinion concerning the propriety of a request made under the Freedom of Information Law, a copy of which you attached.

In the request, which was made to Ms. Peggy Orce, Inmate Records Coordinator at your facility, you sought:

> "a) accident reports of 6/9/92, involving the above named
>
> b) request to inspect copies of Work Orders submitted from January 1, 1992 to present
>
> c) Medical records
>
> d) directive # 4064 - Facility Safety".

In this regard, the only issue in my view involves the requirement imposed by §89(3) of the Freedom of Information Law 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.

It appears that items a and d of your request reasonably describe the records sought. With respect to items b and c, although it may be implicit that you sought work orders and medical records pertaining to yourself, you did not so state. Consequently, it might be contended that those aspects of your request do not meet the standard imposed by §89(3). Further, I have no knowledge of the volume or nature of medical records pertaining to you, and it is possible that additional detail might have been appropriate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Peggy Orce, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7236

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jeffrey E. Robinson
Real Estate Appraiser
L.T. Bookhout, Inc.
P.O. Box 807
Rhinebeck, NY 12572-0807

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

Dear Mr. Robinson:

I have received your letter of June 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you are having difficulty obtaining property record cards for various assessors' offices in Columbia County, particularly in the towns of Kinderhook and Hillsdale. In this regard, I offer the following comments.

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

Second, 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Assuming that the records in which you are interested are essentially the equivalent of those described above, I believe that they 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

cc: Assessor, Town of Kinderhook
Assessor, Town of Hillsdale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7237

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jitendra Lakram
92-A-2581
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. Lakram:

I have received your letter of July 1. You wrote that you would like "to find out how to get all paperwork in possession of the D.A. pertaining to [your] case that constitutes 'Brady' and 'Rosario' material after conviction of crimes pending appeal free of charge due to [your] inability to pay the costly price of copies."

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Under §87(1)(b)(iii) of that statute, an agency may charge up to twenty-five cents per photocopy. I point out that 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

It is possible that you may receive a waiver or reduction of fees in conjunction with a different provision of law. However, since I am not an expert on that subject, it is suggested that you discuss the matter with an 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-7238

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Henry F. Sobota
Scolaro, Shulman, Cohen, Lawler
& Burstein, P.C.
90 Presidential Plaza
Syracuse, NY 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, unless otherwise indicated.

Dear Mr. Sobota:

As you are aware, I have received your letter of June 24 and the materials attached to it.

You have sought an advisory opinion concerning the propriety of a denial of access to records by the State Liquor Authority. In conjunction with a request for disclosure of copies of records relating to an application for liquor license by a named entity, a restaurant, the Authority denied access to the following records on the ground that disclosure would constitute an unwarranted invasion of personal privacy, apparently pursuant to §89(2)(b)(v):

"1. the applicant's statement of finances;

2. the personal questionnaire for each director, officer and major shareholder; and

3. the applicant identification record."

It is your view that the Authority's denial was improper, for you contend that under §89(2)(v), "an agency may invoke the privacy exception only as to 'information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency'" (emphasis yours). You expressed the belief that the information sought is relevant to the work of the Authority and that if it is not relevant to its work, the collection of that information would contravene the Personal Privacy Protection Law,

§94(1)(a). That provision precludes state agencies from collecting personal information from individuals unless it is relevant and necessary to carry out an agency's legal duties.

Having discussed the contents of the records sought with the Authority's records access officer, Richard Chernela, I was informed that an applicant's statement of finances involves the sources of funding used to invest in a license. Those kinds of items ordinarily are reflective of one's personal finances and include such items as a person's bank account numbers. The personal questionnaires to which you referred include home addresses, social security numbers, information regarding personal finances and the like.

According to the records access officer, the information contained in those two kinds of records are relevant to the work of the Authority, for it is needed to determine whether an applicant meets the criteria needed to hold a license. Consequently, I believe that the personal information in question would have been properly collected and reflective of compliance with the Personal Privacy Protection Law.

Further, it appears from my perspective that the denial was likely appropriate. The provision that you cited, §89(2)(b)(v), represents one among five examples of unwarranted invasions of personal privacy. It is noted that the introductory language of §89(2)(b) states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the five examples that follow. Consequently, I believe that those illustrations represent few among conceivable dozens of situations in which records or portions thereof may be withheld in consideration of personal privacy.

I point out that the first example, §89(2)(b)(i), refers to the ability to withhold employment or credit histories. Personal financial information might in some contexts be characterized as a credit history. Even if it could not be so characterized, I believe that it represents the kind of intimate, personal information that could properly be withheld as an unwarranted invasion of personal privacy.

With respect to the remaining record to which you referred, an "applicant identification record", the records access officer could not determine precisely which record that might be. Since you used that phrase in previous correspondence in conjunction with fingerprints, Mr. Chernela conjectured that the record denied may be a criminal history record. If that is so, and if the record indicates that there were no convictions of the subject of the record, I believe that it could be withheld. In my opinion, only to the extent that such a record indicates a conviction would it 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: Joseph A. Comperiati
Richard Chernela

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2113
FOIL-AO-7239

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Stanley Pawenski
Mr. Arthur Gleason
Mr. John Niedbalec
Cohoes City School District
20 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 Board Members Pawenski, Gleason and Niedbalec:

I have received your letter of July 8 and the materials attached to it.

According to your letter, the first issue involves a "workshop" session of the Cohoes Board of Education begun on the evening of June 22, during which the Board entered into an executive session and "voted to appoint" a particular individual to the position of principal of the Middle School. You wrote that:

> "No formal motion or second was made, nor was there a recording of the 'ayes' and 'nays'. The Board President characterized this as a 'polling' of the Board, with the aim of getting a 'consensus'. The seeking of a 'consensus' was presented as routine practice of the Board.
>
> "The Board president again 'polled' the Board seeking another 'consensus', this time seeking to reverse the Board's stated intention to defer its vote on the principal's position until after July 1st, the start of the District's new fiscal year and instead scheduled the vote for a special meeting which would be held immediately following the Board's Public Hearing on its annual budget which was scheduled for Wednesday, June 24th. Again the Board was 'polled' and a 'consensus' obtained in the same manner as set forth above. The reason stated by the Board

> president for these actions was that the June 24th meeting would be the last one wherein he would have a majority in favor of appointing this individual."

In this regard, although it is unclear whether the vote to appoint a particular individual to a position was taken in public or during an executive session, I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote of the members must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

When action is taken, minutes must be prepared in accordance with §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."

Additionally, in one of the few instances in the Freedom of Information Law that requires that records be maintained, §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 §86(3)], such as a town board, 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.

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 of remedies" (id. 646).

In the context of the situation 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 to indicate the nature of the action taken and 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 an 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 a public body in effect reaches agreement on a particular subject, I believe that the minutes should be prepared and should reflect the actual votes of the members.

In contrast, if a consensus 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.

The second issue involves a hearing and an agenda relating to it that pertains to the budget, and an agenda concerning a "special meeting" that would follow the hearing. You wrote that legal notices were published regarding the hearing but that "[n]o public notice of the second special meeting was provided, nor did the District notify the press of any change in the agenda."

It is noted initially that there is a distinction between a meeting and a hearing. A hearing is generally held to enable members of the public to express their views concerning a particular issue. A meeting is generally held by a public body discuss, to deliberate, and potentially, to take action. Further, the notice requirements may differ in the case of a hearing as opposed to a meeting. Prior to a hearing, there may be a requirement that a legal notice be published that indicates the subject of the hearing, the time and place. In contrast, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. However, notice of a meeting need not indicate the subjects to be considered. Moreover, although notice of a meeting must be given to the news media and posted, there is no requirement that a public body pay to place a legal notice in advance of a meeting.

Similarly, there is nothing in the Open Meetings Law pertaining to agendas. While many public bodies routinely prepare and disclose agendas, there is no requirement that agendas be prepared.

Lastly, you asked whether "budget related discussions can properly be held in executive session." In this regard, by way of background, every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

> discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §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 §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

I hope that I have 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-1230

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Richard C. Dolan
[redacted]

Dear Mr. Dolan:

I have received your letter of July 8 in which you appealed an alleged denial of access to records by the Town of Keene. The records sought relate to the assessment of real property and include property record cards and real property transfer report forms #5217, and you indicated that you intend to use the records in question in conjunction with the judicial review of your assessment.

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 is not empowered to determine appeals, enforce the law or compel an agency to grant or deny access to records.

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

As such, in the case of a town, I believe that an appeal may be made to the town board or the person designated by the town board to determine appeals.

I also offer the following additional comments.

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Therefore, if, for example, there is no "list of land-and-house sales in [y]our neighborhood...used to arrive at [y]our assessment", Town officials would not, in my view, be required to prepare such a list 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. Moreover, 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 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

With respect to the forms that you requested, §574(5) of the Real Property Tax Law states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced above are usually called "EA 5217" forms, and they include the selling price of a parcel when real property is transferred. Although those forms may often be considered confidential, they are available "for purposes of administrative or judicial review of assessments." Therefore, if those records are maintained by the Town, since you are seeking them for use in a judicial review of your assessment, I believe that they must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Clarence Miner, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7231

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Frank Perrella
86-A-7876 E-3-30
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 June 18. You raised a series of questions concerning a situation in which the records sought consist of more than 6395 documents, and that those documents are "subject to redaction."

Your first question is whether it can be ascertained whether "this voluminous police agency file contains trial transcripts". In my view, the simplest and most direct method of so doing would involve asking, by means of a letter, whether or the extent to which the records include trial transcripts.

Second, you asked whether an applicant may seek to obtain records "on a piecemeal basis, considering he is indigent. I believe that if a request for copies is made, an applicant may ask for as few or as many as he believes he can afford or which would be of interest.

Third, you asked whether an agency must allow inspection of records by a relative or agent. In this regard, if records are available to the public generally, I believe that any person would have the right to inspect them. If records could be withheld from the public on the ground that disclosure would result in an unwarranted invasion of personal privacy, but would be available to the subject of the record, that person could authorize disclosure to an agent pursuant to §89(2)(c) of the Freedom of Information Law. That provision states in relevant part that:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
> ii. when the person to whom a record pertains consents in writing to disclosure..."

If, however, portions of records may be withheld from the public generally as well as the applicant, there may be no way of permitting inspection of records other than by preparing photocopies, from which appropriate deletions could be made. In such situations, I believe that an agency may charge a fee for photocopying. Unless a statute other than the Freedom of Information Law so specifies, an agency can charge no more than twenty-five cents per photocopy [see §87(1)(b)(iii)].

Fourth, you asked whether an applicant has "legal standing under the circumstances (his indigence) to obtain a reduced copying fee for a large file". 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

Lastly, since you referred to a "Vaughn" index, as you may be aware, 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 a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme

> Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that 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-7232

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Wallace S. Nolen
RS Paralegal & Recovery Services
122 Cannon Street
Poughkeepsie, NY 12601-3321

The staff of the Committee 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 June 23, as well as a response to your request by Stephen Del Giacco, Records Access Officer for the Commission of Correction. In addition, under separate cover and as required by §89(4)(a) of the Freedom of Information Law, a copy of a determination of your appeal was forwarded to this office by Mark Bonacquist, Acting Counsel to the Commission. You have sought an advisory opinion concerning the propriety of the denial.

According to that determination, the records withheld include:

> "internal staff memoranda; the Poughkeepsie Police Department lockup log dated 10/28/88; a Police Department Report of Personnel Change dated 7/10/90; and a copy of the Dutchess County Grand Jury Report regarding the arrest and detention of two individuals by the Poughkeepsie Police Department in March 1990 and April 1990."

The internal staff memoranda and lockup log were denied pursuant to §87(2)(g) of the Freedom of Information Law; the report of personnel change was denied in accordance with §§50-a of the Civil Rights Law and 87(2)(a) and (b) of the Freedom of Information Law; the Grand Jury report was denied under the Criminal Procedure Law, §§190.85 and 87(2)(a) and (b) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, with respect to the internal memoranda, §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 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.

Second, the lockup log also consists of intra-agency material. Having discussed that kind of record with Mr. Del Giacco, he said that lockup logs may differ in content from one facility to another. In this instance, he indicated that a separate sheet is prepared regarding each inmate. Each sheet includes an inmate's name, details concerning that person's arrest, the time of an officer's inspection of cell, a description of findings and the condition of an inmate, and perhaps commentary concerning the officer's observations. In my view, the content of those records would determine the extent to which they must be disclosed or may be withheld. I believe that those portions of the logs identifying inmates, the dates of their arrests, the time of an inspection and the like would be available, for they consist of factual information accessible under §87(2)(g)(i). It is possible, however, that details concerning the condition of an inmate and similar information could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Some commentary may not be factual in nature but rather reflective of an officer's opinion and could be withheld under §87(2)(g). There may also be concerns relating to security, in which case §87(2)(f) may be relevant. That provision permits an agency to withhold records

to the extent that disclosure would "endanger the life or safety of any person."

Third, with respect to a record of personnel change, §50-a of the Civil Rights Law exempts from public disclosure personnel records pertaining to police and correction officers that are "used to evaluate performance toward continued employment or promotion". Insofar as the records in question are used for such evaluation, I believe that they could properly be withheld. However, if such a record merely indicates an officer's appointment or promotion, it would, in my view, be available.

Lastly, §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."

As such, I believe that grand jury reports are generally confidential and exempted from disclosure by means of the Criminal Procedure Law and §87(2)(a) of 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

cc: Stephen Del Giacco, Records Access Officer
Mark Bonacquist, Acting Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2112
FOIL-AO- 7233

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Anthony S. Derico
[redacted]

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

Dear Mr. Derico:

I have received your letter of June 26, which pertains to public participation at meetings of the Halfmoon Town Board.

According to your letter, the Board permits members of the public to speak for up to three minutes during each of two portions of its meetings. One of those opportunities involves the ability to comment concerning subjects listed on an agenda. However, you wrote that the agenda is not available until the day of the meeting. The second opportunity involves the ability to comment on issues other than agenda items. Nevertheless, it is your view that three minutes may be inadequate "to answer the lengthy and often inaccurate rebuttals of Town Officials."

You have asked whether "the failure to provide the public with a timely and adequate copy of the Agenda represent[s] a deliberate attempt by the Town not to comply with its own meetings procedures -- procedures established by the Supervisor at the Town's organizational meeting."

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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to permit 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, and many do so. When a

public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally, which would appear to be so in this instance. By authorizing the public to speak during two portions of its meetings, the Board appears to be acting beyond the requirements of the Open Meetings Law.

As in the case of public participation, the Open Meetings Law is silent with respect to agendas. Neither the Open Meetings Law nor any other statute of which I am aware requires that agendas be prepared or specifies when they must be disclosed. Most public bodies prepare agendas based upon practice, policy or rule, rather than pursuant to any statutory requirement.

In my view, once an agenda has been prepared, it constitutes a "record" subject to rights conferred by the Freedom of Information Law [see Public Officers Law, §86(4)]. Further, since they are disclosed on the day of a meeting, I believe that agendas would be available to the public, essentially as soon as they exist, even if they are prepared prior to the dates of meetings.

Lastly, although you referred to procedures established at the Board's organizational meeting, you did not describe any such procedures in relation to the issue that you raised. If, for example, one aspect of the Board's procedures requires that agendas be prepared or disclosed at least three days prior to meetings, a failure to do so would in my opinion be inconsistent with its own rules. It is noted, however, that such inconsistency would not represent a violation of the Open Meetings Law; again, that statute does not deal with the preparation or disclosure of agendas.

I hope that I have 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- 7234

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Julius Davis
87-A-7553
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. Davis:

I have received your letter of June 23 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you made a request to the Erie County District Attorney for records "maintained within [your] criminal investigation file". Further, because you are unaware of the specific records within the file, you also requested " a detailed current list of all records/documents in the file." In response to the request, you were informed that the Office of the District Attorney does not maintain a list of records maintained in the file and that he could not comply with the request "due to lack of specificity."

In this regard, I offer the following comments.

First, I point out that §89(3) of the Freedom of Information Law states in part that, with certain exceptions, an agency is not required to create a record not maintained or possessed by the agency. One of the exceptions to that general principle pertains to §87(3)(c), 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 required to be maintained under §87(3)(c) 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 need not be 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. In short, while I believe that the District Attorney must maintain a reasonably detailed list of the kinds of records maintained by his office, there is no requirement that a list be prepared that identifies each record within a file.

Second, §89(3) states in part 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. Even though records located in that case involved more than two thousand pages, it was found that the request reasonably described the records sought. If there is a "file" consisting of the records concerning your criminal investigation, and if that file can be located, I do not believe that additional specificity would be required to make an appropriate request. In that circumstance, as in Konigsberg, the agency would in my opinion be obliged to review the records within the file to determine the extent to which the Freedom of Information Law requires disclosure.

I hope that I have been of some 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- 7235

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Dennis Villaronga
90-A-9556
Wallkill Correctional Facility
Box G
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. Villaronga:

I have received your letter of June 25 in which you asked that I provide an opinion concerning the propriety of a request made under the Freedom of Information Law, a copy of which you attached.

In the request, which was made to Ms. Peggy Orce, Inmate Records Coordinator at your facility, you sought:

> "a) accident reports of 6/9/92, involving the above named
>
> b) request to inspect copies of Work Orders submitted from January 1, 1992 to present
>
> c) Medical records
>
> d) directive # 4064 - Facility Safety".

In this regard, the only issue in my view involves the requirement imposed by §89(3) of the Freedom of Information Law 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.

It appears that items a and d of your request reasonably describe the records sought. With respect to items b and c, although it may be implicit that you sought work orders and medical records pertaining to yourself, you did not so state. Consequently, it might be contended that those aspects of your request do not meet the standard imposed by §89(3). Further, I have no knowledge of the volume or nature of medical records pertaining to you, and it is possible that additional detail might have been appropriate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Peggy Orce, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7236

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jeffrey E. Robinson
Real Estate Appraiser
L.T. Bookhout, Inc.
P.O. Box 807
Rhinebeck, NY 12572-0807

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

Dear Mr. Robinson:

I have received your letter of June 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you are having difficulty obtaining property record cards for various assessors' offices in Columbia County, particularly in the towns of Kinderhook and Hillsdale. In this regard, I offer the following comments.

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

Second, 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Assuming that the records in which you are interested are essentially the equivalent of those described above, I believe that they 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

cc: Assessor, Town of Kinderhook
Assessor, Town of Hillsdale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7237

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jitendra Lakram
92-A-2581
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. Lakram:

I have received your letter of July 1. You wrote that you would like "to find out how to get all paperwork in possession of the D.A. pertaining to [your] case that constitutes 'Brady' and 'Rosario' material after conviction of crimes pending appeal free of charge due to [your] inability to pay the costly price of copies."

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Under §87(1)(b)(iii) of that statute, an agency may charge up to twenty-five cents per photocopy. I point out that 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

It is possible that you may receive a waiver or reduction of fees in conjunction with a different provision of law. However, since I am not an expert on that subject, it is suggested that you discuss the matter with an 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-7238

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Henry F. Sobota
Scolaro, Shulman, Cohen, Lawler
& Burstein, P.C.
90 Presidential Plaza
Syracuse, NY 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, unless otherwise indicated.

Dear Mr. Sobota:

As you are aware, I have received your letter of June 24 and the materials attached to it.

You have sought an advisory opinion concerning the propriety of a denial of access to records by the State Liquor Authority. In conjunction with a request for disclosure of copies of records relating to an application for liquor license by a named entity, a restaurant, the Authority denied access to the following records on the ground that disclosure would constitute an unwarranted invasion of personal privacy, apparently pursuant to §89(2)(b)(v):

"1. the applicant's statement of finances;

2. the personal questionnaire for each director, officer and major shareholder; and

3. the applicant identification record."

It is your view that the Authority's denial was improper, for you contend that under §89(2)(v), "an agency may invoke the privacy exception only as to 'information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency'" (emphasis yours). You expressed the belief that the information sought is relevant to the work of the Authority and that if it is not relevant to its work, the collection of that information would contravene the Personal Privacy Protection Law,

§94(1)(a). That provision precludes state agencies from collecting personal information from individuals unless it is relevant and necessary to carry out an agency's legal duties.

Having discussed the contents of the records sought with the Authority's records access officer, Richard Chernela, I was informed that an applicant's statement of finances involves the sources of funding used to invest in a license. Those kinds of items ordinarily are reflective of one's personal finances and include such items as a person's bank account numbers. The personal questionnaires to which you referred include home addresses, social security numbers, information regarding personal finances and the like.

According to the records access officer, the information contained in those two kinds of records are relevant to the work of the Authority, for it is needed to determine whether an applicant meets the criteria needed to hold a license. Consequently, I believe that the personal information in question would have been properly collected and reflective of compliance with the Personal Privacy Protection Law.

Further, it appears from my perspective that the denial was likely appropriate. The provision that you cited, §89(2)(b)(v), represents one among five examples of unwarranted invasions of personal privacy. It is noted that the introductory language of §89(2)(b) states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the five examples that follow. Consequently, I believe that those illustrations represent few among conceivable dozens of situations in which records or portions thereof may be withheld in consideration of personal privacy.

I point out that the first example, §89(2)(b)(i), refers to the ability to withhold employment or credit histories. Personal financial information might in some contexts be characterized as a credit history. Even if it could not be so characterized, I believe that it represents the kind of intimate, personal information that could properly be withheld as an unwarranted invasion of personal privacy.

With respect to the remaining record to which you referred, an "applicant identification record", the records access officer could not determine precisely which record that might be. Since you used that phrase in previous correspondence in conjunction with fingerprints, Mr. Chernela conjectured that the record denied may be a criminal history record. If that is so, and if the record indicates that there were no convictions of the subject of the record, I believe that it could be withheld. In my opinion, only to the extent that such a record indicates a conviction would it 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: Joseph A. Comperiati
Richard Chernela

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2113
FOIL-AO-7239

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Stanley Pawenski
Mr. Arthur Gleason
Mr. John Niedbalec
Cohoes City School District
20 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 Board Members Pawenski, Gleason and Niedbalec:

I have received your letter of July 8 and the materials attached to it.

According to your letter, the first issue involves a "workshop" session of the Cohoes Board of Education begun on the evening of June 22, during which the Board entered into an executive session and "voted to appoint" a particular individual to the position of principal of the Middle School. You wrote that:

> "No formal motion or second was made, nor was there a recording of the 'ayes' and 'nays'. The Board President characterized this as a 'polling' of the Board, with the aim of getting a 'consensus'. The seeking of a 'consensus' was presented as routine practice of the Board.
>
> "The Board president again 'polled' the Board seeking another 'consensus', this time seeking to reverse the Board's stated intention to defer its vote on the principal's position until after July 1st, the start of the District's new fiscal year and instead scheduled the vote for a special meeting which would be held immediately following the Board's Public Hearing on its annual budget which was scheduled for Wednesday, June 24th. Again the Board was 'polled' and a 'consensus' obtained in the same manner as set forth above. The reason stated by the Board

> president for these actions was that the June 24th meeting would be the last one wherein he would have a majority in favor of appointing this individual."

In this regard, although it is unclear whether the vote to appoint a particular individual to a position was taken in public or during an executive session, I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote of the members must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

When action is taken, minutes must be prepared in accordance with §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."

Additionally, in one of the few instances in the Freedom of Information Law that requires that records be maintained, §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 §86(3)], such as a town board, 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.

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 of remedies" (id. 646).

In the context of the situation 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 to indicate the nature of the action taken and 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 an 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 a public body in effect reaches agreement on a particular subject, I believe that the minutes should be prepared and should reflect the actual votes of the members.

In contrast, if a consensus 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.

The second issue involves a hearing and an agenda relating to it that pertains to the budget, and an agenda concerning a "special meeting" that would follow the hearing. You wrote that legal notices were published regarding the hearing but that "[n]o public notice of the second special meeting was provided, nor did the District notify the press of any change in the agenda."

It is noted initially that there is a distinction between a meeting and a hearing. A hearing is generally held to enable members of the public to express their views concerning a particular issue. A meeting is generally held by a public body discuss, to deliberate, and potentially, to take action. Further, the notice requirements may differ in the case of a hearing as opposed to a meeting. Prior to a hearing, there may be a requirement that a legal notice be published that indicates the subject of the hearing, the time and place. In contrast, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. However, notice of a meeting need not indicate the subjects to be considered. Moreover, although notice of a meeting must be given to the news media and posted, there is no requirement that a public body pay to place a legal notice in advance of a meeting.

Similarly, there is nothing in the Open Meetings Law pertaining to agendas. While many public bodies routinely prepare and disclose agendas, there is no requirement that agendas be prepared.

Lastly, you asked whether "budget related discussions can properly be held in executive session." In this regard, by way of background, every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

> discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §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 §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

I hope that I have 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-7232

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Wallace S. Nolen
RS Paralegal & Recovery Services
122 Cannon Street
Poughkeepsie, NY 12601-3321

The staff of the Committee 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 June 23, as well as a response to your request by Stephen Del Giacco, Records Access Officer for the Commission of Correction. In addition, under separate cover and as required by §89(4)(a) of the Freedom of Information Law, a copy of a determination of your appeal was forwarded to this office by Mark Bonacquist, Acting Counsel to the Commission. You have sought an advisory opinion concerning the propriety of the denial.

According to that determination, the records withheld include:

> "internal staff memoranda; the Poughkeepsie Police Department lockup log dated 10/28/88; a Police Department Report of Personnel Change dated 7/10/90; and a copy of the Dutchess County Grand Jury Report regarding the arrest and detention of two individuals by the Poughkeepsie Police Department in March 1990 and April 1990."

The internal staff memoranda and lockup log were denied pursuant to §87(2)(g) of the Freedom of Information Law; the report of personnel change was denied in accordance with §§50-a of the Civil Rights Law and 87(2)(a) and (b) of the Freedom of Information Law; the Grand Jury report was denied under the Criminal Procedure Law, §§190.85 and 87(2)(a) and (b) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, with respect to the internal memoranda, §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 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.

Second, the lockup log also consists of intra-agency material. Having discussed that kind of record with Mr. Del Giacco, he said that lockup logs may differ in content from one facility to another. In this instance, he indicated that a separate sheet is prepared regarding each inmate. Each sheet includes an inmate's name, details concerning that person's arrest, the time of an officer's inspection of cell, a description of findings and the condition of an inmate, and perhaps commentary concerning the officer's observations. In my view, the content of those records would determine the extent to which they must be disclosed or may be withheld. I believe that those portions of the logs identifying inmates, the dates of their arrests, the time of an inspection and the like would be available, for they consist of factual information accessible under §87(2)(g)(i). It is possible, however, that details concerning the condition of an inmate and similar information could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Some commentary may not be factual in nature but rather reflective of an officer's opinion and could be withheld under §87(2)(g). There may also be concerns relating to security, in which case §87(2)(f) may be relevant. That provision permits an agency to withhold records

to the extent that disclosure would "endanger the life or safety of any person."

Third, with respect to a record of personnel change, §50-a of the Civil Rights Law exempts from public disclosure personnel records pertaining to police and correction officers that are "used to evaluate performance toward continued employment or promotion". Insofar as the records in question are used for such evaluation, I believe that they could properly be withheld. However, if such a record merely indicates an officer's appointment or promotion, it would, in my view, be available.

Lastly, §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."

As such, I believe that grand jury reports are generally confidential and exempted from disclosure by means of the Criminal Procedure Law and §87(2)(a) of 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

cc: Stephen Del Giacco, Records Access Officer
Mark Bonacquist, Acting Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2112
FOIL-AO- 7233

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Anthony S. Derico
[redacted]

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

Dear Mr. Derico:

I have received your letter of June 26, which pertains to public participation at meetings of the Halfmoon Town Board.

According to your letter, the Board permits members of the public to speak for up to three minutes during each of two portions of its meetings. One of those opportunities involves the ability to comment concerning subjects listed on an agenda. However, you wrote that the agenda is not available until the day of the meeting. The second opportunity involves the ability to comment on issues other than agenda items. Nevertheless, it is your view that three minutes may be inadequate "to answer the lengthy and often inaccurate rebuttals of Town Officials."

You have asked whether "the failure to provide the public with a timely and adequate copy of the Agenda represent[s] a deliberate attempt by the Town not to comply with its own meetings procedures -- procedures established by the Supervisor at the Town's organizational meeting."

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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to permit 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, and many do so. When a

public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally, which would appear to be so in this instance. By authorizing the public to speak during two portions of its meetings, the Board appears to be acting beyond the requirements of the Open Meetings Law.

As in the case of public participation, the Open Meetings Law is silent with respect to agendas. Neither the Open Meetings Law nor any other statute of which I am aware requires that agendas be prepared or specifies when they must be disclosed. Most public bodies prepare agendas based upon practice, policy or rule, rather than pursuant to any statutory requirement.

In my view, once an agenda has been prepared, it constitutes a "record" subject to rights conferred by the Freedom of Information Law [see Public Officers Law, §86(4)]. Further, since they are disclosed on the day of a meeting, I believe that agendas would be available to the public, essentially as soon as they exist, even if they are prepared prior to the dates of meetings.

Lastly, although you referred to procedures established at the Board's organizational meeting, you did not describe any such procedures in relation to the issue that you raised. If, for example, one aspect of the Board's procedures requires that agendas be prepared or disclosed at least three days prior to meetings, a failure to do so would in my opinion be inconsistent with its own rules. It is noted, however, that such inconsistency would not represent a violation of the Open Meetings Law; again, that statute does not deal with the preparation or disclosure of agendas.

I hope that I have 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- 7234

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Julius Davis
87-A-7553
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. Davis:

I have received your letter of June 23 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you made a request to the Erie County District Attorney for records "maintained within [your] criminal investigation file". Further, because you are unaware of the specific records within the file, you also requested " a detailed current list of all records/documents in the file." In response to the request, you were informed that the Office of the District Attorney does not maintain a list of records maintained in the file and that he could not comply with the request "due to lack of specificity."

In this regard, I offer the following comments.

First, I point out that §89(3) of the Freedom of Information Law states in part that, with certain exceptions, an agency is not required to create a record not maintained or possessed by the agency. One of the exceptions to that general principle pertains to §87(3)(c), 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 required to be maintained under §87(3)(c) 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 need not be 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. In short, while I believe that the District Attorney must maintain a reasonably detailed list of the kinds of records maintained by his office, there is no requirement that a list be prepared that identifies each record within a file.

Second, §89(3) states in part 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. Even though records located in that case involved more than two thousand pages, it was found that the request reasonably described the records sought. If there is a "file" consisting of the records concerning your criminal investigation, and if that file can be located, I do not believe that additional specificity would be required to make an appropriate request. In that circumstance, as in Konigsberg, the agency would in my opinion be obliged to review the records within the file to determine the extent to which the Freedom of Information Law requires disclosure.

I hope that I have been of some 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-1230

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Richard C. Dolan
[redacted]

Dear Mr. Dolan:

I have received your letter of July 8 in which you appealed an alleged denial of access to records by the Town of Keene. The records sought relate to the assessment of real property and include property record cards and real property transfer report forms #5217, and you indicated that you intend to use the records in question in conjunction with the judicial review of your assessment.

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 is not empowered to determine appeals, enforce the law or compel an agency to grant or deny access to records.

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

As such, in the case of a town, I believe that an appeal may be made to the town board or the person designated by the town board to determine appeals.

I also offer the following additional comments.

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Therefore, if, for example, there is no "list of land-and-house sales in [y]our neighborhood...used to arrive at [y]our assessment", Town officials would not, in my view, be required to prepare such a list 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. Moreover, 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 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

With respect to the forms that you requested, §574(5) of the Real Property Tax Law states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced above are usually called "EA 5217" forms, and they include the selling price of a parcel when real property is transferred. Although those forms may often be considered confidential, they are available "for purposes of administrative or judicial review of assessments." Therefore, if those records are maintained by the Town, since you are seeking them for use in a judicial review of your assessment, I believe that they must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Clarence Miner, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7231

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Frank Perrella
86-A-7876 E-3-30
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 June 18. You raised a series of questions concerning a situation in which the records sought consist of more than 6395 documents, and that those documents are "subject to redaction."

Your first question is whether it can be ascertained whether "this voluminous police agency file contains trial transcripts". In my view, the simplest and most direct method of so doing would involve asking, by means of a letter, whether or the extent to which the records include trial transcripts.

Second, you asked whether an applicant may seek to obtain records "on a piecemeal basis, considering he is indigent. I believe that if a request for copies is made, an applicant may ask for as few or as many as he believes he can afford or which would be of interest.

Third, you asked whether an agency must allow inspection of records by a relative or agent. In this regard, if records are available to the public generally, I believe that any person would have the right to inspect them. If records could be withheld from the public on the ground that disclosure would result in an unwarranted invasion of personal privacy, but would be available to the subject of the record, that person could authorize disclosure to an agent pursuant to §89(2)(c) of the Freedom of Information Law. That provision states in relevant part that:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
> ii. when the person to whom a record pertains consents in writing to disclosure..."

If, however, portions of records may be withheld from the public generally as well as the applicant, there may be no way of permitting inspection of records other than by preparing photocopies, from which appropriate deletions could be made. In such situations, I believe that an agency may charge a fee for photocopying. Unless a statute other than the Freedom of Information Law so specifies, an agency can charge no more than twenty-five cents per photocopy [see §87(1)(b)(iii)].

Fourth, you asked whether an applicant has "legal standing under the circumstances (his indigence) to obtain a reduced copying fee for a large file". 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

Lastly, since you referred to a "Vaughn" index, as you may be aware, 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 a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme

> Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that 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-7232

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Wallace S. Nolen
RS Paralegal & Recovery Services
122 Cannon Street
Poughkeepsie, NY 12601-3321

The staff of the Committee 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 June 23, as well as a response to your request by Stephen Del Giacco, Records Access Officer for the Commission of Correction. In addition, under separate cover and as required by §89(4)(a) of the Freedom of Information Law, a copy of a determination of your appeal was forwarded to this office by Mark Bonacquist, Acting Counsel to the Commission. You have sought an advisory opinion concerning the propriety of the denial.

According to that determination, the records withheld include:

> "internal staff memoranda; the Poughkeepsie Police Department lockup log dated 10/28/88; a Police Department Report of Personnel Change dated 7/10/90; and a copy of the Dutchess County Grand Jury Report regarding the arrest and detention of two individuals by the Poughkeepsie Police Department in March 1990 and April 1990."

The internal staff memoranda and lockup log were denied pursuant to §87(2)(g) of the Freedom of Information Law; the report of personnel change was denied in accordance with §§50-a of the Civil Rights Law and 87(2)(a) and (b) of the Freedom of Information Law; the Grand Jury report was denied under the Criminal Procedure Law, §§190.85 and 87(2)(a) and (b) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, with respect to the internal memoranda, §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 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.

Second, the lockup log also consists of intra-agency material. Having discussed that kind of record with Mr. Del Giacco, he said that lockup logs may differ in content from one facility to another. In this instance, he indicated that a separate sheet is prepared regarding each inmate. Each sheet includes an inmate's name, details concerning that person's arrest, the time of an officer's inspection of cell, a description of findings and the condition of an inmate, and perhaps commentary concerning the officer's observations. In my view, the content of those records would determine the extent to which they must be disclosed or may be withheld. I believe that those portions of the logs identifying inmates, the dates of their arrests, the time of an inspection and the like would be available, for they consist of factual information accessible under §87(2)(g)(i). It is possible, however, that details concerning the condition of an inmate and similar information could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Some commentary may not be factual in nature but rather reflective of an officer's opinion and could be withheld under §87(2)(g). There may also be concerns relating to security, in which case §87(2)(f) may be relevant. That provision permits an agency to withhold records

to the extent that disclosure would "endanger the life or safety of any person."

Third, with respect to a record of personnel change, §50-a of the Civil Rights Law exempts from public disclosure personnel records pertaining to police and correction officers that are "used to evaluate performance toward continued employment or promotion". Insofar as the records in question are used for such evaluation, I believe that they could properly be withheld. However, if such a record merely indicates an officer's appointment or promotion, it would, in my view, be available.

Lastly, §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."

As such, I believe that grand jury reports are generally confidential and exempted from disclosure by means of the Criminal Procedure Law and §87(2)(a) of 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

cc: Stephen Del Giacco, Records Access Officer
Mark Bonacquist, Acting Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2112
FOIL-AO- 7233

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Anthony S. Derico
[redacted]

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

Dear Mr. Derico:

I have received your letter of June 26, which pertains to public participation at meetings of the Halfmoon Town Board.

According to your letter, the Board permits members of the public to speak for up to three minutes during each of two portions of its meetings. One of those opportunities involves the ability to comment concerning subjects listed on an agenda. However, you wrote that the agenda is not available until the day of the meeting. The second opportunity involves the ability to comment on issues other than agenda items. Nevertheless, it is your view that three minutes may be inadequate "to answer the lengthy and often inaccurate rebuttals of Town Officials."

You have asked whether "the failure to provide the public with a timely and adequate copy of the Agenda represent[s] a deliberate attempt by the Town not to comply with its own meetings procedures -- procedures established by the Supervisor at the Town's organizational meeting."

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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to permit 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, and many do so. When a

public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally, which would appear to be so in this instance. By authorizing the public to speak during two portions of its meetings, the Board appears to be acting beyond the requirements of the Open Meetings Law.

As in the case of public participation, the Open Meetings Law is silent with respect to agendas. Neither the Open Meetings Law nor any other statute of which I am aware requires that agendas be prepared or specifies when they must be disclosed. Most public bodies prepare agendas based upon practice, policy or rule, rather than pursuant to any statutory requirement.

In my view, once an agenda has been prepared, it constitutes a "record" subject to rights conferred by the Freedom of Information Law [see Public Officers Law, §86(4)]. Further, since they are disclosed on the day of a meeting, I believe that agendas would be available to the public, essentially as soon as they exist, even if they are prepared prior to the dates of meetings.

Lastly, although you referred to procedures established at the Board's organizational meeting, you did not describe any such procedures in relation to the issue that you raised. If, for example, one aspect of the Board's procedures requires that agendas be prepared or disclosed at least three days prior to meetings, a failure to do so would in my opinion be inconsistent with its own rules. It is noted, however, that such inconsistency would not represent a violation of the Open Meetings Law; again, that statute does not deal with the preparation or disclosure of agendas.

I hope that I have 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- 7234

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Julius Davis
87-A-7553
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. Davis:

I have received your letter of June 23 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you made a request to the Erie County District Attorney for records "maintained within [your] criminal investigation file". Further, because you are unaware of the specific records within the file, you also requested " a detailed current list of all records/documents in the file." In response to the request, you were informed that the Office of the District Attorney does not maintain a list of records maintained in the file and that he could not comply with the request "due to lack of specificity."

In this regard, I offer the following comments.

First, I point out that §89(3) of the Freedom of Information Law states in part that, with certain exceptions, an agency is not required to create a record not maintained or possessed by the agency. One of the exceptions to that general principle pertains to §87(3)(c), 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 required to be maintained under §87(3)(c) 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 need not be 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. In short, while I believe that the District Attorney must maintain a reasonably detailed list of the kinds of records maintained by his office, there is no requirement that a list be prepared that identifies each record within a file.

Second, §89(3) states in part 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. Even though records located in that case involved more than two thousand pages, it was found that the request reasonably described the records sought. If there is a "file" consisting of the records concerning your criminal investigation, and if that file can be located, I do not believe that additional specificity would be required to make an appropriate request. In that circumstance, as in Konigsberg, the agency would in my opinion be obliged to review the records within the file to determine the extent to which the Freedom of Information Law requires disclosure.

I hope that I have been of some 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- 7235

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Dennis Villaronga
90-A-9556
Wallkill Correctional Facility
Box G
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. Villaronga:

I have received your letter of June 25 in which you asked that I provide an opinion concerning the propriety of a request made under the Freedom of Information Law, a copy of which you attached.

In the request, which was made to Ms. Peggy Orce, Inmate Records Coordinator at your facility, you sought:

> "a) accident reports of 6/9/92, involving the above named
>
> b) request to inspect copies of Work Orders submitted from January 1, 1992 to present
>
> c) Medical records
>
> d) directive # 4064 - Facility Safety".

In this regard, the only issue in my view involves the requirement imposed by §89(3) of the Freedom of Information Law 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.

It appears that items a and d of your request reasonably describe the records sought. With respect to items b and c, although it may be implicit that you sought work orders and medical records pertaining to yourself, you did not so state. Consequently, it might be contended that those aspects of your request do not meet the standard imposed by §89(3). Further, I have no knowledge of the volume or nature of medical records pertaining to you, and it is possible that additional detail might have been appropriate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Peggy Orce, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7236

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jeffrey E. Robinson
Real Estate Appraiser
L.T. Bookhout, Inc.
P.O. Box 807
Rhinebeck, NY 12572-0807

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

Dear Mr. Robinson:

I have received your letter of June 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you are having difficulty obtaining property record cards for various assessors' offices in Columbia County, particularly in the towns of Kinderhook and Hillsdale. In this regard, I offer the following comments.

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

Second, 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Assuming that the records in which you are interested are essentially the equivalent of those described above, I believe that they 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

cc: Assessor, Town of Kinderhook
Assessor, Town of Hillsdale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7237

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jitendra Lakram
92-A-2581
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. Lakram:

I have received your letter of July 1. You wrote that you would like "to find out how to get all paperwork in possession of the D.A. pertaining to [your] case that constitutes 'Brady' and 'Rosario' material after conviction of crimes pending appeal free of charge due to [your] inability to pay the costly price of copies."

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Under §87(1)(b)(iii) of that statute, an agency may charge up to twenty-five cents per photocopy. I point out that 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

It is possible that you may receive a waiver or reduction of fees in conjunction with a different provision of law. However, since I am not an expert on that subject, it is suggested that you discuss the matter with an 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-7238

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Henry F. Sobota
Scolaro, Shulman, Cohen, Lawler
& Burstein, P.C.
90 Presidential Plaza
Syracuse, NY 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, unless otherwise indicated.

Dear Mr. Sobota:

As you are aware, I have received your letter of June 24 and the materials attached to it.

You have sought an advisory opinion concerning the propriety of a denial of access to records by the State Liquor Authority. In conjunction with a request for disclosure of copies of records relating to an application for liquor license by a named entity, a restaurant, the Authority denied access to the following records on the ground that disclosure would constitute an unwarranted invasion of personal privacy, apparently pursuant to §89(2)(b)(v):

"1. the applicant's statement of finances;

2. the personal questionnaire for each director, officer and major shareholder; and

3. the applicant identification record."

It is your view that the Authority's denial was improper, for you contend that under §89(2)(v), "an agency may invoke the privacy exception only as to 'information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency'" (emphasis yours). You expressed the belief that the information sought is relevant to the work of the Authority and that if it is not relevant to its work, the collection of that information would contravene the Personal Privacy Protection Law,

§94(1)(a). That provision precludes state agencies from collecting personal information from individuals unless it is relevant and necessary to carry out an agency's legal duties.

Having discussed the contents of the records sought with the Authority's records access officer, Richard Chernela, I was informed that an applicant's statement of finances involves the sources of funding used to invest in a license. Those kinds of items ordinarily are reflective of one's personal finances and include such items as a person's bank account numbers. The personal questionnaires to which you referred include home addresses, social security numbers, information regarding personal finances and the like.

According to the records access officer, the information contained in those two kinds of records are relevant to the work of the Authority, for it is needed to determine whether an applicant meets the criteria needed to hold a license. Consequently, I believe that the personal information in question would have been properly collected and reflective of compliance with the Personal Privacy Protection Law.

Further, it appears from my perspective that the denial was likely appropriate. The provision that you cited, §89(2)(b)(v), represents one among five examples of unwarranted invasions of personal privacy. It is noted that the introductory language of §89(2)(b) states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the five examples that follow. Consequently, I believe that those illustrations represent few among conceivable dozens of situations in which records or portions thereof may be withheld in consideration of personal privacy.

I point out that the first example, §89(2)(b)(i), refers to the ability to withhold employment or credit histories. Personal financial information might in some contexts be characterized as a credit history. Even if it could not be so characterized, I believe that it represents the kind of intimate, personal information that could properly be withheld as an unwarranted invasion of personal privacy.

With respect to the remaining record to which you referred, an "applicant identification record", the records access officer could not determine precisely which record that might be. Since you used that phrase in previous correspondence in conjunction with fingerprints, Mr. Chernela conjectured that the record denied may be a criminal history record. If that is so, and if the record indicates that there were no convictions of the subject of the record, I believe that it could be withheld. In my opinion, only to the extent that such a record indicates a conviction would it 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: Joseph A. Comperiati
Richard Chernela

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2113
FOIL-AO-7239

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Stanley Pawenski
Mr. Arthur Gleason
Mr. John Niedbalec
Cohoes City School District
20 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 Board Members Pawenski, Gleason and Niedbalec:

I have received your letter of July 8 and the materials attached to it.

According to your letter, the first issue involves a "workshop" session of the Cohoes Board of Education begun on the evening of June 22, during which the Board entered into an executive session and "voted to appoint" a particular individual to the position of principal of the Middle School. You wrote that:

> "No formal motion or second was made, nor was there a recording of the 'ayes' and 'nays'. The Board President characterized this as a 'polling' of the Board, with the aim of getting a 'consensus'. The seeking of a 'consensus' was presented as routine practice of the Board.
>
> "The Board president again 'polled' the Board seeking another 'consensus', this time seeking to reverse the Board's stated intention to defer its vote on the principal's position until after July 1st, the start of the District's new fiscal year and instead scheduled the vote for a special meeting which would be held immediately following the Board's Public Hearing on its annual budget which was scheduled for Wednesday, June 24th. Again the Board was 'polled' and a 'consensus' obtained in the same manner as set forth above. The reason stated by the Board

> president for these actions was that the June 24th meeting would be the last one wherein he would have a majority in favor of appointing this individual."

In this regard, although it is unclear whether the vote to appoint a particular individual to a position was taken in public or during an executive session, I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote of the members must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

When action is taken, minutes must be prepared in accordance with §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."

Additionally, in one of the few instances in the Freedom of Information Law that requires that records be maintained, §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 §86(3)], such as a town board, 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.

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 of remedies" (id. 646).

In the context of the situation 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 to indicate the nature of the action taken and 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 an 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 a public body in effect reaches agreement on a particular subject, I believe that the minutes should be prepared and should reflect the actual votes of the members.

In contrast, if a consensus 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.

The second issue involves a hearing and an agenda relating to it that pertains to the budget, and an agenda concerning a "special meeting" that would follow the hearing. You wrote that legal notices were published regarding the hearing but that "[n]o public notice of the second special meeting was provided, nor did the District notify the press of any change in the agenda."

It is noted initially that there is a distinction between a meeting and a hearing. A hearing is generally held to enable members of the public to express their views concerning a particular issue. A meeting is generally held by a public body discuss, to deliberate, and potentially, to take action. Further, the notice requirements may differ in the case of a hearing as opposed to a meeting. Prior to a hearing, there may be a requirement that a legal notice be published that indicates the subject of the hearing, the time and place. In contrast, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. However, notice of a meeting need not indicate the subjects to be considered. Moreover, although notice of a meeting must be given to the news media and posted, there is no requirement that a public body pay to place a legal notice in advance of a meeting.

Similarly, there is nothing in the Open Meetings Law pertaining to agendas. While many public bodies routinely prepare and disclose agendas, there is no requirement that agendas be prepared.

Lastly, you asked whether "budget related discussions can properly be held in executive session." In this regard, by way of background, every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

> discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §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 §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

I hope that I have 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-1230

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Richard C. Dolan
[redacted]

Dear Mr. Dolan:

I have received your letter of July 8 in which you appealed an alleged denial of access to records by the Town of Keene. The records sought relate to the assessment of real property and include property record cards and real property transfer report forms #5217, and you indicated that you intend to use the records in question in conjunction with the judicial review of your assessment.

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 is not empowered to determine appeals, enforce the law or compel an agency to grant or deny access to records.

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

As such, in the case of a town, I believe that an appeal may be made to the town board or the person designated by the town board to determine appeals.

I also offer the following additional comments.

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Therefore, if, for example, there is no "list of land-and-house sales in [y]our neighborhood...used to arrive at [y]our assessment", Town officials would not, in my view, be required to prepare such a list 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. Moreover, 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 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

With respect to the forms that you requested, §574(5) of the Real Property Tax Law states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced above are usually called "EA 5217" forms, and they include the selling price of a parcel when real property is transferred. Although those forms may often be considered confidential, they are available "for purposes of administrative or judicial review of assessments." Therefore, if those records are maintained by the Town, since you are seeking them for use in a judicial review of your assessment, I believe that they must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Clarence Miner, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7231

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Frank Perrella
86-A-7876 E-3-30
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 June 18. You raised a series of questions concerning a situation in which the records sought consist of more than 6395 documents, and that those documents are "subject to redaction."

Your first question is whether it can be ascertained whether "this voluminous police agency file contains trial transcripts". In my view, the simplest and most direct method of so doing would involve asking, by means of a letter, whether or the extent to which the records include trial transcripts.

Second, you asked whether an applicant may seek to obtain records "on a piecemeal basis, considering he is indigent. I believe that if a request for copies is made, an applicant may ask for as few or as many as he believes he can afford or which would be of interest.

Third, you asked whether an agency must allow inspection of records by a relative or agent. In this regard, if records are available to the public generally, I believe that any person would have the right to inspect them. If records could be withheld from the public on the ground that disclosure would result in an unwarranted invasion of personal privacy, but would be available to the subject of the record, that person could authorize disclosure to an agent pursuant to §89(2)(c) of the Freedom of Information Law. That provision states in relevant part that:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
> ii. when the person to whom a record pertains consents in writing to disclosure..."

If, however, portions of records may be withheld from the public generally as well as the applicant, there may be no way of permitting inspection of records other than by preparing photocopies, from which appropriate deletions could be made. In such situations, I believe that an agency may charge a fee for photocopying. Unless a statute other than the Freedom of Information Law so specifies, an agency can charge no more than twenty-five cents per photocopy [see §87(1)(b)(iii)].

Fourth, you asked whether an applicant has "legal standing under the circumstances (his indigence) to obtain a reduced copying fee for a large file". 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

Lastly, since you referred to a "Vaughn" index, as you may be aware, 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 a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme

> Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that 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-7232

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Wallace S. Nolen
RS Paralegal & Recovery Services
122 Cannon Street
Poughkeepsie, NY 12601-3321

The staff of the Committee 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 June 23, as well as a response to your request by Stephen Del Giacco, Records Access Officer for the Commission of Correction. In addition, under separate cover and as required by §89(4)(a) of the Freedom of Information Law, a copy of a determination of your appeal was forwarded to this office by Mark Bonacquist, Acting Counsel to the Commission. You have sought an advisory opinion concerning the propriety of the denial.

According to that determination, the records withheld include:

> "internal staff memoranda; the Poughkeepsie Police Department lockup log dated 10/28/88; a Police Department Report of Personnel Change dated 7/10/90; and a copy of the Dutchess County Grand Jury Report regarding the arrest and detention of two individuals by the Poughkeepsie Police Department in March 1990 and April 1990."

The internal staff memoranda and lockup log were denied pursuant to §87(2)(g) of the Freedom of Information Law; the report of personnel change was denied in accordance with §§50-a of the Civil Rights Law and 87(2)(a) and (b) of the Freedom of Information Law; the Grand Jury report was denied under the Criminal Procedure Law, §§190.85 and 87(2)(a) and (b) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, with respect to the internal memoranda, §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 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.

Second, the lockup log also consists of intra-agency material. Having discussed that kind of record with Mr. Del Giacco, he said that lockup logs may differ in content from one facility to another. In this instance, he indicated that a separate sheet is prepared regarding each inmate. Each sheet includes an inmate's name, details concerning that person's arrest, the time of an officer's inspection of cell, a description of findings and the condition of an inmate, and perhaps commentary concerning the officer's observations. In my view, the content of those records would determine the extent to which they must be disclosed or may be withheld. I believe that those portions of the logs identifying inmates, the dates of their arrests, the time of an inspection and the like would be available, for they consist of factual information accessible under §87(2)(g)(i). It is possible, however, that details concerning the condition of an inmate and similar information could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Some commentary may not be factual in nature but rather reflective of an officer's opinion and could be withheld under §87(2)(g). There may also be concerns relating to security, in which case §87(2)(f) may be relevant. That provision permits an agency to withhold records

to the extent that disclosure would "endanger the life or safety of any person."

Third, with respect to a record of personnel change, §50-a of the Civil Rights Law exempts from public disclosure personnel records pertaining to police and correction officers that are "used to evaluate performance toward continued employment or promotion". Insofar as the records in question are used for such evaluation, I believe that they could properly be withheld. However, if such a record merely indicates an officer's appointment or promotion, it would, in my view, be available.

Lastly, §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."

As such, I believe that grand jury reports are generally confidential and exempted from disclosure by means of the Criminal Procedure Law and §87(2)(a) of 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

cc: Stephen Del Giacco, Records Access Officer
Mark Bonacquist, Acting Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2112
FOIL-AO- 7233

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Anthony S. Derico
[redacted]

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

Dear Mr. Derico:

I have received your letter of June 26, which pertains to public participation at meetings of the Halfmoon Town Board.

According to your letter, the Board permits members of the public to speak for up to three minutes during each of two portions of its meetings. One of those opportunities involves the ability to comment concerning subjects listed on an agenda. However, you wrote that the agenda is not available until the day of the meeting. The second opportunity involves the ability to comment on issues other than agenda items. Nevertheless, it is your view that three minutes may be inadequate "to answer the lengthy and often inaccurate rebuttals of Town Officials."

You have asked whether "the failure to provide the public with a timely and adequate copy of the Agenda represent[s] a deliberate attempt by the Town not to comply with its own meetings procedures -- procedures established by the Supervisor at the Town's organizational meeting."

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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to permit 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, and many do so. When a

public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally, which would appear to be so in this instance. By authorizing the public to speak during two portions of its meetings, the Board appears to be acting beyond the requirements of the Open Meetings Law.

As in the case of public participation, the Open Meetings Law is silent with respect to agendas. Neither the Open Meetings Law nor any other statute of which I am aware requires that agendas be prepared or specifies when they must be disclosed. Most public bodies prepare agendas based upon practice, policy or rule, rather than pursuant to any statutory requirement.

In my view, once an agenda has been prepared, it constitutes a "record" subject to rights conferred by the Freedom of Information Law [see Public Officers Law, §86(4)]. Further, since they are disclosed on the day of a meeting, I believe that agendas would be available to the public, essentially as soon as they exist, even if they are prepared prior to the dates of meetings.

Lastly, although you referred to procedures established at the Board's organizational meeting, you did not describe any such procedures in relation to the issue that you raised. If, for example, one aspect of the Board's procedures requires that agendas be prepared or disclosed at least three days prior to meetings, a failure to do so would in my opinion be inconsistent with its own rules. It is noted, however, that such inconsistency would not represent a violation of the Open Meetings Law; again, that statute does not deal with the preparation or disclosure of agendas.

I hope that I have 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- 7234

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Julius Davis
87-A-7553
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. Davis:

I have received your letter of June 23 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you made a request to the Erie County District Attorney for records "maintained within [your] criminal investigation file". Further, because you are unaware of the specific records within the file, you also requested " a detailed current list of all records/documents in the file." In response to the request, you were informed that the Office of the District Attorney does not maintain a list of records maintained in the file and that he could not comply with the request "due to lack of specificity."

In this regard, I offer the following comments.

First, I point out that §89(3) of the Freedom of Information Law states in part that, with certain exceptions, an agency is not required to create a record not maintained or possessed by the agency. One of the exceptions to that general principle pertains to §87(3)(c), 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 required to be maintained under §87(3)(c) 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 need not be 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. In short, while I believe that the District Attorney must maintain a reasonably detailed list of the kinds of records maintained by his office, there is no requirement that a list be prepared that identifies each record within a file.

Second, §89(3) states in part 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. Even though records located in that case involved more than two thousand pages, it was found that the request reasonably described the records sought. If there is a "file" consisting of the records concerning your criminal investigation, and if that file can be located, I do not believe that additional specificity would be required to make an appropriate request. In that circumstance, as in Konigsberg, the agency would in my opinion be obliged to review the records within the file to determine the extent to which the Freedom of Information Law requires disclosure.

I hope that I have been of some 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- 7235

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Dennis Villaronga
90-A-9556
Wallkill Correctional Facility
Box G
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. Villaronga:

I have received your letter of June 25 in which you asked that I provide an opinion concerning the propriety of a request made under the Freedom of Information Law, a copy of which you attached.

In the request, which was made to Ms. Peggy Orce, Inmate Records Coordinator at your facility, you sought:

> "a) accident reports of 6/9/92, involving the above named
>
> b) request to inspect copies of Work Orders submitted from January 1, 1992 to present
>
> c) Medical records
>
> d) directive # 4064 - Facility Safety".

In this regard, the only issue in my view involves the requirement imposed by §89(3) of the Freedom of Information Law 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.

It appears that items a and d of your request reasonably describe the records sought. With respect to items b and c, although it may be implicit that you sought work orders and medical records pertaining to yourself, you did not so state. Consequently, it might be contended that those aspects of your request do not meet the standard imposed by §89(3). Further, I have no knowledge of the volume or nature of medical records pertaining to you, and it is possible that additional detail might have been appropriate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Peggy Orce, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7236

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jeffrey E. Robinson
Real Estate Appraiser
L.T. Bookhout, Inc.
P.O. Box 807
Rhinebeck, NY 12572-0807

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

Dear Mr. Robinson:

I have received your letter of June 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you are having difficulty obtaining property record cards for various assessors' offices in Columbia County, particularly in the towns of Kinderhook and Hillsdale. In this regard, I offer the following comments.

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

Second, 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Assuming that the records in which you are interested are essentially the equivalent of those described above, I believe that they 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

cc: Assessor, Town of Kinderhook
Assessor, Town of Hillsdale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7237

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jitendra Lakram
92-A-2581
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. Lakram:

I have received your letter of July 1. You wrote that you would like "to find out how to get all paperwork in possession of the D.A. pertaining to [your] case that constitutes 'Brady' and 'Rosario' material after conviction of crimes pending appeal free of charge due to [your] inability to pay the costly price of copies."

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Under §87(1)(b)(iii) of that statute, an agency may charge up to twenty-five cents per photocopy. I point out that 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

It is possible that you may receive a waiver or reduction of fees in conjunction with a different provision of law. However, since I am not an expert on that subject, it is suggested that you discuss the matter with an 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-7238

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Henry F. Sobota
Scolaro, Shulman, Cohen, Lawler
& Burstein, P.C.
90 Presidential Plaza
Syracuse, NY 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, unless otherwise indicated.

Dear Mr. Sobota:

As you are aware, I have received your letter of June 24 and the materials attached to it.

You have sought an advisory opinion concerning the propriety of a denial of access to records by the State Liquor Authority. In conjunction with a request for disclosure of copies of records relating to an application for liquor license by a named entity, a restaurant, the Authority denied access to the following records on the ground that disclosure would constitute an unwarranted invasion of personal privacy, apparently pursuant to §89(2)(b)(v):

"1. the applicant's statement of finances;

2. the personal questionnaire for each director, officer and major shareholder; and

3. the applicant identification record."

It is your view that the Authority's denial was improper, for you contend that under §89(2)(v), "an agency may invoke the privacy exception only as to 'information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency'" (emphasis yours). You expressed the belief that the information sought is relevant to the work of the Authority and that if it is not relevant to its work, the collection of that information would contravene the Personal Privacy Protection Law,

§94(1)(a). That provision precludes state agencies from collecting personal information from individuals unless it is relevant and necessary to carry out an agency's legal duties.

Having discussed the contents of the records sought with the Authority's records access officer, Richard Chernela, I was informed that an applicant's statement of finances involves the sources of funding used to invest in a license. Those kinds of items ordinarily are reflective of one's personal finances and include such items as a person's bank account numbers. The personal questionnaires to which you referred include home addresses, social security numbers, information regarding personal finances and the like.

According to the records access officer, the information contained in those two kinds of records are relevant to the work of the Authority, for it is needed to determine whether an applicant meets the criteria needed to hold a license. Consequently, I believe that the personal information in question would have been properly collected and reflective of compliance with the Personal Privacy Protection Law.

Further, it appears from my perspective that the denial was likely appropriate. The provision that you cited, §89(2)(b)(v), represents one among five examples of unwarranted invasions of personal privacy. It is noted that the introductory language of §89(2)(b) states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the five examples that follow. Consequently, I believe that those illustrations represent few among conceivable dozens of situations in which records or portions thereof may be withheld in consideration of personal privacy.

I point out that the first example, §89(2)(b)(i), refers to the ability to withhold employment or credit histories. Personal financial information might in some contexts be characterized as a credit history. Even if it could not be so characterized, I believe that it represents the kind of intimate, personal information that could properly be withheld as an unwarranted invasion of personal privacy.

With respect to the remaining record to which you referred, an "applicant identification record", the records access officer could not determine precisely which record that might be. Since you used that phrase in previous correspondence in conjunction with fingerprints, Mr. Chernela conjectured that the record denied may be a criminal history record. If that is so, and if the record indicates that there were no convictions of the subject of the record, I believe that it could be withheld. In my opinion, only to the extent that such a record indicates a conviction would it 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: Joseph A. Comperiati
Richard Chernela

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2113
FOIL-AO-7239

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Stanley Pawenski
Mr. Arthur Gleason
Mr. John Niedbalec
Cohoes City School District
20 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 Board Members Pawenski, Gleason and Niedbalec:

I have received your letter of July 8 and the materials attached to it.

According to your letter, the first issue involves a "workshop" session of the Cohoes Board of Education begun on the evening of June 22, during which the Board entered into an executive session and "voted to appoint" a particular individual to the position of principal of the Middle School. You wrote that:

> "No formal motion or second was made, nor was there a recording of the 'ayes' and 'nays'. The Board President characterized this as a 'polling' of the Board, with the aim of getting a 'consensus'. The seeking of a 'consensus' was presented as routine practice of the Board.
>
> "The Board president again 'polled' the Board seeking another 'consensus', this time seeking to reverse the Board's stated intention to defer its vote on the principal's position until after July 1st, the start of the District's new fiscal year and instead scheduled the vote for a special meeting which would be held immediately following the Board's Public Hearing on its annual budget which was scheduled for Wednesday, June 24th. Again the Board was 'polled' and a 'consensus' obtained in the same manner as set forth above. The reason stated by the Board

> president for these actions was that the June 24th meeting would be the last one wherein he would have a majority in favor of appointing this individual."

In this regard, although it is unclear whether the vote to appoint a particular individual to a position was taken in public or during an executive session, I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote of the members must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

When action is taken, minutes must be prepared in accordance with §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."

Additionally, in one of the few instances in the Freedom of Information Law that requires that records be maintained, §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 §86(3)], such as a town board, 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.

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 of remedies" (id. 646).

In the context of the situation 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 to indicate the nature of the action taken and 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 an 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 a public body in effect reaches agreement on a particular subject, I believe that the minutes should be prepared and should reflect the actual votes of the members.

In contrast, if a consensus 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.

The second issue involves a hearing and an agenda relating to it that pertains to the budget, and an agenda concerning a "special meeting" that would follow the hearing. You wrote that legal notices were published regarding the hearing but that "[n]o public notice of the second special meeting was provided, nor did the District notify the press of any change in the agenda."

It is noted initially that there is a distinction between a meeting and a hearing. A hearing is generally held to enable members of the public to express their views concerning a particular issue. A meeting is generally held by a public body discuss, to deliberate, and potentially, to take action. Further, the notice requirements may differ in the case of a hearing as opposed to a meeting. Prior to a hearing, there may be a requirement that a legal notice be published that indicates the subject of the hearing, the time and place. In contrast, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. However, notice of a meeting need not indicate the subjects to be considered. Moreover, although notice of a meeting must be given to the news media and posted, there is no requirement that a public body pay to place a legal notice in advance of a meeting.

Similarly, there is nothing in the Open Meetings Law pertaining to agendas. While many public bodies routinely prepare and disclose agendas, there is no requirement that agendas be prepared.

Lastly, you asked whether "budget related discussions can properly be held in executive session." In this regard, by way of background, every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

> discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §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 §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

I hope that I have 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-1230

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Richard C. Dolan
[redacted]

Dear Mr. Dolan:

I have received your letter of July 8 in which you appealed an alleged denial of access to records by the Town of Keene. The records sought relate to the assessment of real property and include property record cards and real property transfer report forms #5217, and you indicated that you intend to use the records in question in conjunction with the judicial review of your assessment.

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 is not empowered to determine appeals, enforce the law or compel an agency to grant or deny access to records.

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

As such, in the case of a town, I believe that an appeal may be made to the town board or the person designated by the town board to determine appeals.

I also offer the following additional comments.

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Therefore, if, for example, there is no "list of land-and-house sales in [y]our neighborhood...used to arrive at [y]our assessment", Town officials would not, in my view, be required to prepare such a list 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. Moreover, 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 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

With respect to the forms that you requested, §574(5) of the Real Property Tax Law states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced above are usually called "EA 5217" forms, and they include the selling price of a parcel when real property is transferred. Although those forms may often be considered confidential, they are available "for purposes of administrative or judicial review of assessments." Therefore, if those records are maintained by the Town, since you are seeking them for use in a judicial review of your assessment, I believe that they must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Clarence Miner, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7231

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Frank Perrella
86-A-7876 E-3-30
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 June 18. You raised a series of questions concerning a situation in which the records sought consist of more than 6395 documents, and that those documents are "subject to redaction."

Your first question is whether it can be ascertained whether "this voluminous police agency file contains trial transcripts". In my view, the simplest and most direct method of so doing would involve asking, by means of a letter, whether or the extent to which the records include trial transcripts.

Second, you asked whether an applicant may seek to obtain records "on a piecemeal basis, considering he is indigent. I believe that if a request for copies is made, an applicant may ask for as few or as many as he believes he can afford or which would be of interest.

Third, you asked whether an agency must allow inspection of records by a relative or agent. In this regard, if records are available to the public generally, I believe that any person would have the right to inspect them. If records could be withheld from the public on the ground that disclosure would result in an unwarranted invasion of personal privacy, but would be available to the subject of the record, that person could authorize disclosure to an agent pursuant to §89(2)(c) of the Freedom of Information Law. That provision states in relevant part that:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
> ii. when the person to whom a record pertains consents in writing to disclosure..."

If, however, portions of records may be withheld from the public generally as well as the applicant, there may be no way of permitting inspection of records other than by preparing photocopies, from which appropriate deletions could be made. In such situations, I believe that an agency may charge a fee for photocopying. Unless a statute other than the Freedom of Information Law so specifies, an agency can charge no more than twenty-five cents per photocopy [see §87(1)(b)(iii)].

Fourth, you asked whether an applicant has "legal standing under the circumstances (his indigence) to obtain a reduced copying fee for a large file". 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

Lastly, since you referred to a "Vaughn" index, as you may be aware, 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 a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme

> Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that 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-7232

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Wallace S. Nolen
RS Paralegal & Recovery Services
122 Cannon Street
Poughkeepsie, NY 12601-3321

The staff of the Committee 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 June 23, as well as a response to your request by Stephen Del Giacco, Records Access Officer for the Commission of Correction. In addition, under separate cover and as required by §89(4)(a) of the Freedom of Information Law, a copy of a determination of your appeal was forwarded to this office by Mark Bonacquist, Acting Counsel to the Commission. You have sought an advisory opinion concerning the propriety of the denial.

According to that determination, the records withheld include:

> "internal staff memoranda; the Poughkeepsie Police Department lockup log dated 10/28/88; a Police Department Report of Personnel Change dated 7/10/90; and a copy of the Dutchess County Grand Jury Report regarding the arrest and detention of two individuals by the Poughkeepsie Police Department in March 1990 and April 1990."

The internal staff memoranda and lockup log were denied pursuant to §87(2)(g) of the Freedom of Information Law; the report of personnel change was denied in accordance with §§50-a of the Civil Rights Law and 87(2)(a) and (b) of the Freedom of Information Law; the Grand Jury report was denied under the Criminal Procedure Law, §§190.85 and 87(2)(a) and (b) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, with respect to the internal memoranda, §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 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.

Second, the lockup log also consists of intra-agency material. Having discussed that kind of record with Mr. Del Giacco, he said that lockup logs may differ in content from one facility to another. In this instance, he indicated that a separate sheet is prepared regarding each inmate. Each sheet includes an inmate's name, details concerning that person's arrest, the time of an officer's inspection of cell, a description of findings and the condition of an inmate, and perhaps commentary concerning the officer's observations. In my view, the content of those records would determine the extent to which they must be disclosed or may be withheld. I believe that those portions of the logs identifying inmates, the dates of their arrests, the time of an inspection and the like would be available, for they consist of factual information accessible under §87(2)(g)(i). It is possible, however, that details concerning the condition of an inmate and similar information could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Some commentary may not be factual in nature but rather reflective of an officer's opinion and could be withheld under §87(2)(g). There may also be concerns relating to security, in which case §87(2)(f) may be relevant. That provision permits an agency to withhold records

to the extent that disclosure would "endanger the life or safety of any person."

Third, with respect to a record of personnel change, §50-a of the Civil Rights Law exempts from public disclosure personnel records pertaining to police and correction officers that are "used to evaluate performance toward continued employment or promotion". Insofar as the records in question are used for such evaluation, I believe that they could properly be withheld. However, if such a record merely indicates an officer's appointment or promotion, it would, in my view, be available.

Lastly, §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."

As such, I believe that grand jury reports are generally confidential and exempted from disclosure by means of the Criminal Procedure Law and §87(2)(a) of 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

cc: Stephen Del Giacco, Records Access Officer
Mark Bonacquist, Acting Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2112
FOIL-AO- 7233

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Anthony S. Derico
[redacted]

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

Dear Mr. Derico:

I have received your letter of June 26, which pertains to public participation at meetings of the Halfmoon Town Board.

According to your letter, the Board permits members of the public to speak for up to three minutes during each of two portions of its meetings. One of those opportunities involves the ability to comment concerning subjects listed on an agenda. However, you wrote that the agenda is not available until the day of the meeting. The second opportunity involves the ability to comment on issues other than agenda items. Nevertheless, it is your view that three minutes may be inadequate "to answer the lengthy and often inaccurate rebuttals of Town Officials."

You have asked whether "the failure to provide the public with a timely and adequate copy of the Agenda represent[s] a deliberate attempt by the Town not to comply with its own meetings procedures -- procedures established by the Supervisor at the Town's organizational meeting."

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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to permit 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, and many do so. When a

public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally, which would appear to be so in this instance. By authorizing the public to speak during two portions of its meetings, the Board appears to be acting beyond the requirements of the Open Meetings Law.

As in the case of public participation, the Open Meetings Law is silent with respect to agendas. Neither the Open Meetings Law nor any other statute of which I am aware requires that agendas be prepared or specifies when they must be disclosed. Most public bodies prepare agendas based upon practice, policy or rule, rather than pursuant to any statutory requirement.

In my view, once an agenda has been prepared, it constitutes a "record" subject to rights conferred by the Freedom of Information Law [see Public Officers Law, §86(4)]. Further, since they are disclosed on the day of a meeting, I believe that agendas would be available to the public, essentially as soon as they exist, even if they are prepared prior to the dates of meetings.

Lastly, although you referred to procedures established at the Board's organizational meeting, you did not describe any such procedures in relation to the issue that you raised. If, for example, one aspect of the Board's procedures requires that agendas be prepared or disclosed at least three days prior to meetings, a failure to do so would in my opinion be inconsistent with its own rules. It is noted, however, that such inconsistency would not represent a violation of the Open Meetings Law; again, that statute does not deal with the preparation or disclosure of agendas.

I hope that I have 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- 7234

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Julius Davis
87-A-7553
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. Davis:

I have received your letter of June 23 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you made a request to the Erie County District Attorney for records "maintained within [your] criminal investigation file". Further, because you are unaware of the specific records within the file, you also requested " a detailed current list of all records/documents in the file." In response to the request, you were informed that the Office of the District Attorney does not maintain a list of records maintained in the file and that he could not comply with the request "due to lack of specificity."

In this regard, I offer the following comments.

First, I point out that §89(3) of the Freedom of Information Law states in part that, with certain exceptions, an agency is not required to create a record not maintained or possessed by the agency. One of the exceptions to that general principle pertains to §87(3)(c), 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 required to be maintained under §87(3)(c) 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 need not be 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. In short, while I believe that the District Attorney must maintain a reasonably detailed list of the kinds of records maintained by his office, there is no requirement that a list be prepared that identifies each record within a file.

Second, §89(3) states in part 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. Even though records located in that case involved more than two thousand pages, it was found that the request reasonably described the records sought. If there is a "file" consisting of the records concerning your criminal investigation, and if that file can be located, I do not believe that additional specificity would be required to make an appropriate request. In that circumstance, as in Konigsberg, the agency would in my opinion be obliged to review the records within the file to determine the extent to which the Freedom of Information Law requires disclosure.

I hope that I have been of some 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- 7235

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Dennis Villaronga
90-A-9556
Wallkill Correctional Facility
Box G
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. Villaronga:

I have received your letter of June 25 in which you asked that I provide an opinion concerning the propriety of a request made under the Freedom of Information Law, a copy of which you attached.

In the request, which was made to Ms. Peggy Orce, Inmate Records Coordinator at your facility, you sought:

> "a) accident reports of 6/9/92, involving the above named
>
> b) request to inspect copies of Work Orders submitted from January 1, 1992 to present
>
> c) Medical records
>
> d) directive # 4064 - Facility Safety".

In this regard, the only issue in my view involves the requirement imposed by §89(3) of the Freedom of Information Law 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.

It appears that items a and d of your request reasonably describe the records sought. With respect to items b and c, although it may be implicit that you sought work orders and medical records pertaining to yourself, you did not so state. Consequently, it might be contended that those aspects of your request do not meet the standard imposed by §89(3). Further, I have no knowledge of the volume or nature of medical records pertaining to you, and it is possible that additional detail might have been appropriate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Peggy Orce, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7236

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jeffrey E. Robinson
Real Estate Appraiser
L.T. Bookhout, Inc.
P.O. Box 807
Rhinebeck, NY 12572-0807

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

Dear Mr. Robinson:

I have received your letter of June 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you are having difficulty obtaining property record cards for various assessors' offices in Columbia County, particularly in the towns of Kinderhook and Hillsdale. In this regard, I offer the following comments.

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

Second, 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Assuming that the records in which you are interested are essentially the equivalent of those described above, I believe that they 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

cc: Assessor, Town of Kinderhook
Assessor, Town of Hillsdale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7237

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jitendra Lakram
92-A-2581
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. Lakram:

I have received your letter of July 1. You wrote that you would like "to find out how to get all paperwork in possession of the D.A. pertaining to [your] case that constitutes 'Brady' and 'Rosario' material after conviction of crimes pending appeal free of charge due to [your] inability to pay the costly price of copies."

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Under §87(1)(b)(iii) of that statute, an agency may charge up to twenty-five cents per photocopy. I point out that 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

It is possible that you may receive a waiver or reduction of fees in conjunction with a different provision of law. However, since I am not an expert on that subject, it is suggested that you discuss the matter with an 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-7238

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Henry F. Sobota
Scolaro, Shulman, Cohen, Lawler
& Burstein, P.C.
90 Presidential Plaza
Syracuse, NY 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, unless otherwise indicated.

Dear Mr. Sobota:

As you are aware, I have received your letter of June 24 and the materials attached to it.

You have sought an advisory opinion concerning the propriety of a denial of access to records by the State Liquor Authority. In conjunction with a request for disclosure of copies of records relating to an application for liquor license by a named entity, a restaurant, the Authority denied access to the following records on the ground that disclosure would constitute an unwarranted invasion of personal privacy, apparently pursuant to §89(2)(b)(v):

"1. the applicant's statement of finances;

2. the personal questionnaire for each director, officer and major shareholder; and

3. the applicant identification record."

It is your view that the Authority's denial was improper, for you contend that under §89(2)(v), "an agency may invoke the privacy exception only as to 'information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency'" (emphasis yours). You expressed the belief that the information sought is relevant to the work of the Authority and that if it is not relevant to its work, the collection of that information would contravene the Personal Privacy Protection Law,

§94(1)(a). That provision precludes state agencies from collecting personal information from individuals unless it is relevant and necessary to carry out an agency's legal duties.

Having discussed the contents of the records sought with the Authority's records access officer, Richard Chernela, I was informed that an applicant's statement of finances involves the sources of funding used to invest in a license. Those kinds of items ordinarily are reflective of one's personal finances and include such items as a person's bank account numbers. The personal questionnaires to which you referred include home addresses, social security numbers, information regarding personal finances and the like.

According to the records access officer, the information contained in those two kinds of records are relevant to the work of the Authority, for it is needed to determine whether an applicant meets the criteria needed to hold a license. Consequently, I believe that the personal information in question would have been properly collected and reflective of compliance with the Personal Privacy Protection Law.

Further, it appears from my perspective that the denial was likely appropriate. The provision that you cited, §89(2)(b)(v), represents one among five examples of unwarranted invasions of personal privacy. It is noted that the introductory language of §89(2)(b) states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the five examples that follow. Consequently, I believe that those illustrations represent few among conceivable dozens of situations in which records or portions thereof may be withheld in consideration of personal privacy.

I point out that the first example, §89(2)(b)(i), refers to the ability to withhold employment or credit histories. Personal financial information might in some contexts be characterized as a credit history. Even if it could not be so characterized, I believe that it represents the kind of intimate, personal information that could properly be withheld as an unwarranted invasion of personal privacy.

With respect to the remaining record to which you referred, an "applicant identification record", the records access officer could not determine precisely which record that might be. Since you used that phrase in previous correspondence in conjunction with fingerprints, Mr. Chernela conjectured that the record denied may be a criminal history record. If that is so, and if the record indicates that there were no convictions of the subject of the record, I believe that it could be withheld. In my opinion, only to the extent that such a record indicates a conviction would it 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: Joseph A. Comperiati
Richard Chernela

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2113
FOIL-AO-7239

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Stanley Pawenski
Mr. Arthur Gleason
Mr. John Niedbalec
Cohoes City School District
20 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 Board Members Pawenski, Gleason and Niedbalec:

I have received your letter of July 8 and the materials attached to it.

According to your letter, the first issue involves a "workshop" session of the Cohoes Board of Education begun on the evening of June 22, during which the Board entered into an executive session and "voted to appoint" a particular individual to the position of principal of the Middle School. You wrote that:

> "No formal motion or second was made, nor was there a recording of the 'ayes' and 'nays'. The Board President characterized this as a 'polling' of the Board, with the aim of getting a 'consensus'. The seeking of a 'consensus' was presented as routine practice of the Board.
>
> "The Board president again 'polled' the Board seeking another 'consensus', this time seeking to reverse the Board's stated intention to defer its vote on the principal's position until after July 1st, the start of the District's new fiscal year and instead scheduled the vote for a special meeting which would be held immediately following the Board's Public Hearing on its annual budget which was scheduled for Wednesday, June 24th. Again the Board was 'polled' and a 'consensus' obtained in the same manner as set forth above. The reason stated by the Board

> president for these actions was that the June 24th meeting would be the last one wherein he would have a majority in favor of appointing this individual."

In this regard, although it is unclear whether the vote to appoint a particular individual to a position was taken in public or during an executive session, I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote of the members must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

When action is taken, minutes must be prepared in accordance with §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."

Additionally, in one of the few instances in the Freedom of Information Law that requires that records be maintained, §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 §86(3)], such as a town board, 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.

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 of remedies" (id. 646).

In the context of the situation 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 to indicate the nature of the action taken and 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 an 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 a public body in effect reaches agreement on a particular subject, I believe that the minutes should be prepared and should reflect the actual votes of the members.

In contrast, if a consensus 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.

The second issue involves a hearing and an agenda relating to it that pertains to the budget, and an agenda concerning a "special meeting" that would follow the hearing. You wrote that legal notices were published regarding the hearing but that "[n]o public notice of the second special meeting was provided, nor did the District notify the press of any change in the agenda."

It is noted initially that there is a distinction between a meeting and a hearing. A hearing is generally held to enable members of the public to express their views concerning a particular issue. A meeting is generally held by a public body discuss, to deliberate, and potentially, to take action. Further, the notice requirements may differ in the case of a hearing as opposed to a meeting. Prior to a hearing, there may be a requirement that a legal notice be published that indicates the subject of the hearing, the time and place. In contrast, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. However, notice of a meeting need not indicate the subjects to be considered. Moreover, although notice of a meeting must be given to the news media and posted, there is no requirement that a public body pay to place a legal notice in advance of a meeting.

Similarly, there is nothing in the Open Meetings Law pertaining to agendas. While many public bodies routinely prepare and disclose agendas, there is no requirement that agendas be prepared.

Lastly, you asked whether "budget related discussions can properly be held in executive session." In this regard, by way of background, every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

> discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §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 §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

I hope that I have 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-1230

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Richard C. Dolan
[redacted]

Dear Mr. Dolan:

I have received your letter of July 8 in which you appealed an alleged denial of access to records by the Town of Keene. The records sought relate to the assessment of real property and include property record cards and real property transfer report forms #5217, and you indicated that you intend to use the records in question in conjunction with the judicial review of your assessment.

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 is not empowered to determine appeals, enforce the law or compel an agency to grant or deny access to records.

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

As such, in the case of a town, I believe that an appeal may be made to the town board or the person designated by the town board to determine appeals.

I also offer the following additional comments.

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Therefore, if, for example, there is no "list of land-and-house sales in [y]our neighborhood...used to arrive at [y]our assessment", Town officials would not, in my view, be required to prepare such a list 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. Moreover, 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 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

With respect to the forms that you requested, §574(5) of the Real Property Tax Law states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced above are usually called "EA 5217" forms, and they include the selling price of a parcel when real property is transferred. Although those forms may often be considered confidential, they are available "for purposes of administrative or judicial review of assessments." Therefore, if those records are maintained by the Town, since you are seeking them for use in a judicial review of your assessment, I believe that they must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Clarence Miner, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7231

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Frank Perrella
86-A-7876 E-3-30
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 June 18. You raised a series of questions concerning a situation in which the records sought consist of more than 6395 documents, and that those documents are "subject to redaction."

Your first question is whether it can be ascertained whether "this voluminous police agency file contains trial transcripts". In my view, the simplest and most direct method of so doing would involve asking, by means of a letter, whether or the extent to which the records include trial transcripts.

Second, you asked whether an applicant may seek to obtain records "on a piecemeal basis, considering he is indigent. I believe that if a request for copies is made, an applicant may ask for as few or as many as he believes he can afford or which would be of interest.

Third, you asked whether an agency must allow inspection of records by a relative or agent. In this regard, if records are available to the public generally, I believe that any person would have the right to inspect them. If records could be withheld from the public on the ground that disclosure would result in an unwarranted invasion of personal privacy, but would be available to the subject of the record, that person could authorize disclosure to an agent pursuant to §89(2)(c) of the Freedom of Information Law. That provision states in relevant part that:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
> ii. when the person to whom a record pertains consents in writing to disclosure..."

If, however, portions of records may be withheld from the public generally as well as the applicant, there may be no way of permitting inspection of records other than by preparing photocopies, from which appropriate deletions could be made. In such situations, I believe that an agency may charge a fee for photocopying. Unless a statute other than the Freedom of Information Law so specifies, an agency can charge no more than twenty-five cents per photocopy [see §87(1)(b)(iii)].

Fourth, you asked whether an applicant has "legal standing under the circumstances (his indigence) to obtain a reduced copying fee for a large file". 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

Lastly, since you referred to a "Vaughn" index, as you may be aware, 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 a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme

> Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that 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-7232

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Wallace S. Nolen
RS Paralegal & Recovery Services
122 Cannon Street
Poughkeepsie, NY 12601-3321

The staff of the Committee 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 June 23, as well as a response to your request by Stephen Del Giacco, Records Access Officer for the Commission of Correction. In addition, under separate cover and as required by §89(4)(a) of the Freedom of Information Law, a copy of a determination of your appeal was forwarded to this office by Mark Bonacquist, Acting Counsel to the Commission. You have sought an advisory opinion concerning the propriety of the denial.

According to that determination, the records withheld include:

> "internal staff memoranda; the Poughkeepsie Police Department lockup log dated 10/28/88; a Police Department Report of Personnel Change dated 7/10/90; and a copy of the Dutchess County Grand Jury Report regarding the arrest and detention of two individuals by the Poughkeepsie Police Department in March 1990 and April 1990."

The internal staff memoranda and lockup log were denied pursuant to §87(2)(g) of the Freedom of Information Law; the report of personnel change was denied in accordance with §§50-a of the Civil Rights Law and 87(2)(a) and (b) of the Freedom of Information Law; the Grand Jury report was denied under the Criminal Procedure Law, §§190.85 and 87(2)(a) and (b) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, with respect to the internal memoranda, §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 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.

Second, the lockup log also consists of intra-agency material. Having discussed that kind of record with Mr. Del Giacco, he said that lockup logs may differ in content from one facility to another. In this instance, he indicated that a separate sheet is prepared regarding each inmate. Each sheet includes an inmate's name, details concerning that person's arrest, the time of an officer's inspection of cell, a description of findings and the condition of an inmate, and perhaps commentary concerning the officer's observations. In my view, the content of those records would determine the extent to which they must be disclosed or may be withheld. I believe that those portions of the logs identifying inmates, the dates of their arrests, the time of an inspection and the like would be available, for they consist of factual information accessible under §87(2)(g)(i). It is possible, however, that details concerning the condition of an inmate and similar information could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Some commentary may not be factual in nature but rather reflective of an officer's opinion and could be withheld under §87(2)(g). There may also be concerns relating to security, in which case §87(2)(f) may be relevant. That provision permits an agency to withhold records

to the extent that disclosure would "endanger the life or safety of any person."

Third, with respect to a record of personnel change, §50-a of the Civil Rights Law exempts from public disclosure personnel records pertaining to police and correction officers that are "used to evaluate performance toward continued employment or promotion". Insofar as the records in question are used for such evaluation, I believe that they could properly be withheld. However, if such a record merely indicates an officer's appointment or promotion, it would, in my view, be available.

Lastly, §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."

As such, I believe that grand jury reports are generally confidential and exempted from disclosure by means of the Criminal Procedure Law and §87(2)(a) of 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

cc: Stephen Del Giacco, Records Access Officer
Mark Bonacquist, Acting Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2112
FOIL-AO- 7233

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Anthony S. Derico
[redacted]

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

Dear Mr. Derico:

I have received your letter of June 26, which pertains to public participation at meetings of the Halfmoon Town Board.

According to your letter, the Board permits members of the public to speak for up to three minutes during each of two portions of its meetings. One of those opportunities involves the ability to comment concerning subjects listed on an agenda. However, you wrote that the agenda is not available until the day of the meeting. The second opportunity involves the ability to comment on issues other than agenda items. Nevertheless, it is your view that three minutes may be inadequate "to answer the lengthy and often inaccurate rebuttals of Town Officials."

You have asked whether "the failure to provide the public with a timely and adequate copy of the Agenda represent[s] a deliberate attempt by the Town not to comply with its own meetings procedures -- procedures established by the Supervisor at the Town's organizational meeting."

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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to permit 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, and many do so. When a

public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally, which would appear to be so in this instance. By authorizing the public to speak during two portions of its meetings, the Board appears to be acting beyond the requirements of the Open Meetings Law.

As in the case of public participation, the Open Meetings Law is silent with respect to agendas. Neither the Open Meetings Law nor any other statute of which I am aware requires that agendas be prepared or specifies when they must be disclosed. Most public bodies prepare agendas based upon practice, policy or rule, rather than pursuant to any statutory requirement.

In my view, once an agenda has been prepared, it constitutes a "record" subject to rights conferred by the Freedom of Information Law [see Public Officers Law, §86(4)]. Further, since they are disclosed on the day of a meeting, I believe that agendas would be available to the public, essentially as soon as they exist, even if they are prepared prior to the dates of meetings.

Lastly, although you referred to procedures established at the Board's organizational meeting, you did not describe any such procedures in relation to the issue that you raised. If, for example, one aspect of the Board's procedures requires that agendas be prepared or disclosed at least three days prior to meetings, a failure to do so would in my opinion be inconsistent with its own rules. It is noted, however, that such inconsistency would not represent a violation of the Open Meetings Law; again, that statute does not deal with the preparation or disclosure of agendas.

I hope that I have 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- 7234

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Julius Davis
87-A-7553
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. Davis:

I have received your letter of June 23 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you made a request to the Erie County District Attorney for records "maintained within [your] criminal investigation file". Further, because you are unaware of the specific records within the file, you also requested " a detailed current list of all records/documents in the file." In response to the request, you were informed that the Office of the District Attorney does not maintain a list of records maintained in the file and that he could not comply with the request "due to lack of specificity."

In this regard, I offer the following comments.

First, I point out that §89(3) of the Freedom of Information Law states in part that, with certain exceptions, an agency is not required to create a record not maintained or possessed by the agency. One of the exceptions to that general principle pertains to §87(3)(c), 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 required to be maintained under §87(3)(c) 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 need not be 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. In short, while I believe that the District Attorney must maintain a reasonably detailed list of the kinds of records maintained by his office, there is no requirement that a list be prepared that identifies each record within a file.

Second, §89(3) states in part 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. Even though records located in that case involved more than two thousand pages, it was found that the request reasonably described the records sought. If there is a "file" consisting of the records concerning your criminal investigation, and if that file can be located, I do not believe that additional specificity would be required to make an appropriate request. In that circumstance, as in Konigsberg, the agency would in my opinion be obliged to review the records within the file to determine the extent to which the Freedom of Information Law requires disclosure.

I hope that I have been of some 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- 7235

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Dennis Villaronga
90-A-9556
Wallkill Correctional Facility
Box G
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. Villaronga:

I have received your letter of June 25 in which you asked that I provide an opinion concerning the propriety of a request made under the Freedom of Information Law, a copy of which you attached.

In the request, which was made to Ms. Peggy Orce, Inmate Records Coordinator at your facility, you sought:

> "a) accident reports of 6/9/92, involving the above named
>
> b) request to inspect copies of Work Orders submitted from January 1, 1992 to present
>
> c) Medical records
>
> d) directive # 4064 - Facility Safety".

In this regard, the only issue in my view involves the requirement imposed by §89(3) of the Freedom of Information Law 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.

It appears that items a and d of your request reasonably describe the records sought. With respect to items b and c, although it may be implicit that you sought work orders and medical records pertaining to yourself, you did not so state. Consequently, it might be contended that those aspects of your request do not meet the standard imposed by §89(3). Further, I have no knowledge of the volume or nature of medical records pertaining to you, and it is possible that additional detail might have been appropriate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Peggy Orce, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7236

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jeffrey E. Robinson
Real Estate Appraiser
L.T. Bookhout, Inc.
P.O. Box 807
Rhinebeck, NY 12572-0807

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

Dear Mr. Robinson:

I have received your letter of June 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you are having difficulty obtaining property record cards for various assessors' offices in Columbia County, particularly in the towns of Kinderhook and Hillsdale. In this regard, I offer the following comments.

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

Second, 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Assuming that the records in which you are interested are essentially the equivalent of those described above, I believe that they 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

cc: Assessor, Town of Kinderhook
Assessor, Town of Hillsdale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7237

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jitendra Lakram
92-A-2581
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. Lakram:

I have received your letter of July 1. You wrote that you would like "to find out how to get all paperwork in possession of the D.A. pertaining to [your] case that constitutes 'Brady' and 'Rosario' material after conviction of crimes pending appeal free of charge due to [your] inability to pay the costly price of copies."

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Under §87(1)(b)(iii) of that statute, an agency may charge up to twenty-five cents per photocopy. I point out that 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

It is possible that you may receive a waiver or reduction of fees in conjunction with a different provision of law. However, since I am not an expert on that subject, it is suggested that you discuss the matter with an 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-7238

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Henry F. Sobota
Scolaro, Shulman, Cohen, Lawler
& Burstein, P.C.
90 Presidential Plaza
Syracuse, NY 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, unless otherwise indicated.

Dear Mr. Sobota:

As you are aware, I have received your letter of June 24 and the materials attached to it.

You have sought an advisory opinion concerning the propriety of a denial of access to records by the State Liquor Authority. In conjunction with a request for disclosure of copies of records relating to an application for liquor license by a named entity, a restaurant, the Authority denied access to the following records on the ground that disclosure would constitute an unwarranted invasion of personal privacy, apparently pursuant to §89(2)(b)(v):

"1. the applicant's statement of finances;

2. the personal questionnaire for each director, officer and major shareholder; and

3. the applicant identification record."

It is your view that the Authority's denial was improper, for you contend that under §89(2)(v), "an agency may invoke the privacy exception only as to 'information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency'" (emphasis yours). You expressed the belief that the information sought is relevant to the work of the Authority and that if it is not relevant to its work, the collection of that information would contravene the Personal Privacy Protection Law,

§94(1)(a). That provision precludes state agencies from collecting personal information from individuals unless it is relevant and necessary to carry out an agency's legal duties.

Having discussed the contents of the records sought with the Authority's records access officer, Richard Chernela, I was informed that an applicant's statement of finances involves the sources of funding used to invest in a license. Those kinds of items ordinarily are reflective of one's personal finances and include such items as a person's bank account numbers. The personal questionnaires to which you referred include home addresses, social security numbers, information regarding personal finances and the like.

According to the records access officer, the information contained in those two kinds of records are relevant to the work of the Authority, for it is needed to determine whether an applicant meets the criteria needed to hold a license. Consequently, I believe that the personal information in question would have been properly collected and reflective of compliance with the Personal Privacy Protection Law.

Further, it appears from my perspective that the denial was likely appropriate. The provision that you cited, §89(2)(b)(v), represents one among five examples of unwarranted invasions of personal privacy. It is noted that the introductory language of §89(2)(b) states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the five examples that follow. Consequently, I believe that those illustrations represent few among conceivable dozens of situations in which records or portions thereof may be withheld in consideration of personal privacy.

I point out that the first example, §89(2)(b)(i), refers to the ability to withhold employment or credit histories. Personal financial information might in some contexts be characterized as a credit history. Even if it could not be so characterized, I believe that it represents the kind of intimate, personal information that could properly be withheld as an unwarranted invasion of personal privacy.

With respect to the remaining record to which you referred, an "applicant identification record", the records access officer could not determine precisely which record that might be. Since you used that phrase in previous correspondence in conjunction with fingerprints, Mr. Chernela conjectured that the record denied may be a criminal history record. If that is so, and if the record indicates that there were no convictions of the subject of the record, I believe that it could be withheld. In my opinion, only to the extent that such a record indicates a conviction would it 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: Joseph A. Comperiati
Richard Chernela

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2113
FOIL-AO-7239

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Stanley Pawenski
Mr. Arthur Gleason
Mr. John Niedbalec
Cohoes City School District
20 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 Board Members Pawenski, Gleason and Niedbalec:

I have received your letter of July 8 and the materials attached to it.

According to your letter, the first issue involves a "workshop" session of the Cohoes Board of Education begun on the evening of June 22, during which the Board entered into an executive session and "voted to appoint" a particular individual to the position of principal of the Middle School. You wrote that:

> "No formal motion or second was made, nor was there a recording of the 'ayes' and 'nays'. The Board President characterized this as a 'polling' of the Board, with the aim of getting a 'consensus'. The seeking of a 'consensus' was presented as routine practice of the Board.
>
> "The Board president again 'polled' the Board seeking another 'consensus', this time seeking to reverse the Board's stated intention to defer its vote on the principal's position until after July 1st, the start of the District's new fiscal year and instead scheduled the vote for a special meeting which would be held immediately following the Board's Public Hearing on its annual budget which was scheduled for Wednesday, June 24th. Again the Board was 'polled' and a 'consensus' obtained in the same manner as set forth above. The reason stated by the Board

> president for these actions was that the June 24th meeting would be the last one wherein he would have a majority in favor of appointing this individual."

In this regard, although it is unclear whether the vote to appoint a particular individual to a position was taken in public or during an executive session, I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote of the members must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

When action is taken, minutes must be prepared in accordance with §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."

Additionally, in one of the few instances in the Freedom of Information Law that requires that records be maintained, §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 §86(3)], such as a town board, 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.

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 of remedies" (id. 646).

In the context of the situation 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 to indicate the nature of the action taken and 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 an 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 a public body in effect reaches agreement on a particular subject, I believe that the minutes should be prepared and should reflect the actual votes of the members.

In contrast, if a consensus 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.

The second issue involves a hearing and an agenda relating to it that pertains to the budget, and an agenda concerning a "special meeting" that would follow the hearing. You wrote that legal notices were published regarding the hearing but that "[n]o public notice of the second special meeting was provided, nor did the District notify the press of any change in the agenda."

It is noted initially that there is a distinction between a meeting and a hearing. A hearing is generally held to enable members of the public to express their views concerning a particular issue. A meeting is generally held by a public body discuss, to deliberate, and potentially, to take action. Further, the notice requirements may differ in the case of a hearing as opposed to a meeting. Prior to a hearing, there may be a requirement that a legal notice be published that indicates the subject of the hearing, the time and place. In contrast, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. However, notice of a meeting need not indicate the subjects to be considered. Moreover, although notice of a meeting must be given to the news media and posted, there is no requirement that a public body pay to place a legal notice in advance of a meeting.

Similarly, there is nothing in the Open Meetings Law pertaining to agendas. While many public bodies routinely prepare and disclose agendas, there is no requirement that agendas be prepared.

Lastly, you asked whether "budget related discussions can properly be held in executive session." In this regard, by way of background, every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

> discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §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 §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

I hope that I have 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-1230

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Richard C. Dolan
[redacted]

Dear Mr. Dolan:

I have received your letter of July 8 in which you appealed an alleged denial of access to records by the Town of Keene. The records sought relate to the assessment of real property and include property record cards and real property transfer report forms #5217, and you indicated that you intend to use the records in question in conjunction with the judicial review of your assessment.

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 is not empowered to determine appeals, enforce the law or compel an agency to grant or deny access to records.

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

As such, in the case of a town, I believe that an appeal may be made to the town board or the person designated by the town board to determine appeals.

I also offer the following additional comments.

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Therefore, if, for example, there is no "list of land-and-house sales in [y]our neighborhood...used to arrive at [y]our assessment", Town officials would not, in my view, be required to prepare such a list 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. Moreover, 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 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

With respect to the forms that you requested, §574(5) of the Real Property Tax Law states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced above are usually called "EA 5217" forms, and they include the selling price of a parcel when real property is transferred. Although those forms may often be considered confidential, they are available "for purposes of administrative or judicial review of assessments." Therefore, if those records are maintained by the Town, since you are seeking them for use in a judicial review of your assessment, I believe that they must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Clarence Miner, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7231

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Frank Perrella
86-A-7876 E-3-30
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 June 18. You raised a series of questions concerning a situation in which the records sought consist of more than 6395 documents, and that those documents are "subject to redaction."

Your first question is whether it can be ascertained whether "this voluminous police agency file contains trial transcripts". In my view, the simplest and most direct method of so doing would involve asking, by means of a letter, whether or the extent to which the records include trial transcripts.

Second, you asked whether an applicant may seek to obtain records "on a piecemeal basis, considering he is indigent. I believe that if a request for copies is made, an applicant may ask for as few or as many as he believes he can afford or which would be of interest.

Third, you asked whether an agency must allow inspection of records by a relative or agent. In this regard, if records are available to the public generally, I believe that any person would have the right to inspect them. If records could be withheld from the public on the ground that disclosure would result in an unwarranted invasion of personal privacy, but would be available to the subject of the record, that person could authorize disclosure to an agent pursuant to §89(2)(c) of the Freedom of Information Law. That provision states in relevant part that:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
> ii. when the person to whom a record pertains consents in writing to disclosure..."

If, however, portions of records may be withheld from the public generally as well as the applicant, there may be no way of permitting inspection of records other than by preparing photocopies, from which appropriate deletions could be made. In such situations, I believe that an agency may charge a fee for photocopying. Unless a statute other than the Freedom of Information Law so specifies, an agency can charge no more than twenty-five cents per photocopy [see §87(1)(b)(iii)].

Fourth, you asked whether an applicant has "legal standing under the circumstances (his indigence) to obtain a reduced copying fee for a large file". 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

Lastly, since you referred to a "Vaughn" index, as you may be aware, 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 a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme

> Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that 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-7232

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 10, 1992

Mr. Wallace S. Nolen
RS Paralegal & Recovery Services
122 Cannon Street
Poughkeepsie, NY 12601-3321

The staff of the Committee 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 June 23, as well as a response to your request by Stephen Del Giacco, Records Access Officer for the Commission of Correction. In addition, under separate cover and as required by §89(4)(a) of the Freedom of Information Law, a copy of a determination of your appeal was forwarded to this office by Mark Bonacquist, Acting Counsel to the Commission. You have sought an advisory opinion concerning the propriety of the denial.

According to that determination, the records withheld include:

> "internal staff memoranda; the Poughkeepsie Police Department lockup log dated 10/28/88; a Police Department Report of Personnel Change dated 7/10/90; and a copy of the Dutchess County Grand Jury Report regarding the arrest and detention of two individuals by the Poughkeepsie Police Department in March 1990 and April 1990."

The internal staff memoranda and lockup log were denied pursuant to §87(2)(g) of the Freedom of Information Law; the report of personnel change was denied in accordance with §§50-a of the Civil Rights Law and 87(2)(a) and (b) of the Freedom of Information Law; the Grand Jury report was denied under the Criminal Procedure Law, §§190.85 and 87(2)(a) and (b) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, with respect to the internal memoranda, §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 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.

Second, the lockup log also consists of intra-agency material. Having discussed that kind of record with Mr. Del Giacco, he said that lockup logs may differ in content from one facility to another. In this instance, he indicated that a separate sheet is prepared regarding each inmate. Each sheet includes an inmate's name, details concerning that person's arrest, the time of an officer's inspection of cell, a description of findings and the condition of an inmate, and perhaps commentary concerning the officer's observations. In my view, the content of those records would determine the extent to which they must be disclosed or may be withheld. I believe that those portions of the logs identifying inmates, the dates of their arrests, the time of an inspection and the like would be available, for they consist of factual information accessible under §87(2)(g)(i). It is possible, however, that details concerning the condition of an inmate and similar information could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Some commentary may not be factual in nature but rather reflective of an officer's opinion and could be withheld under §87(2)(g). There may also be concerns relating to security, in which case §87(2)(f) may be relevant. That provision permits an agency to withhold records

to the extent that disclosure would "endanger the life or safety of any person."

Third, with respect to a record of personnel change, §50-a of the Civil Rights Law exempts from public disclosure personnel records pertaining to police and correction officers that are "used to evaluate performance toward continued employment or promotion". Insofar as the records in question are used for such evaluation, I believe that they could properly be withheld. However, if such a record merely indicates an officer's appointment or promotion, it would, in my view, be available.

Lastly, §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."

As such, I believe that grand jury reports are generally confidential and exempted from disclosure by means of the Criminal Procedure Law and §87(2)(a) of 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

cc: Stephen Del Giacco, Records Access Officer
Mark Bonacquist, Acting Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2112
FOIL-AO- 7233

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Anthony S. Derico
[redacted]

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

Dear Mr. Derico:

I have received your letter of June 26, which pertains to public participation at meetings of the Halfmoon Town Board.

According to your letter, the Board permits members of the public to speak for up to three minutes during each of two portions of its meetings. One of those opportunities involves the ability to comment concerning subjects listed on an agenda. However, you wrote that the agenda is not available until the day of the meeting. The second opportunity involves the ability to comment on issues other than agenda items. Nevertheless, it is your view that three minutes may be inadequate "to answer the lengthy and often inaccurate rebuttals of Town Officials."

You have asked whether "the failure to provide the public with a timely and adequate copy of the Agenda represent[s] a deliberate attempt by the Town not to comply with its own meetings procedures -- procedures established by the Supervisor at the Town's organizational meeting."

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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to permit 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, and many do so. When a

public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally, which would appear to be so in this instance. By authorizing the public to speak during two portions of its meetings, the Board appears to be acting beyond the requirements of the Open Meetings Law.

As in the case of public participation, the Open Meetings Law is silent with respect to agendas. Neither the Open Meetings Law nor any other statute of which I am aware requires that agendas be prepared or specifies when they must be disclosed. Most public bodies prepare agendas based upon practice, policy or rule, rather than pursuant to any statutory requirement.

In my view, once an agenda has been prepared, it constitutes a "record" subject to rights conferred by the Freedom of Information Law [see Public Officers Law, §86(4)]. Further, since they are disclosed on the day of a meeting, I believe that agendas would be available to the public, essentially as soon as they exist, even if they are prepared prior to the dates of meetings.

Lastly, although you referred to procedures established at the Board's organizational meeting, you did not describe any such procedures in relation to the issue that you raised. If, for example, one aspect of the Board's procedures requires that agendas be prepared or disclosed at least three days prior to meetings, a failure to do so would in my opinion be inconsistent with its own rules. It is noted, however, that such inconsistency would not represent a violation of the Open Meetings Law; again, that statute does not deal with the preparation or disclosure of agendas.

I hope that I have 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- 7234

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Julius Davis
87-A-7553
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. Davis:

I have received your letter of June 23 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you made a request to the Erie County District Attorney for records "maintained within [your] criminal investigation file". Further, because you are unaware of the specific records within the file, you also requested " a detailed current list of all records/documents in the file." In response to the request, you were informed that the Office of the District Attorney does not maintain a list of records maintained in the file and that he could not comply with the request "due to lack of specificity."

In this regard, I offer the following comments.

First, I point out that §89(3) of the Freedom of Information Law states in part that, with certain exceptions, an agency is not required to create a record not maintained or possessed by the agency. One of the exceptions to that general principle pertains to §87(3)(c), 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 required to be maintained under §87(3)(c) 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 need not be 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. In short, while I believe that the District Attorney must maintain a reasonably detailed list of the kinds of records maintained by his office, there is no requirement that a list be prepared that identifies each record within a file.

Second, §89(3) states in part 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. Even though records located in that case involved more than two thousand pages, it was found that the request reasonably described the records sought. If there is a "file" consisting of the records concerning your criminal investigation, and if that file can be located, I do not believe that additional specificity would be required to make an appropriate request. In that circumstance, as in Konigsberg, the agency would in my opinion be obliged to review the records within the file to determine the extent to which the Freedom of Information Law requires disclosure.

I hope that I have been of some 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- 7235

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Dennis Villaronga
90-A-9556
Wallkill Correctional Facility
Box G
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. Villaronga:

I have received your letter of June 25 in which you asked that I provide an opinion concerning the propriety of a request made under the Freedom of Information Law, a copy of which you attached.

In the request, which was made to Ms. Peggy Orce, Inmate Records Coordinator at your facility, you sought:

> "a) accident reports of 6/9/92, involving the above named
>
> b) request to inspect copies of Work Orders submitted from January 1, 1992 to present
>
> c) Medical records
>
> d) directive # 4064 - Facility Safety".

In this regard, the only issue in my view involves the requirement imposed by §89(3) of the Freedom of Information Law 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.

It appears that items a and d of your request reasonably describe the records sought. With respect to items b and c, although it may be implicit that you sought work orders and medical records pertaining to yourself, you did not so state. Consequently, it might be contended that those aspects of your request do not meet the standard imposed by §89(3). Further, I have no knowledge of the volume or nature of medical records pertaining to you, and it is possible that additional detail might have been appropriate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Peggy Orce, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7236

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jeffrey E. Robinson
Real Estate Appraiser
L.T. Bookhout, Inc.
P.O. Box 807
Rhinebeck, NY 12572-0807

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

Dear Mr. Robinson:

I have received your letter of June 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you are having difficulty obtaining property record cards for various assessors' offices in Columbia County, particularly in the towns of Kinderhook and Hillsdale. In this regard, I offer the following comments.

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

Second, 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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Assuming that the records in which you are interested are essentially the equivalent of those described above, I believe that they 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

cc: Assessor, Town of Kinderhook
Assessor, Town of Hillsdale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7237

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Jitendra Lakram
92-A-2581
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. Lakram:

I have received your letter of July 1. You wrote that you would like "to find out how to get all paperwork in possession of the D.A. pertaining to [your] case that constitutes 'Brady' and 'Rosario' material after conviction of crimes pending appeal free of charge due to [your] inability to pay the costly price of copies."

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Under §87(1)(b)(iii) of that statute, an agency may charge up to twenty-five cents per photocopy. I point out that 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

It is possible that you may receive a waiver or reduction of fees in conjunction with a different provision of law. However, since I am not an expert on that subject, it is suggested that you discuss the matter with an 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-7238

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Henry F. Sobota
Scolaro, Shulman, Cohen, Lawler
& Burstein, P.C.
90 Presidential Plaza
Syracuse, NY 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, unless otherwise indicated.

Dear Mr. Sobota:

As you are aware, I have received your letter of June 24 and the materials attached to it.

You have sought an advisory opinion concerning the propriety of a denial of access to records by the State Liquor Authority. In conjunction with a request for disclosure of copies of records relating to an application for liquor license by a named entity, a restaurant, the Authority denied access to the following records on the ground that disclosure would constitute an unwarranted invasion of personal privacy, apparently pursuant to §89(2)(b)(v):

"1. the applicant's statement of finances;

2. the personal questionnaire for each director, officer and major shareholder; and

3. the applicant identification record."

It is your view that the Authority's denial was improper, for you contend that under §89(2)(v), "an agency may invoke the privacy exception only as to 'information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency'" (emphasis yours). You expressed the belief that the information sought is relevant to the work of the Authority and that if it is not relevant to its work, the collection of that information would contravene the Personal Privacy Protection Law,

§94(1)(a). That provision precludes state agencies from collecting personal information from individuals unless it is relevant and necessary to carry out an agency's legal duties.

Having discussed the contents of the records sought with the Authority's records access officer, Richard Chernela, I was informed that an applicant's statement of finances involves the sources of funding used to invest in a license. Those kinds of items ordinarily are reflective of one's personal finances and include such items as a person's bank account numbers. The personal questionnaires to which you referred include home addresses, social security numbers, information regarding personal finances and the like.

According to the records access officer, the information contained in those two kinds of records are relevant to the work of the Authority, for it is needed to determine whether an applicant meets the criteria needed to hold a license. Consequently, I believe that the personal information in question would have been properly collected and reflective of compliance with the Personal Privacy Protection Law.

Further, it appears from my perspective that the denial was likely appropriate. The provision that you cited, §89(2)(b)(v), represents one among five examples of unwarranted invasions of personal privacy. It is noted that the introductory language of §89(2)(b) states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the five examples that follow. Consequently, I believe that those illustrations represent few among conceivable dozens of situations in which records or portions thereof may be withheld in consideration of personal privacy.

I point out that the first example, §89(2)(b)(i), refers to the ability to withhold employment or credit histories. Personal financial information might in some contexts be characterized as a credit history. Even if it could not be so characterized, I believe that it represents the kind of intimate, personal information that could properly be withheld as an unwarranted invasion of personal privacy.

With respect to the remaining record to which you referred, an "applicant identification record", the records access officer could not determine precisely which record that might be. Since you used that phrase in previous correspondence in conjunction with fingerprints, Mr. Chernela conjectured that the record denied may be a criminal history record. If that is so, and if the record indicates that there were no convictions of the subject of the record, I believe that it could be withheld. In my opinion, only to the extent that such a record indicates a conviction would it 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: Joseph A. Comperiati
Richard Chernela

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2113
FOIL-AO-7239

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Stanley Pawenski
Mr. Arthur Gleason
Mr. John Niedbalec
Cohoes City School District
20 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 Board Members Pawenski, Gleason and Niedbalec:

I have received your letter of July 8 and the materials attached to it.

According to your letter, the first issue involves a "workshop" session of the Cohoes Board of Education begun on the evening of June 22, during which the Board entered into an executive session and "voted to appoint" a particular individual to the position of principal of the Middle School. You wrote that:

> "No formal motion or second was made, nor was there a recording of the 'ayes' and 'nays'. The Board President characterized this as a 'polling' of the Board, with the aim of getting a 'consensus'. The seeking of a 'consensus' was presented as routine practice of the Board.
>
> "The Board president again 'polled' the Board seeking another 'consensus', this time seeking to reverse the Board's stated intention to defer its vote on the principal's position until after July 1st, the start of the District's new fiscal year and instead scheduled the vote for a special meeting which would be held immediately following the Board's Public Hearing on its annual budget which was scheduled for Wednesday, June 24th. Again the Board was 'polled' and a 'consensus' obtained in the same manner as set forth above. The reason stated by the Board

> president for these actions was that the June 24th meeting would be the last one wherein he would have a majority in favor of appointing this individual."

In this regard, although it is unclear whether the vote to appoint a particular individual to a position was taken in public or during an executive session, I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote of the members must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

When action is taken, minutes must be prepared in accordance with §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."

Additionally, in one of the few instances in the Freedom of Information Law that requires that records be maintained, §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 §86(3)], such as a town board, 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.

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 of remedies" (id. 646).

In the context of the situation 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 to indicate the nature of the action taken and 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 an 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 a public body in effect reaches agreement on a particular subject, I believe that the minutes should be prepared and should reflect the actual votes of the members.

In contrast, if a consensus 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.

The second issue involves a hearing and an agenda relating to it that pertains to the budget, and an agenda concerning a "special meeting" that would follow the hearing. You wrote that legal notices were published regarding the hearing but that "[n]o public notice of the second special meeting was provided, nor did the District notify the press of any change in the agenda."

It is noted initially that there is a distinction between a meeting and a hearing. A hearing is generally held to enable members of the public to express their views concerning a particular issue. A meeting is generally held by a public body discuss, to deliberate, and potentially, to take action. Further, the notice requirements may differ in the case of a hearing as opposed to a meeting. Prior to a hearing, there may be a requirement that a legal notice be published that indicates the subject of the hearing, the time and place. In contrast, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. However, notice of a meeting need not indicate the subjects to be considered. Moreover, although notice of a meeting must be given to the news media and posted, there is no requirement that a public body pay to place a legal notice in advance of a meeting.

Similarly, there is nothing in the Open Meetings Law pertaining to agendas. While many public bodies routinely prepare and disclose agendas, there is no requirement that agendas be prepared.

Lastly, you asked whether "budget related discussions can properly be held in executive session." In this regard, by way of background, every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

> discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §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 §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

I hope that I have 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 - 7240

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Ms. Sharon Gazin
[redacted]

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

Dear Ms. Gazin:

I have received your letter of June 26, which reached this office on July 7.

According to your letter, your son is a student at the Zoller Elementary School in the Schenectady City School System. On June 4, you asked that your son not be placed in the class of a particular teacher, and you requested "information contained on a list of students who will be assigned among four second grade teachers." You indicated that you would like to obtain the information to determine whether your son is to be assigned to the teacher in question in order to enable you to decide "whether to abandon [y]our neighborhood school and place him in a magnet school." You added that "[o]fficials have stated that they cannot make this information available...on the grounds that these are "tentative working documents, not part of his permanent file."

In this regard, from my perspective, the statute governing access to the record sought is the Family Educational Rights and Privacy Act (FERPA), which is a federal law (20 U.S.C. 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 documentation in which you are interested would constitute 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, 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..."

Based upon the foregoing, even though the document in question is characterized as tentative or may not be part of your son's permanent file, I believe that it nonetheless would constitute an education record. Further, insofar as it pertains to your child, I believe that it must be disclosed to you by the District in order to comply with federal law.

Since the record would apparently identify other students, it is noted that those portions that would, if disclosed, identify those other students would be confidential, unless the parents of those other students consent to disclosure. That being so, it would appear that only those aspects of the record indicating your son's name and that of the teacher to which he may be assigned would be available to you. However, disclosure of those portions of the record would likely enable you to make a decision concerning the placement of your child.

As you requested, and in an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to the officials designated in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Ceglerski
Edward Rock
Michael Coury
Colleen Fennell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7241

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Pedro Nieblas
92-A-5555
Downstate Correctional Facility
Box 445, Red Schoolhouse Road
Fishkill, NY 12524-0445

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

Dear Mr. Nieblas:

I have received your letter of July 3. You have sought assistance in obtaining records maintained by the New York City Police Department and the Office of the District Attorney of Kings County pertaining to your criminal case.

In this regard, I offer the following comments.

First, a request should be directed to the "records access officers" at those agencies. The records access officer has the duty of coordinating an agency's response to requests. At the New York City Police Department, the records access officer is Sgt. Louis J. Capasso, Room 110C, 1 Police Plaza, New York, NY 10038. I believe that the records access officer for the Office of the Kings County District Attorney is Michael Napolitano, Assistant District Attorney, Municipal Building, Brooklyn, NY 11201-33745.

Second, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate the records in which you are interested.

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 §87(2)(a) through (i) of the Law. Since I am unaware of 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

provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §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". That provision 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 §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 §87(2)(e).

Another possible ground for denial is §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 §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 and communicated within the department or to another agency would in my view fall within the scope of §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 o 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. Further, although the courts are not subject to the Freedom of Information Law, court records are often available under other provisions of law (see e.g., Judiciary Law, §255) from the clerk of the court in which a proceeding was conducted.

Enclosed, as you requested, is a brochure that describes the Freedom of Information Law in detail.

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-7242

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Garrett W. Swenson, Jr.
Assistant Town Attorney
Town of Brookhaven
32333 Route 1122
Medford, NY 11763

The staff of the Committee 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. Swenson:

I have received your letter of June 26 and the materials attached to it.

On behalf of the Brookhaven Town Attorney and the Town's Board of Ethics, you have requested an advisory opinion "on whether public inspection of filed Annual Financial Disclosure Statements is governed by the Freedom of Information Law...or by the Rules and Regulations of [the Town's] local Board of Ethics."

Under §811 of the General Municipal Law, a "political subdivision" as that phrase is defined in §810(1), which includes the Town of Brookhaven, has the option of promulgating a "form of annual statement of financial disclosure" or using the form prescribed in §812. Similarly, a political subdivision may designate an office within the municipality as the repository for those statements, or the statements may be filed with the Temporary State Commission on Local Government Ethics ("the Commission"). The materials that you forwarded indicate that the Town has developed its own financial disclosure form and requires that completed financial disclosure statements be filed in the office of the Town Attorney on behalf of the Board of Ethics.

One aspect of the Rules and Regulations of the Board of Ethics, §9(C)(2), provides that upon proper application to inspect a financial disclosure statement, the Town Attorney forwards a copy to the person whose statement has been requested. That person "may then request that a particular matter be withheld from public inspection on the grounds that it is highly personal or that public inspection would result in embarrassment or harassment..." If such

a request to withhold is made to the Town Attorney, it is forwarded to the Board of Ethics for consideration. Additional provisions describe the ensuing procedures involving the disclosure or deletion of such "particular matter".

A second issue involves the imposition of a fee of fifty cents per photocopy, even though, if applicable, the Freedom of Information Law would permit a maximum fee of twenty-five cents per photocopy.

The third pertains to requests by applicants to "inspect the original Financial Disclosure Statements rather then receive copies." Section 9(C)(6) of the Board of Ethics' Rules and Regulations states that:

> "No public inspection shall be permitted, and the Town Attorney shall deny any request for public inspection when the Town Attorney determines that it is sought for any unlawful purpose; and/or any commercial purpose; and/or to determine the credit rating of any individual; and/or for use for direct or indirect solicitation of money for political, charitable or other purposes."

In conjunction with the foregoing issues, you wrote that:

> "This office has expressed the opinion that §87(2)(a) of the Public Officers Law would operate to except the Financial Disclosure Statements from disclosure under FOIL. We have adopted this position because, in our view, §813(18)(1) of the General Municipal Law creates a conditional confidentiality which in effect makes such Statements confidential under State "statute", unless released in accordance with the Rules and Regulations of the Temporary State Commission on Local Government Ethics, or a comparable local enactment where the question has been made the subject of local regulations pursuant to a local election under GML §811(1)(2). Consistent with the General Municipal Law, §9 of the Rules and Regulations of the Town of Brookhaven Board of Ethics, enacted under that same authority by which the Temporary State Commission enacted regulations governing public inspection, also creates a local conditional confidentiality. (See: GML §811(C).) We are accordingly of the opinion that the foregoing exception to FOIL would apply and that public inspection of these documents must be pursued in accordance with the Rules and Regulations of the Board of Ethics.

> "Following the same reasoning, we also believe that 25 (cents) per page limitation contained within FOIL would not be applicable to such inspection...
>
> "Finally, due to the staff time which would be involved in allowing inspection of original filed Financial Disclosure Statements, and in light of the sensitive nature of the Financial Disclosure Statements and our reluctance to grant direct access to original Town documents, we believe the provision providing for copies rather than actual inspection would be valid."

Although the advisory jurisdiction of this office pertains to the Freedom of Information Law, in this instance, in order to provide advice concerning your questions, it is necessary to attempt to interpret various statutes in the General Municipal Law. In view of your questions and the complex nature of relevant provisions of the General Municipal Law, I have contacted the Commission to discuss the matter and to receive additional information on the subject. Further, while I do not intend to be overly technical, I disagree with your conclusions. It is also noted that the Commission, the agency charged with enforcing the 1987 Ethics in Government Act, disagrees with certain of my conclusions. In this regard, I offer the following comments.

First, the initial and basic issue involves which law applies -- the Freedom of Information Law, the General Municipal Law, or perhaps a local enactment.

As you may be aware, the Freedom of Information Law pertains to all agency records, irrespective of whether they are public, deniable or exempted from disclosure by statute. 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, I believe that financial disclosure statements and related documents constitute "records" that fall within the scope of the Freedom of Information Law. Whether records are available may be dependent upon their contents (i.e., the extent to which disclosure would constitute an unwarranted

invasion of personal privacy) or the relationship between the Freedom of Information Law and other statutes.

When a municipality elects to file financial disclosure statements with the Commission, §813 of the General Municipal Law in my view provides clear direction. Specifically, paragraph (a) of subdivision (18) of that statute states that:

> "Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection are:
>
> (1) the information set forth in an annual statement of financial disclosure filed pursuant to local law, ordinance or resolution or filed pursuant to section eight hundred eleven or eight hundred twelve of this article except the categories of value or amount which shall remain confidential and any other item of information deleted pursuant to paragraph h of subdivision nine of this section, as the case may be;
>
> (2) notices of delinquency sent under subdivision eleven of this section;
>
> (3) notices of reasonable cause sent under paragraph b of subdivision twelve of this section; and
>
> (4) notices of civil assessments imposed under this section."

As such, §813(18)(a) governs rights of access to records of "the commission".

The provision upon which you rely to remove the records in question from the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." In my view, since subparagraphs (1) through (4) of §813(18)(c) authorize disclosure of certain records of the Commission, they could not be characterized as "exempting records from disclosure." However, with respect to any other records of the Commission, i.e., those other than the four categories identified in subparagraphs (1) through (4), they would in my view be "specifically exempted from disclosure by state...statute." Stated differently, a "zone" within subdivision (18)(a) creates rights of access; the remainder of the records of the Commission fall outside of that zone and would be exempted from disclosure.

It is emphasized that the preceding two paragraphs dealt solely with records of the Commission, rather than a municipal agency that serves as the repository of records generated under the

Ethics in Government Act. Notably, in a memorandum prepared by the Commission in April of 1991 and transmitted to me, the Commission wrote that "The Act does not specifically address the public availability of annual financial disclosure statements filed with a municipality's own local ethics board." That memorandum states, however, that "the Act does authorize a Section 811 Municipality to promulgate rules and regulations, which 'may provide for the public availability of items of information to be contained on such form of statement of financial disclosure'." Section 811(1)(c) authorizes the governing body of a municipality to promulgate:

> "rules and regulations pursuant to local law, ordinance or resolution which rules or regulations may provide for the public availability of items of information to be contained on such form of statement of financial disclosure, the determination of penalties for violation of such rules or regulations, and such other powers as are conferred upon the temporary state commission on local government ethics pursuant to section eight hundred thirteen of this article as such local governing body determines are warranted under the circumstances."

In addition, §811(1)(d) states in part that if a local board of ethics is designated to carry out duties that would otherwise be performed by the Commission:

> "then such local law, ordinance or resolution shall confer upon the board appropriate authority to enforce such filing requirement, including the authority to promulgate rules and regulations of the same import as those which the temporary state commission on local government ethics enjoys under section eight hundred thirteen of this article."

In turn, §813(9)(c) states in relevant part that the Commission shall "[a]dopt, amend, and rescind rules and regulations to govern procedures of the commission..." As such, it appears from my perspective that the regulatory authority of the Commission and, therefore, a local board of ethics, is restricted to the procedural implementation of the Ethics in Government Act. In my view, issues concerning rights of access to records do not involve matters of procedure, but rather matters of substantive law that are governed by statute. Moreover, it has been held that regulations cannot serve to exempt records from disclosure. As indicated earlier, §87(2)(a) of the Freedom of Information Law permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute." It has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of 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 the foregoing reasons, I believe that rights of access to the Commission's records are governed by the Ethics in Government Act [§813(18)(a)] and that regulations promulgated by a municipality may implement procedures but cannot determine rights of access to records. If my conclusions are accurate, that neither §813 nor the regulations promulgated by the Commission or of the Board of Ethics would govern rights of access to records maintained by the Board of Ethics, the Freedom of Information Law would govern.

This is not to suggest that public rights of access would be significantly different whether the Freedom of Information Law or a different provision of law is applied. For instance, under §813(18)(a)(1), financial disclosure statements filed with the Commission are available, except those portions indicating categories of value or amount or when it is found that reported items "have no material bearing on the discharge of the reporting person's official duties." In my view, the same information that is exempted from disclosure could be deleted from a financial disclosure statement under the Freedom of Information Law on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b) and 89(2)(b)]. Therefore, while the statutes governing rights of access may be different, I believe that the outcome in terms of disclosure to the public would essentially be the same.

Your remaining two questions involve fees for copies and the right of the Town to require disclosure by means of making photocopies as opposed to inspection.

In this regard, I point out that the provision involving access to Commission records, §813(18)(a), refers to certain records "which shall be available for public inspection." Similarly, the regulations promulgated by the Commission concerning the records specify that "[t]he annual statements are not available for photocopying, photographing, or mechanical duplication in any manner [9 NYCRR 9978.6(c)]. As such, if the Board's regulations were required to be consistent with those of the Commission, the public could inspect but not seek photocopies of financial disclosure statements. I point out that the Commission's Executive Director has referred to a recent decision involving the State Ethics Commission. That entity operates under the Executive Law, and the language of the provision concerning access to its records is the same as that in the General Municipal Law concerning the Commission. In upholding the State Ethics Commission's denial of a request for photocopies of disclosure statements, the Court found that "the word 'copying' does not appear in Executive Law §94(17) unlike in FOIL, where that word is associated with the word 'inspection' throughout...We further note that the obligation to

permit public inspection does not, within its definition, include a commensurate obligation to permit copying" [John v. New York State Ethics Commission, 5581 NYS 2d 882, 884; ___ AD 2d ___ (1992)].

Consistent with the preceding analysis, while statutes within the Executive Law and the General Municipal Law pertaining to records of the State Ethics Commission and the Temporary State Commission on Local Government Ethics govern access to records of those entities, it is reiterated that the Freedom of Information Law in my opinion is the governing statute with respect to records of local boards of ethics.

If that is so, an applicant for an available record would have the right to inspect that record and obtain a photocopy upon payment of the appropriate fee.

With respect to the fee, assuming that there is no provision that would prohibit an agency from making photocopies, I believe that the Town could access a fee of no more than twenty-five cents per photocopy. As suggested earlier, whether or not the Freedom of Information Law governs rights of access, financial disclosure statements constitute "records" as defined by that statute. In the absence of any statute establishing a different fee, the Town in my view would be restricted to charging the fee noted above.

By way of background, §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 of 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."

Therefore, 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 is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

In addition, 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 states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR 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. Therefore, insofar as the resolution authorizes the assessment of a fee other than a maximum fee of twenty-five cents per photocopy, I believe that it is invalid.

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, §9(C)(6) of the Board of Ethics' rules, which was quoted on page 2 imposes restrictions upon the disclosure of financial disclosure statements based upon the intended of use of those records. In my opinion, if those records are available to the public under the Freedom of Information Law or another provision, they should be made equally available to any person, irrespective of one's status or interest [see M. Farbman & Sons v. NYC Health and Hosps. Corp., 62 NY 2d 74 (1984); Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. In short, I believe that the limitations imposed by the regulations are of questionable validity.

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: Mark Davies, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7243

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Bruce Hislop
Equitax
Box 89A
Ford Road
Melrose, NY 12121

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

Dear Mr. Hislop:

I have received your letter of July 7 and the materials attached to it.

According to your letter, the Office of the Assessor of the City of Schenectady does not permit the inspection of property record cards but rather prepares photocopies based upon a fee schedule established in an ordinance that appears to have been recently enacted. The fee schedule pertains to "property record card data for commercial use or commercial users", and the fees imposed pursuant to the schedule are based upon the assessed value of a parcel.

You have requested my views concerning the propriety of the foregoing.

It is noted initially that a bill was introduced in the State Legislature (A. 9519) which would have authorized agencies to distinguish between commercial users of records and others regarding fees for copies under certain circumstances. That bill, however, was not enacted. Consequently, for the following reasons, I believe that the ordinance is invalid insofar as it is inconsistent with the Freedom of Information Law.

First, when records are available under the Freedom of Information Law, it has been held that they must be made equally available to any person, without regard to status or interest [see M. Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d

75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976)]. The Law does not generally distinguish among applicants, and the commercial use of records is largely irrelevant to rights of access or the fees that agencies may charge.

Second, §87(1) of the Freedom of Information Law specifies that accessible records must be made equally available for inspection and copying. Further, I believe that an accessible record may be inspected free of charge.

Third, in my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy up to nine by fourteen inches.

By way of background, §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 of 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 is conferred by a

statute. In Sheehan v. City of Syracuse [521 NYS 2d 207 (1987)]. a fee in excess of twenty-five cents per photocopy for certain records was established by an ordinance, and the court found the ordinance to be invalid.

Further, 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 states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (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. Therefore, insofar as the ordinance authorizes the assessment of a fee other than a maximum fee of twenty-five cents per photocopy, I believe that it is invalid.

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)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carolyn Friello, City Clerk
City Assessor
Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7244

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Ms. Barbara S. Wall
[redacted]

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

Dear Ms. Wall:

I have received your letter of July 1, which reached this office on July 8.

According to your letter, on December 12, you submitted a request for records of the Ossining School District, and the receipt of the request was acknowledged twice, on December 21 and January 17. You wrote that the information to which you have been denied involves "the name and address of the manufacturer, designer and installer of the window at Ossining High School including those in Room 224..." You added that you incurred an injury involving a window, and that the District has denied a request for the same information made by your attorney.

You have asked for assistance in the matter.

In this regard, insofar as the information sought is maintained in the form of a record or records by the District and can be located, I believe that it must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. For the following reasons, while it might be contended that such records may be withheld, they would in my view be accessible under the Law.

First, although §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", the records sought pertain to commercial entities or persons acting in business capacities. From my perspective and based upon judicial interpretations, §87(2)(b) is intended to pertain to natural

persons, not entities or persons acting in business capacities. In a decision rendered by the Court of Appeals that focuses upon the privacy provision, 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)]. In a 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). Most recently, in a case concerning records pertaining to the performance of individual cardiac surgeons, the court granted access and cited an opinion prepared by this office in which it was advised that the information should be disclosed since it concerned professional activity licensed by the state (Newsday Inc. v. New York State Department of Health, Supreme Court, Albany County, October 15, 1991). In short, I do not believe that disclosure of the information would result in an unwarranted invasion of personal privacy.

Second, the initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §3101(d) of the Civil Practice Law and Rules, which exempts material prepared for litigation from disclosure. Nevertheless, the records sought would apparently have been prepared or acquired in the ordinary course of business, rather than for any purpose relating to litigation. Further, it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

Additionally, as stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction

between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

In sum, assuming that the information sought exists in the form of a record or records and can be found by the District, I believe that it must be made available, for none of the grounds for denial appearing in the Freedom of Information Law 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
Executive Director

RJF:jm
cc: Records Access Officer, Ossining School District
Robert Ondrovic

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2114
FOIL-AO- 7245

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Henry Cassell
[redacted]

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

Dear Mr. Cassell:

I have received your letter of July 2 which relates to the Peekskill Board of Education.

According to your letter, at a meeting held on June 16, it was stated by three of the six Board members that "no guidelines or objectives were presented last year by the Board to the Peekskill Superintendent of Schools". You wrote that the renewal of the Superintendent's contract was a matter of controversy, that "the Board used the lack of guidelines as the basis for their inability to perform a formal evaluation", and that the contract was renewed. Nevertheless, at the next meeting, another Board member "publicly revealed that written guidelines and objectives were in fact provided to the Superintendent and all Board Trustees", and that "several months after these guidelines were presented changes in them were imposed, and objected to by the Superintendent on the basis that it was too late in the year to alter his objectives, thereby apparently satisfying the formal nature of the original guidelines."

It is your belief that there was a "deliberate deception" and you questioned what "legal recourse [is] available...for what [you] consider a blatant violation of the public trust and obvious effort to disregard the "sunshine laws."

In this regard, in my opinion, it is questionable whether prior discussions involving the development of guidelines or objectives could properly have been discussed in private. Further, I believe that action to adopt or apply any such guidelines or objectives should have occurred in public, and that records containing guidelines or objectives would be or should have been available under the Freedom of Information Law. In this regard, I offer the following comments.

First, by way of background, it is emphasized that the definition of "meeting" [see Open Meetings Law, §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)].

Further, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

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

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, I do not believe that §105(1)(f) could be asserted, even though the discussion involves a "personnel" matter. As stated judicially, "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" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981). In the context of your letter, insofar as discussions might have involved the Superintendent's strengths and weaknesses and his or her performance, I believe that an executive session could properly have been held. On the other hand, insofar as the discussion involved policy in the nature of goals or objectives inherent in the position of superintendent that would be applicable to any person who might serve in that position, I do not believe that there would have been a basis for conducting an executive session.

The Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, §106 of that statute provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be

> made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

Based on the foregoing, if the Board adopted guidelines or objectives, I believe that minutes so indicating should have been prepared and made available. Moreover, any vote or action taken should, in my opinion, have occurred in public.

Although it is unclear whether a request was made for records in the nature of goals or objectives applicable to staff, those kinds of records in my view would be available. I point out 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. 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 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. While two of the grounds for denial may be relevant to the kind of record in question, neither in my opinion cold be appropriately asserted.

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. From my perspective, guidelines or objectives adopted by the Board would be reflective of its policy regarding the manner in which duties imposed upon a person or inherent in a person are intended to be carried out, and, therefore, would be available under §87(2)(g)(i).

Also significant is §87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, 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); 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); 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].

While standards, goals, guidelines or objectives might apply to a particular employee, those records would clearly be relevant to the performance of that person's official duties. Consequently, I believe that they would be available.

When a request for records is made, and an agency official asserts that no such records exist, knowing that they do exist, §89(8) of the Freedom of Information Law may be relevant. That provision states that:

> "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."

Lastly, since I am not an expert on the subject, I am unaware of what avenues of recourse might exist under the Education Law or regulations regarding the matter that you described. In some instances, appropriate "recourse" may involve the election of new members to a board.

I hope that I have been of some assistance.

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- 7246

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Samuel Jackson
91-R-3715
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. Jackson:

I have received your letter of July 1 and the correspondence attached to it. You asked that I "impose [my] authority" on the Department of Correctional Services concerning the release of records that you requested. One of your requests involves records maintained at your facility; the second involves records relating to an investigation that you requested from the Department's Inspector General.

With respect to the first request, based upon comments offered by the facility's FOIL officer, there are two issues. One involves the vagueness of the request. In this regard, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. While I do not believe that requests must in every instance identify or specify the records, a request must include sufficient detail to enable agency officials to locate and identify the records you are seeking.

The second issue involves the payment of fees for photocopies. Under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy. I point out that 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 one's status, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with §87(1)(b)(iii) of that statute.

With regard to records relating to an investigation, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of 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 provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §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". That provision 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 §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 §87(2)(e).

Another possible ground for denial is §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 §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

Records prepared by employees of the department and communicated within the Department or to another agency would in my view fall within the scope of §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 o 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. Further, although the courts are not subject to the Freedom of Information Law, court records are often available under other provisions of law (see e.g., Judiciary Law, §255) from the clerk of the court in which a proceeding was conducted.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: N. Vadnais, FOIL Officer
Brian Malone, Inspector General

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7247

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Hon. Frank Rey
Mayor
Village of North Tarrytown
28 Beekman Avenue
North Tarrytown, NY 10591

Dear Mayor Rey:

I thank you for sending a copy of your determination of an appeal rendered under the Freedom of Information Law concerning a request made by Mr. Sean Treacy.

According to your response, the request was denied because it was too "vague". Further, the application form attached to your response indicates that the record sought "does not exist". In my opinion, the Freedom of Information Law requires that the requested record be maintained by the Village.

By way of background, the Freedom of Information Law pertains to existing records and states that, in general, an agency, such as the Village, is not required to create records. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

The record requested, however, is one of the records "specified in subdivision three of section eighty-seven". That provision states in relevant part that:

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

The "subject matter list" required to be maintained under §87(3)(c) 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, the regulations promulgated by the Committee on Open Government state that 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 [21 NYCRR 1401.6(b)].

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. The village clerk, who serves as the "records management officer" pursuant to §57.19 of the Arts and Cultural Affairs Law, should be familiar with that document.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7248

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

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 July 2 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter and the correspondence attached to it, on June 16, you appealed a denial of access by the City of Johnstown to records reflective of "legal fees pertaining to administering of loans by the city of Johnstown in conjunction with the Johnstown Economic Development Corporation."

In this regard, I offer the following comments.

First, §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, 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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, 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.

With regard to expenses incurred, as a general matter, 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 specific 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 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 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 liable 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 CPR 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. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

Based upon the foregoing and subject to the qualifications discussed above, I believe that records involving payments to attorneys 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: Mayor, City of Johnstown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7249

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Frank C. Quinn
[redacted]

Dear Mr. Quinn:

As you are aware, your letter addressed to Attorney General Abrams of June 30 has been forwarded to the Committee on Open Government. The Committee is authorized to advise with respect to the Freedom of Information Law.

In your letter you described the following hypothetical situation:

> "A public school employee sues the school district. In a court of law he wins his suit and is awarded, for argument sake, $900,000 dollars. Lets also assume that this award comes from the taxpayers pocket. The plaintiff and the defendant strike a deal whereas the judge slaps a court order that the judgement be kept confidential."

Your question is: "since this money (award) comes from the taxpayers pocket, are they not entitled to know?"

In this regard, absent an order requiring confidentiality, I believe that a settlement agreement between an agency, such as a school district, and one of its employees or others must be disclosed under the Freedom of Information Law. Enclosed is a copy of an advisory opinion previously rendered that stands for that proposition.

If a court, however, has ordered that a judgment or other record be sealed, it would appear that disclosure of a record by a school district would violate the order and potentially result in a finding of contempt. It is noted that although the courts are not subject to the Freedom of Information Law, court records are often available under other provisions of law (see e.g., Judiciary Law, §255). Further, I have enclosed a copy of a rule applicable

to civil proceedings conducted in New York State trial courts that imposes restrictions on the ability of those courts to seal records. I am unaware of what the practice or any rule on the subject might be in the case of a proceeding brought in federal court.

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- 7250

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 21, 1992

Mr. Jeff Miller
Editor
Times/Review Newspapers
7785 Main Road
P.O. Box 1500
Mattituck, NY 11952

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

Dear Mr. Miller:

I have received your letter of July 9 in which you requested advice concerning access to certain records.

You wrote that the Times/Review Newspapers are:

> "trying to establish a consistent policy on coverage of misdemeanor crimes involving 16-, 17- and 18-year-olds. At present, some judges prefer that information on such cases should be withheld by police on the grounds that the youths are eligible for youthful offender status. But some judges argue that eligibility is a matter to be determined by the judges themselves, and therefore, police should release the information to newspapers."

You have asked what the "proper procedure" might be concerning access to or the confidentiality of the records that you described.

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 §87(2)(a) through (i) of the Law.

Second, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." While records concerning youthful offenders

might at some point fall within a statutory exemption from disclosure, that point is reached, in my view, only when or after certain events occur.

Most relevant to the issue in my view is §720.15 of the Criminal Procedure Law which, as amended by Chapter 411 of the Laws of 1979, provides that:

> "1. When an accusatory instrument against an apparently eligible youth is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public.
>
> 2. When a youth is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and which the defendant's consent, be conducted in private.
>
> 3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law."

Based upon the foregoing, it is clear in my opinion that only a court has the authority to seal an accusatory instrument that identifies "an apparently eligible youth". From my perspective, unless and until a court issues an order to seal records, those records should be available from police departments, for example, to the same extent as are records pertaining to adults.

Further, subdivision (3) of §720.15 narrows the applicability of subdivisions (1) and (2) and the capacity to seal records or conduct private proceedings by distinguishing between apparently eligible youths charged with felonies from others. Under §720.15(3), the provisions regarding the sealing of an accusatory instrument are not applicable, at least for a time, if a youth has been charged with a felony.

I hope that I 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-7251

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 21, 1992

Ms. Patricia Carroll
[redacted]

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

Dear Ms. Carroll:

I have received your letter of July 6 in which you asked that I inform you of the circumstances in which a school district "can take longer than 30 days to act on a Freedom of Information request."

By way of background, you wrote that the information sought involves the total number of teachers employed, the "total salary line for all (not individual)" and the "total benefit line for all not individual." You were informed that "no such documentation exists and it will take more than 30 days to research the information."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law generally pertains to existing records and does not require agencies to create new records in order to respond to requests for information. 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 possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

Based upon the foregoing, if no records exist that contain the information in which you are interested, District officials in my opinion would not be required to conduct "research" for the purpose of preparing new records on your behalf. Therefore, although it appears that the District has chosen to review its records and

prepare tabulations reflective of information sought, its choice to do so in my view represents activities that are not required to be performed and which would exceed the responsibilities imposed by the Freedom of Information Law. That being so, I do not believe that there is any legal limitation on the amount of time that might be taken to prepare records containing the information sought.

Second, when records do exist and the Freedom of Information Law applies, that statute 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. There is no provision in the law that specifies the time following an acknowledgement during which an agency must grant or deny a request. In my view, an agency has a reasonable time to make such a determination. What is reasonable may be dependent upon the volume of a request, the need to conduct legal research, and the ease or difficulty of locating records. If a request is denied or if a delay is unreasonable, the provision pertaining to the right to appeal states in relevant part that:

> "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 there may be no record indicating the total amount of teachers' salaries, one of the few situations in which an agency must maintain a record involves a payroll listing. Section 87(3)(b) states that each agency "shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency." By reviewing that record, I believe that you could determine the number of persons employed as teachers and total amount of their salaries. It may also be possible to acquire other existing records involving the payment of benefits that would enable you to ascertain the amounts expended for certain of those items.

I hope that I have 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, Bayport-Blue Point School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1252

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 22, 1992

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 letters of July 8 and July 14 in which you allege that the Great Neck Board of Park Commissioners "opposes the intent of the Freedom of Information Law" by assessing "an arbitrary twenty-five cents per page copy charge."

In my view, a fee of twenty-five cents per photocopy is appropriate and consistent with law.

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."

Based upon the foregoing, unless a different statute authorizes other fees, the first clause of the provision quoted above 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 duplicated by means of photocopying, such as tape recordings or computer tapes.

Your inference that an agency is permitted to recover only its costs when preparing photocopies is, in my view, inaccurate. Whether the actual cost of photocopying is more or less than

twenty-five cents, an agency is clearly authorized to establish a fee of up to twenty-five cents per photocopy. Again, the "actual cost" standard pertains to the reproduction of records that cannot be photocopied. I point out, too, that no fee may be charged for the inspection of records accessible under the Law.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7253

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 23, 1992

Ms. Kristin Weatherbee
[redacted]

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

Dear Ms. Weatherbee:

I have received your letter of July 9, as well as the materials attached to it. Your correspondence pertains to your efforts in gaining access to information concerning research by the Town of Alabama "into the feasibility of siting a 1300 ton per day municipal solid waste incinerator." You asked that I review the Town Supervisor's responses to your requests and inform you "on how to proceed."

By way of background, you enclosed minutes of Town Board meetings indicating that a number of residents formed a committee to study a proposal advanced by the Wheelabrator Technologies Corporation. Among the members are the Supervisor and other Town officials. In response to your request for information acquired by the committee, you were informed that the committee is "not a committee with legislative powers, so does not have to keep town records." I do not fully understand the meaning of the response. Based upon the minutes of a meeting of June 10, it appears that Town officials intended to "to set up a committee to research the Wheelabrator Company." However, the minutes of the meeting of July 8 state that the Supervisor "reported that the following residents of the Town have formed a committee..." If the committee was created by citizens rather than the Town, it would not, in my opinion, be required to disclose its records under the Freedom of Information Law. However, for reasons to be discussed later, any records acquired by the committee maintained by Town officials in their capacities as Town officials would in my view be subject to the Freedom of Information Law. On the other hand, if the committee was created by the Town Board, I believe that all records that it acquired or prepared for the Town would clearly fall within the scope of the Freedom of Information Law.

Similarly, in response to your request for a feasibility study prepared by Wheelabrator Technologies, the Supervisor wrote: "Not Town Records, not available." Nevertheless, you wrote that the

minutes of meetings indicate that "received correspondence from Wheelabrator on two occasions."

In this regard, it is emphasized that the Freedom of Information Law pertains to agency records, and that §86(4) defines the term "record" expansively to include:

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

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" 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).

Based upon the definition of "record" and judicial interpretations, if the committee was created by the Town, despite the absence of any "legislative" authority, any documentation that it has acquired or prepared on behalf of the Town would in my view constitute "records" subject to rights conferred by the Freedom of Information Law. If the Committee was not designated by the Town but has submitted records to the Town, those records would also fall within the scope of the Freedom of Information Law. Further, if a feasibility study or other documents prepared by Wheelabrator are in possession of the Town, I believe that those materials would constitute "records" subject to rights of access.

In short, regardless of their source, any documents, videotapes, or informational materials that are maintained by or for the Town would in my opinion be records that must be disclosed to the extent required by the Freedom of Information Law. In terms of rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If you believe that records have been withheld, you may appeal a denial of access pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Town Supervisor.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Anthony Mudrzynski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3117
FOIL-AO- 7254

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 24, 1992

Ms. June Maxam
Editor/Publisher
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 July 15. You asked that I provide advice to Mr. Raymond Ciccarelli, Superintendent of the Minerva Central School District, concerning the Freedom of Information Law and the Open Meetings Law.

The first issue involves discussions of a "twice defeated budget" in executive session "by using the excuse of 'personnel'." In this regard, by way of background, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may

appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. Further, although one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §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 §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs which can be accomplished by according to seniority, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public

monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "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" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the funding or reduction of positions, could appropriately be discussed during an executive session.

Further, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

The second issue involves a request for minutes of a meeting of May 28 that was rejected because the minutes had not been

approved. The Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, §106 of that statute provides that:

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain, for §106(3) states that minutes must be made available "within two weeks of the date of such meeting."

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 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

The third issue pertains to fees for copies of records. In my view, for the following reasons, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee of more

than twenty-five cents per photocopy or for searching for records, no such fee may be assessed.

By way of background, §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 of 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 is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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)].

A fourth issue involves an unanswered request for salary information concerning District officials.

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.

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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries 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 [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.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her

administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

As you requested and in an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be forwarded to Mr. Ciccarelli.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Raymond Ciccarelli, Jr., Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7255

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 24, 1992

Mr. Bruce T. Reiter
[redacted]

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

Dear Mr. Reiter:

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

One of the items of correspondence is a letter dated June 19 and directed to the President of the Watervliet City School Board in which you appealed due to a failure on the part of the District to disclose copies of "all of the employees W-2 's for the year ending 12/13/91." The other item is a letter of June 19 sent to the District's Record Clerk in which you requested a variety of information "pursuant to the Freedom of Information Act (FOIA), 5 U.S.C., Section 552." You have sought assistance, for neither item had apparently been answered as of the date of your letter to this office.

Although both requests will be considered later in the opinion, it is noted initially that the statute under which your request was made is a federal act. That provision applies only to records maintained by federal agencies. However, a different statute, the New York Freedom of Information Law (Public Officers Law, Article 6, §§84-90) is applicable to records maintained by entities of state and local government in New York, including school districts. As such, my comments will pertain to the New York rather than the federal statute.

With regard to your appeal, §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, 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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, with certain qualifications, I believe that W-2 forms must be disclosed. 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.

Although tangential to your request, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries 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 [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 operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment 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.

It has been contended that W-2 forms are specifically exempted from disclosure by statute on the basis of 26 USC 6103 (the Internal Revenue Code) and §697(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 a school district. 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 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. Moreover, in a recent decision, the same conclusion was reached, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992). There may be hundreds of W-2 forms from which portions could be deleted, but I believe that employers, i.e., the District, must also prepare an equivalent record that includes employees' names and gross wages. It is suggested that you discuss that possibility with an official of the District, for it would be more efficient and less burdensome to disclose a single listing than hundreds of forms.

The other request, which is dated June 19, is voluminous and raises a number of issues.

Insofar as the request involves contracts or agreements between the District and various persons, I believe that those records must be disclosed, for none of the grounds for denial would apply. By means of example, although a contract between the District and the Superintendent relates only to one individual, for reasons described earlier, disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

Item 3 involves a request for a "complete listing of the expenses included...in the 1992-93 budget" concerning various "categories", i.e., contractual expenses relating to the District Clerk, "Curriculum Development and Supervision", "Supervision - Regular School", etc. I am unaware of whether the District maintains "listings of expenses" in relation to those categories, and it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law provides in part that an agency need not create a record in response to a request. Therefore, if the District does not maintain the listings that you requested, it would not be required to prepare new records on your behalf.

Further, assuming that there are no "listings" and if you sought existing records involving analogous information, I point out that §89(3) also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 District's record-keeping systems; whether it has the ability to locate and identify all of the records sought in the manner in which you requested them is unknown to me. It is possible, however, that based upon its filing or indexing mechanisms, certain aspects of your request might not reasonably describe the records.

Finally, with one exception, insofar as the records sought exist and can be located and identified by the District, I believe that they would be available under the Freedom of Information Law. The exception involves your request for a list of every employee "receiving health or dental insurance along with each individuals' monthly cost for this insurance." In my view, whether an employee has opted to partake in a dental insurance program or has chosen health benefits on an individual basis or by means of a family plan would be irrelevant to the performance of that person's official duties. As such, I believe that personally identifiable information concerning health or dental insurance could be withheld as an unwarranted invasion of personal privacy. An alternative might involve seeking records indicating costs by category, i.e., the cost of health insurance under an individual or family plan.

I hope that I have 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 Saimond, President, Board of Education
George A. Perry, Records Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2118
FOIL-AO-7256

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Mr. John S. Dzielak
[redacted]

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

Dear Mr. Dzielak:

I have received your letter of July 17 in which you complained that your assessor refused to allow you to gain access to an "agricultural assessment application for exemption" concerning a parcel adjacent to your property. You also wrote that you would like to inspect "the Assessment Review Board Applications and minutes of the hearings for the years 1990-1991-1992."

You have asked that I send a "letter of authorization" to the Assessor and the Chairman of the Assessment Review Board.

In this regard, it is noted at the outset that the Committee on Open Government is permitted to provide advice concerning access to records. This office cannot compel an agency to grant access to records or to "authorize" the disclosure of records. However, in an effort to assist you, I offer the following comments.

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

Second, two of the grounds for denial may be relevant to your inquiry.

Specifically, §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 to 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., §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. Insofar as applications for exemptions contain personal financial information, I believe that those portions of such records could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. On the other hand, if there is no personal financial information in an application and if no other basis for withholding can be asserted, that kind of record must, in my opinion, be made available.

The other ground for denial of possible significance is §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 §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.

In sum, if neither §§87(2)(b) nor (d) is applicable, I believe that the application must be disclosed. Further, if, for example,

personal financial information is contained within an application, that portion of the record may be deleted, but the remainder should be disclosed.

Lastly, since you referred to "minutes of hearings", I point out that such records may but likely need not exist. While the Open Meetings Law includes provisions pertaining to minutes of meetings of public bodies, I know of no requirement that minutes of hearings be prepared. As you may be aware, there is a distinction between a hearing and a meeting. A hearing generally involves a situation in which members of the public are entitled to speak with respect to a certain issue, or in which a person or entity (such as an assessment board of a review) hears testimony regarding an issue. A meeting generally involves a gathering of a public body for the purpose of discussion, deliberation and perhaps taking action.

If there are no minutes of hearings, the Freedom of Information Law would not be applicable. With respect to minutes of open meetings, §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."

In an effort to enhance compliance with and understanding of the issues you raised, copies of this opinion will be forwarded to the officials identified in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ruth Brooks, Assessor
Henry Toland, Chairman, Assessment Review Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7257

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Mr. Kenneth Barry Rubin
[redacted]

The staff of the Committee 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. Rubin:

As you are aware, I have received your letter of July 9 and voluminous accompanying materials.

You have sought an advisory opinion concerning alleged denials of access to medical records by the Department of Civil Service and perhaps the Department of Law. In this regard, I offer the following comments.

First, based upon a review of the materials and a discussion with the records access officer at the Department of Civil Service, it does not appear that any records falling within the scope of your requests were withheld. In his letter to you of April 20, the appeals officer for the Department of Law indicates that the Department does not maintain any records responsive to your request. Similarly, although the Department of Civil Service does maintain records pertaining to you, the correspondence indicates that copies of all such records that you requested were made available to you. It is noted that the Department's records access officer expressed a willingness to make available any other records pertaining to you, if such records exist, if you can describe the nature of the records sought. At this juncture, however, it appears that the Department has provided copies of all records that you requested that it maintains.

For future reference, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a reqeust should contain sufficient detail to enable agency agency officials to lcoate and identify the records.

Lastly, I point out that §89(3) also states 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..." Stated differently, the Freedom of Information Law does not require an agency to create a record in response to a request. Therefore, if information sought does not exist in the form of a record or records, an agency would not be obliged to prepare a new record on behalf of an applicant.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7258

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Ms. Lisa N. Collins
[redacted]

Dear Ms. Collins:

I have received your letter of July 15 in which you sought support for "the destruction of psychiatric records and psychological folders that are retained by school districts...many of which contain erroneous data and damning information." You have sought advice on "how to lobby the matter."

In this regard, I offer the following comments.

First, as you may be aware, the statute that governs rights of access to most education records pertaining to students, including psychiatric and psychological records maintained by school districts, is the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. §1232g. Under FERPA, as a general matter, education records identifiable to students are available only to parents of students under the age of eighteen, and the students themselves when they reach the age of eighteen. Those records ordinarily cannot be disclosed by a school district, unless a parent of a minor student or a student who has reached eighteen, as the case may be, consents to disclosure.

Second, §57.25(2) of the Arts and Cultural Affairs Law deals with the retention and disposal of records maintained by local governments, such as school districts. That provision states that:

> "No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and

> distribute to local governments records retention and disposition schedules establishing minimum legal retention periods. The issuance of such schedules shall constitute formal consent by the commissioner of education to the disposition of records that have been maintained in excess of the retention periods set forth in the schedules. Such schedules shall be reviewed and adopted by formal resolution of the governing body of a local government prior to the disposition of any records. If any law specifically provides a retention and disposition schedule established herein the retention period established by such law shall govern."

While I am not familiar with retention schedules that might exist with respect to particular records, I believe that you could request those schedules from the State Archives and Records Administration at the State Education Department.

Since the State Commissioner of Education develops retention and disposition schedules, it is suggested that any lobbying effort begin by contacting the Commissioner or the State Archivist, who heads the State Archives and Records Administration, which operates within the Education 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-7259

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Stanley S. Newman, President
BidNet
P.O. Box 5600
20A Railroad Avenue
Albany, NY 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. Newman:

I have received your letter of July 14 which relates to fees assessed by the Office of General Services (OGS) and the Dormitory Authority for the acquisition of bid requests.

By way of background, you wrote that BidNet "collects requests for bids from federal, state, and local government agencies and provides the information on a very targeted basis to its clients." You added that some jurisdictions "are mandated by law to charge a fee to recover their costs", and that you "have no trouble with that", but that OGS and the Dormitory Authority have sought to impose fees that you "consider unfair". One of your staff persons was told that the fee at the Dormitory Authority would be $1.50 per page. Further, although you "recognize that the regulations permit OGS to charge up to 25 cents per page, the cost recovery principal [sic] should be at work here", for "[u]nlike most other FOIL requests they do not need to make a separate copy for [you]." It is your contention that "sufficient copies of bid requests are printed to cover mailing to the selected firms on the bid lists, and for display and availability in the bid room where individuals are able to go and pick up copies without charge."

It is your view that, "through BidNet, without additional cost, [agencies'] bid requests are exposed to more potential bidders", and that "New York's benefits should be no less than other jurisdictions that have saved money through the greater competition [you] provide."

You have asked that I "be an advocate" for you concerning the issue and you sought assistance in the matter. In this regard, I offer the following comments.

First, since I am generally unfamiliar with the processes by which bid information is disseminated, I contacted OGS to acquire information on the subject. Apparently, there are different procedures, some of which are mandated by law, that relate to the dissemination of various categories of bid related records. For instance, the law and procedure may differ with respect to records concerning construction as opposed to commodities. In addition, I was informed that OGS has engaged in outreach programs, as well as procedures involving small businesses, in order to attract optimal numbers of potential bidders.

Second, with respect to fees for copies of records, §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."

Based upon the foregoing, unless a different statute authorizes other fees, the first clause of the provision quoted above 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 duplicated by means of photocopying, such as tape recordings or computer tapes, or those that are larger than nine by fourteen inches.

Whether the actual cost of photocopying is more or less than twenty-five cents, an agency is clearly authorized to establish a fee of up to twenty-five cents per photocopy. Again, the "actual cost" standard pertains to the reproduction of records that cannot be photocopied or those that are larger than nine by fourteen inches.

Lastly, in cases in which copies of bid requests are printed in advance and which the agency does not duplicate, photocopy or reproduce records in response to a request, the provisions of the Freedom of Information Law would not appear to be applicable. In those instances, it would appear that an appropriate charge might be based upon the actual cost of producing the records, and that a fee might appropriately be determined in conjunction with the cost of production per unit.

I hope that I 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-7260

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Mr. Elwyn Edmund 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:

As you are aware, I have received your letters of July 19 and July 22 and various related correspondence.

By way of background, on July 10, you submitted a request to the Chemung County Sheriff's Department for an "alleged cassette tape property tag #9488 made in [your] residence on June 22, 1989 by Michael J. Mucci." On July 15, Mark Fleisher, the County's Coordinator for Records/Information and its records access officer wrote to you, stating that the request had been forwarded to his office and that he had enclosed "an application for public access to records" for you to complete and return to him. On July 18, you wrote to Mr. Fleisher contending that he failed to comply with the Freedom of Information Law, §89(3), which includes provisions concerning the time within which agencies must respond to requests. In a response dated July 21, Mr. Fleisher cited §87(1)(b) of the Freedom of Information Law, which requires agencies to promulgate rules and regulations relating to the procedural implementation of the Freedom of Information Law and indicated that the completion of the application form is "standard procedure for [his] office." In addition, he "reject[ed] your allegation that your request for access to records has been denied", stating that "[n]o determination will be made until this office receives your request on the appropriate form as allowed by Section 87(1)(b) of the Public Officers Law of New York State."

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

First, as indicated above, §89(3) of the Freedom of Information Law provides direction concerning the time in which an agency must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, I do not believe that an agency can require that a request be made on a prescribed form. To reiterate, the Freedom of Information Law, section 89(3), as well as 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, require 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 possesses 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 an 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 is unnecessarily serves to delay a response to or deny a request for records.

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. Fleisher.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Fleisher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7261

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Mr. Mike Green
91-B-273
P.O. Box 500
Elmira, NY 14902

Dear Mr. Green:

I have received your letter of July 22 in which you requested various records from this office.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning access to records. The Committee does not maintain records generally, nor it is empowered to obtain records on behalf of an applicant. Nevertheless, I offer the following comments and suggestions.

First, as a general matter, a request made under the Freedom of Information Law should be directed to the 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 for records.

Second, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records.

Third, since you referred to records prepared by a psychiatrist, I point out that mental health records are confidential with respect to the public pursuant to §33.13 of the Mental Hygiene Law and, therefore, would be specifically exempted from disclosure under §87(2)(a) of the Freedom of Information Law. However, the subject of those kinds of records generally has rights of access to them pursuant to §33.16 of the Mental Hygiene Law. As such, it is suggested that a request for psychiatric records be made to the physician or facility that maintains them by citing 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7262

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Mr. Rick Sterling
90-C-1203
P.O. Box 104
Sonyea, NY 14556

The staff of the Committee on Open 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 letter of July 10 in which you wrote that the Family Court in Niagara County failed to respond to a request made under the Freedom of Information Law.

In this regard, the Freedom of Information Law pertains to records of an agency, and the term "agency" is defined in §86(3) of that statute to include:

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

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

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

As such, the courts and court records are not subject to the Freedom of Information Law.

Of possible relevance to the matter is §166 of the Family Court Act. That statute states that:

> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of an investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

Under the circumstances, it is suggested that you resubmit a request in conjunction with an applicable 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7263

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Mr. John Carey
88-C-103
P.O. Box 436
Albion, NY 14411

Dear Mr. Carey:

I have received your recent letter which, although dated July 20, was received by this office on July 15.

As I understand your letter, you have applied for SSI and have "signed papers" in order that the administrators of that program can obtain medical records from your facility. However, having received two letters from the SSI program, the Orleans Correctional Facility failed to transfer the records.

You have asked that this office "file a 1984 FOIL act" in order that your claim can be processed. In this regard, I offer the following comments.

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

Second, under §18 of the Public Officers Law, a patient, a person who is the subject of medical records, generally enjoys rights of access to those records maintained by a provider of medical treatment. Assuming that you have rights of access to the records in question, it is assumed that you could authorize disclosure to a third party, such as a representative of the SSI office. Alternatively, although I am unfamiliar with the requirements of the SSI program, it may be appropriate for you to obtain copies of the records for the purpose of forwarding them to an SSI representative.

Lastly, if your attempts to resolve the matter continue to be unsuccessful, it is suggested that you confer with a representative of Prisoners' Legal Services.

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-1764

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Mr. Dayle Wheelock
89-C-1224 B-1-43
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 of July 9 and the correspondence attached to it.

According to your correspondence, based upon a manual prepared by the State Department of Social Services, it is your belief that you may obtain the names of your "accusers" in a matter involving child abuse. 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 §87(2)(a) through (i) of the Law.

Second, §87(2)(a) of the Law provides that an agency may deny access to records or portions thereof that:

> "are specifically exempted from disclosure by state or federal statute..."

Section 422 of the Social Services Law is a statute which pertains specifically to the statewide central register of child abuse and maltreatment and all reports and records included in the register. Subdivision (4)(A) of §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. Further, subdivision (7) of §422 states that:

> "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, or the agency, institution, organization, program or other entity where such person is employed or with which he is associated, which he reasonably finds will be detrimental to the safety or interests of such person."

Although I am unfamiliar with the manual to which you referred, I believe that rights of access to the information in question are governed by §422 of the Social Services Law rather than the Freedom of Information Law. Further, based upon §422(7), the Commissioner of the Department of Social Services may prohibit the disclosure of information that would identify a person who alleged that child abuse had occurred.

I hope that the foregoing serves to enhance your understanding of applicable 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-7265

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Mr. Mark McCurdy
[redacted]

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

Dear Mr. McCurdy:

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

You have sought assistance in relation to requests for records of the New York City Police Department pertaining to a complaint that you made concerning a police officer. You indicated that the results of an investigation precipitated by your complaint have not been disclosed and that it is your belief that the officer who was the subject of your complaint was dismissed as a result of the ensuing investigation. The request for records concerning the complaint and investigation were denied pursuant to §87(2)(a) and (g) of the Freedom of Information Law. In a separate request, you sought the social security number of the officer who was the subject of your complaint.

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.

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." As indicated in correspondence prepared by the Police Department, 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 a department of correction of individuals employed as correction officers...shall be considered confidential and not subject to inspection or review with the express written consent of such correction 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).

In my opinion, if the subject of your complaint continues to be employed as a police officer, §50-a of the Civil Rights Law would be applicable and would likely serve as a valid basis for a denial of much of the information that you requested. On the other hand, if that person was dismissed, I do not believe that §50-a would be applicable, because he would no longer be a police officer, and the rationale for the confidentiality accorded by that provision would no longer be present.

The other basis for denial upon which the Department relied, §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 de- terminations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government... "

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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 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 those 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 §50-a of the Civil Rights Law. Further, it was held that, although the record consisted of intra-agency material, that records constituted a final agency determination available under §87(2)(g)(iii) of the Freedom of Information Law.

In addition, in a discussion of the intent of the Freedom of Information Law, the Court of Appeals in Capital Newspapers v. Burns found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" [67 NY 2d at 562, 566 (1986)].

In sum, I believe that the Freedom of Information Law as judicially interpreted requires that a record reflective of a final determination to impose disciplinary action must be disclosed.

Since you referred to a "Vaughn" index, as you may be aware, 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 a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

Lastly, I believe that a present or former employee's social security number could be withheld pursuant to §87(2)(b) of the Freedom of Information Law. That provision permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy".

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-7266

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Mr. Richard C. Crana
[redacted]

Dear Mr. Crana:

As you are aware, your letter addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee is authorized to provide advice concerning the Freedom of Information Law.

You wrote that your request for information in June from the Town of Highlands Justice Court had not been answered as of the date of your letter to the Attorney General. It is your belief that the information should have been made available under the Freedom of Information Law. You indicated that you are attempting "to find out how many motorists received traffic (speeding) violations for a 25 MPH school speed zone on Rt. 9W in the Village of Fort Montgomery" between certain dates, and "how many of those motorists either plead guilty or were found guilty and received points/fines."

In this regard, the Freedom of Information Law pertains to records of an agency, and the term "agency" is defined in §86(3) of that statute to include:

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

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

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

However, other provisions of law often provide substantial rights of access to court records. For example, §2019-a of the Uniform Justice Court Act states that, unless otherwise confidential by law, records maintained by justice courts are available to the public.

I am unaware of the manner in which the records in which you are interested are kept or filed. For example, if convictions for speeding are kept separately in chronological order, you may be able to review the records and locate those of interest. Nevertheless, the records might not be filed in a manner that would enable court personnel to locate or retrieve the records in question. It is also possible that the arresting agency (i.e., a police department) may have equivalent records that can be located. Further, unlike a court, records of a police department are subject to rights of access granted by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7267

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 11, 1992

Mr. Miguel Rosa
91-R-8351
Orleans Correctional Facility
35-31 Gaines Basin Road
Albion, NY 14411-0436

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

Dear Mr. Rosa:

I have received your letter of July 22 and the correspondence attached to it.

According to your letter, since April, you have attempted without success to obtain from the Department of Correctional Services what you have characterized as the "CASAT memorandum". The correspondence indicates that the record sought is the CASAT (Comprehensive Alcohol and Substance Abuse Treatment) Program manual, and that it has been withheld because it is presently being revised. Although you were apparently informed that the new, revised manual would be made available when it becomes final, you wrote that it would be of no use to you, because you were denied treatment in the program under procedures in effect at the time of your application for treatment.

In this regard, I offer the following comments.

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

Second, while one of the grounds for denial is relevant, due to its structure, it often requires disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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.

From my perspective, assuming that the procedures in the manual remain in effect until it is finally revised or that the record in question was used and in effect at the time that you applied for treatment, it should be disclosed, for it would represent the Department's policy. If my assumptions are accurate, and if no other ground for denial is relevant, I believe that the record in which you are interested would be accessible under §87(2)(g)(iii) of 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

cc: Mark E. Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7268

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 11, 1992

Mr. Mike Larkin
[redacted]

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

Dear Mr. Larkin:

I have received your letter of July 24, as well as the materials attached to it.

According to your letter, you are having difficulty "obtaining the current entire contract of the Superintendent of Schools for the Islip School District." Rather than providing the contract itself, the Assistant Superintendent for Business sent you a letter describing the contents of the contract. Moreover, the District has sought "to charge [you] for the typed letters he sent to [you]" to "cover the cost of preparing the information requested..." You were also informed that, to make requests in the future, you must make "an appointment to fill out a Freedom of Information Form."

Based upon the correspondence from the District, it appears that officials of the District misunderstand the Freedom of Information Law. In an effort to enhance compliance with and understanding of that statute, copies of this opinion will be forwarded to the District. In this regard, I offer the following comments.

First, the title of the Freedom of Information Law may be somewhat misleading, for it is not a statute that requires an agency to provide information by preparing responses to requests. Rather it is a vehicle that enables the public to request and obtain existing records to the extent required by law. In the situation described in your correspondence, the District sought to provide a description of the contents of a record that were derived from a record, instead of the record itself. For reasons to be discussed later, I believe that the District should have disclosed the record that you requested, the Superintendent's contract.

Second, the District has sought to impose a fee for the preparation of the information that it made available to you, a description of certain elements of the Superintendent's contract. When a request is made under the Freedom of Information Law, the only fee that may be assessed involves a charge for the reproduction of existing records. Specifically, the Law states that an agency must adopt rules and regulations concerning the procedural implementation of the Law, including "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches..." As such, if the Superintendent's contract consists of ten pages, at twenty-five cents per photocopy, the District could charge $2.50 for a copy of that record. Agency officials may choose to explain the contents of records by preparing additional materials; however, so doing in my view would be separate from the requirements of the Freedom of Information Law. Again, that statute pertains to existing records, and fees may be assessed only when an applicant seeks copies of existing records.

Third, I do not believe that an agency can require that a request be made on a prescribed form. 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 requests" [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 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 possesses 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 is unnecessarily serves to delay a response to or deny a request for records.

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

In my opinion, a contract between an administrator, such as a superintendent, and a school district or board of education must be disclosed 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, §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard 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 a their 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); 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); 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 a discussion of the intent of the Freedom of Information Law by the state's highest court in a case cited earlier, 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, a superintendent's contract, like a collective bargaining agreement between a public employer and a public employee union, must be disclosed, for it is clearly relevant to the duties, terms and conditions regarding the employment of a public employee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mel Rubinstein, Superintendent of Schools
James Matthews, Assistant Superintendent for Business

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AL- 25
FOIL-AO- 7269

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 11, 1992

Mr. Michael Zimmerman
Director of Administrative Services
New York State Thruway Authority
200 Southern Boulevard
P.O. Box 189
Albany, NY 12201-0189

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

Dear Mr. Zimmerman:

I have received your letter of July 23 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, the Thruway Authority is working toward implementation of an electronic toll collection system and an "E-Z Pass". The use of the pass "will permit enrolled customers to pass through toll facilities with no exchange of cash, tokens or discount coupons with a collector" by means of an antenna that "reads a 'tag' placed upon the vehicle windshield." Through that device, a customer may be identified and a "prepaid account is decremented by the amount of the toll."

You wrote that it is your belief that "customer account information including name, address, financial and toll transactions, trip information, account balance and the like is private and confidential and should be treated as such..." It is your contention that "the issue goes beyond traditional privacy considerations since knowledge of an individual's daily travel habits could, under certain circumstances, pose a threat to that individual's safety."

You have sought my views on the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an

agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, as you suggested, perhaps of primary relevance is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy. While the specific language of those examples may not be directly applicable to the situation, I believe that those examples are merely illustrative and represent few among conceivable dozens of such invasions of personal privacy. Further, the phrase that precedes the examples states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the illustrations that follow.

With respect to the privacy provisions generally, I do not believe that any person or court could clearly or unequivocally define what an unwarranted invasion of personal privacy might be. In my view, that standard is flexible and is designed to enable government to withhold records or portions thereof when disclosure would result in an unreasonable intrusion into peoples' lives or reveal intimate personal information about individuals. From my perspective, records that suggest where individuals drive, how frequently they do so, or what their traveling habits may be, i.e., in terms of times of day or days of the week, contain the kinds of information that could justifiably be withheld based upon considerations of personal privacy. It is noted that two of the examples of unwarranted invasions of personal privacy, subparagraphs (iv) and (v) of §87(2)(b), refer to information that is not relevant to the work of the agency that maintains it. In my opinion, what is relevant to the agency is that it receives the appropriate payment in tolls; where or when a particular individual drives is likely irrelevant to the work of the Thruway Authority.

Third, a potential problem relating to the issue involves the distinction or the ability to distinguish between records pertaining to natural persons, as opposed to those that identify entities. 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. Article 6-A of the Public Officers Law, the Personal Privacy Protection Law, when read on 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, §§92(3), 92(7), 96(1) and 89(2-a). Therefore, insofar as the information at issue would identify entities, such as business establishments, rather than natural persons, I do not believe that those records could be withheld

based upon considerations of privacy. 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)]. In view of that statement, again, I believe that the authority to withhold the information based upon considerations of privacy is restricted to those situations in which the information pertains to natural persons.

There may, however, be other considerations concerning the ability to deny access that would be relevant to information identifying entities or natural persons, or both.

As you suggested in your letter, disclosure might in some circumstances "pose a threat" to safety. In this regard, §87(2)(f) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." That provision might be applicable with respect to information relating either to natural persons of entities.

Also of potential significance is §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..."

As in the case of the standard concerning personal privacy, in my opinion, there is no absolute definition of what might constitute a trade secret. It might be contended, however, that information reflective of a commercial entity's transportation patterns or habits might if disclosed cause substantial injury to its competitive position. The circumstances in which that contention might be made, however, would likely be rare.

Lastly, I point out that in the event that a judicial proceeding is commenced to seek review of a denial under the Freedom of Information Law, the agency has the burden of proving that the denial was justified [see §89(4)(b)]. To the extent that the information at issue would relate to natural persons, for reasons discussed earlier, I believe that a denial based upon considerations of privacy would be justifiable. However, insofar as the information would relate to entities, meeting the burden of proof would, in my opinion, be difficult.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7270

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 11, 1992

Ms. Linda J. Chapman
[redacted]

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

Dear Ms. Chapman:

I have received your letter of July 21 in which you requested "guidance on how to proceed" under the Freedom of Information Law.

You wrote that an appeal, a copy of which is attached to your letter, was received by the Meridian Fire Department on July 6. As of the date of your correspondence with this office, you had received no response to the appeal.

In this regard, §89(4)(a) of the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to an appeal. 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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 reasons discussed in an advisory opinion prepared on your behalf on June 24, to the extent that the records sought exist, I believe that, with one exception, they must be disclosed. The exception, to reiterate, involves the residence addresses of members of the Department. In my view, home addresses could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Lastly, I point out that under §89(4)(c) of the Freedom of Information Law, a court may under certain circumstances assess against an agency reasonable attorney's fees payable to a person who has substantially prevailed. Nevertheless, it is my hope that the preparation of this and the earlier opinion addressed to you will serve to enhance compliance with the Freedom of Information Law and obviate the need to initiate litigation.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Executive Committee, Meridian Fire Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7271

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 11, 1992

Mr. Terence Murphy
88-A-2495
Southport Correctional Facility
Pine City, NY 14871-2000

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

Dear Mr. Murphy:

I have received your letter of July 20. You asked that I comment with respect to the request attached to it.

In that request, you sought a copy of a monograph from Skidmore College that was prepared by an employee of the College. The author teaches at two correctional facilities, and the publication is entitled "Dealing with Inappropriate Behavior in Prison College Programs: A Handbook for Women."

In this regard, although Skidmore College would have the ability to provide a copy of the publication in question, I do not believe that it would be obligated to do so, for the Freedom of Information Law, in my view, would not be applicable.

It is noted that the Freedom of Information Law pertains 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 of other governmental 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 maintained by entities of state and local government. It does not apply to a private college.

If you cannot obtain the publication from Skidmore College, it is suggested that you seek a copy at your facility or through your facility librarian.

As requested, the attachments to your letter are being returned to you.

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-1772

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 11, 1992

Mr. David Gaskell
Executive Director
NYS Division of Equalization and Assessment
16 Sheridan Avenue
Albany, New York 12210-2714

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

Dear Mr. Gaskell:

I have received your letter of July 22, which deals with fees that may be assessed under the Freedom of Information Law.

According to your letter, the Division of Equalization and Assessment frequently responds to requests for data that the Division has received from municipalities. You indicated that your charges for reproduction of the data are based upon computer processing costs, but that "[l]ocal governments are increasingly concerned that data they have provided to [you] is being sold without any benefit or return to them." You added that you and representatives of local governments believe that the information should be made public. However, for "an improved state-local working relationship, it is important to recognize the contribution and costs of local governments, as well as the State's." As such, you asked whether it is "possible for [the Division] to recognize local costs in supplying...data and add that to [y]our charges for information."

While I am sympathetic with respect to burdens imposed upon local governments and the Division, I do not believe that local costs in providing the data could appropriately be factored into the fees charged by the Division when it makes data available. In this regard, I offer the following comments.

First, while I am not an expert on the subject, I believe that the Real Property Tax Law (RPTL) would require the Division to collect and local governments to transmit to the Division the data

in question, notwithstanding rights conferred by the Freedom of Information Law or even if no request were made under that statute or other applicable law. As you are aware, §214 of the RPTL states in part that the Board of Equalization and Assessment:

> "shall collect, in such detail as may be desirable, statistical and other information relative to assessment and taxation of real property in each municipal corporation in the state."

In addition, §1590(1) of the RPTL provides as follows:

> "A municipal corporation, other than a school district or a village, which prepares assessment rolls and tax rolls by means of electronic data processing, shall annually submit to the state board the data files used in the preparation of each final assessment roll and summaries of the information from the tax roll including as a minimum the number of parcels, the total assessed value thereof, and the total taxable assessed value thereof."

Based upon the foregoing, many municipal corporations are required to forward assessment data in electronic form to your agency, irrespective of the requirements of the Freedom of Information Law or whether any request for that data is ever made. Consequently, your disclosure of the data received from municipalities pursuant to the Freedom of Information Law would apparently add nothing to the costs or burdens imposed upon those entities by other provisions of law.

Second, the Freedom of Information Law pertains to agency records and §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."

Based upon the foregoing, when your agency receives information "in any physical form", that information in my view constitutes a "record" subject to the Freedom of Information Law. Further, absent authority conferred by a different statute, the Freedom of

Information Law would permit the Division to assess a fee for the duplication of an electronic record, for example, based upon the agency's actual cost of reproduction [see Freedom of Information Law, §87(1)(b)(iii)]. In addition, although compliance with the Freedom of Information Law involves the use of government resources and 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, as we may have discussed on other occasions, the Committee on Open Government has recommended legislation which, if enacted, would authorize agencies in certain circumstances to establish fees based upon the commercial utility of records. That legislation (A.9519; S.7500) or legislation similar to it might serve to diminish the burdens currently imposed upon state and local agencies.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1273

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 11, 1992

Mr. Brian Kiesel
92-A-0254
Suite B-Y-551
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. Kiesel:

I have received your letter of July 20. You have asked what to do if after three requests a state correctional facility "refuses to acknowledge receipt of such requests."

In this regard, I offer the following comments.

First, the regulations promulgated by the Department of Correctional Services state that a request for records kept at a correctional facility may be made to the facility superintendent or his designee.

Second, the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7274

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 12, 1992

Mr. John Eiseman
[redacted]

The staff of the Committee 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. Eiseman:

As you are aware, I have received your correspondence concerning requests made under the Freedom of Information Law for records of the New York City Department of Parks and Recreation. You have sought an advisory concerning rights of access to the records sought.

The first request involves records "relating to the hiring of Lifeguards assigned to Rockaway Beach this summer, including specifically the name, age, seniority, training, starting date, and date of completion of the qualifying tests, for all such hires." You informed me by phone, that in order to be hired for the position of lifeguard, an individual must pass certain tests in order to demonstrate that he or she is qualified.

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. From my perspective, two of the grounds for denial are relevant to a determination of rights of access. However, with the exception of one of the items that you requested, which will be considered separately, I do not believe that either of those grounds could properly be asserted.

Of potential significance is §87(2)(g), which permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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. While the information sought might be characterized as "intra-agency material", it would consist solely of factual data. Therefore, again, unless a different ground for denial could be asserted, I believe that the data would be available under §87(2)(g)(i).

Also relevant is §87(2)(b), which authorizes an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first of which states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard 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 a their 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); 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); 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].

If, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications as a condition precedent to serving in a particular position, records containing those kinds of information 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 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 §87(3)(b)]. However, information included in a document that is irrelevant to criteria required for holding the position, such as grade point average, home address, social security number and the like, could in my opinion be deleted prior to disclosure of the remainder of a record to protect against an unwarranted invasion of personal privacy.

It is also important to note that the 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 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" (Capital Newspapers v. Burns, supra, 565-566).

The item which in my view could be withheld when coupled with an identifier, such as a name, is the age of those hired. Ordinarily the age of a public employee is irrelevant to the

performance of that person's duties. Further, even if it is relevant, which may be so in this instance, the age is in my opinion so personal a detail that reference to one's age or date birth could likely be withheld as an unwarranted invasion of personal privacy.

However, §89(2)(c) of the Freedom of Information Law states that disclosure shall not be construed to constitute an unwarranted invasion of personal privacy "when identifying details are deleted." It may be possible to obtain records indicating ages of lifeguards if their names or other identifying details are deleted. In a decision in which a court ordered that certain deletions be made [Harris v. City University of New York [114 AD 2d 805 (1985)], a professor wanted to compare his qualifications with those of other faculty members who had been promoted to full professor during the preceding five years by reviewing their curricula vitae. In determining the issue, it was held that:

> "the deletion of such identifying information as names, addresses and Social Security numbers will not impede petitioner's ability to compare his credentials to those of other professional employees, yet will protect the individuals involved from an unwarranted invasion of their privacy" (id., 805-806).

As such, the court ordered the disclosure of the resumes, following the deletion of the kinds of identifying details described in the passage quoted above.

Your second request was precipitated by your conversation with an assistant commissioner at the Department of Parks and Recreation who informed you that your son received an offer of employment as a lifeguard, but that he declined the offer. You requested records "relating to this alleged offer of employment, including specifically the date, time, and when this alleged offer was made, the name of the person who allegedly made the offer, and the words or substance of the alleged offer." You also sought records pertaining to your son's "alleged declination."

In my view, to the extent that the information sought exists in records, it would be available under the Freedom of Information Law. As in the case of the analysis presented with regard to the other request, the information sought, insofar as it involves intra-agency materials, would consist of factual information available under §87(2)(g)(i). Further, since you informed me that your son is a minor, and since the records sought pertain to him, I do not believe that the Department could withhold any existing records falling within the scope of the request based on a contention that disclosure would result in an unwarranted invasion of personal privacy.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to officials of the Department of Parks and Recreation.

I hope that I have 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 F. Pazan, Records Access Officer
Edward T. Norris, Assistant Commissioner
Betsy Gotbaum, Commissioner
William F. Dalton, Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7275

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 12, 1992

Peter L. Dziedzic
[redacted]

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

Dear Mr. Dziedzic:

I have received your letter of July 30 and the materials attached to it.

According to your letter, on July 22, you "hand delivered" a request for records "addressed to the Town of Oswego Assessor or Records Access Officer." When five business days had passed and you had received no response, you telephoned the town clerk's office to ascertain the status of your request, and you were informed that she "had no knowledge of [your] request and that if [you] wanted any records [you] had to fill out the Town's Freedom of Information request." You were also told that the letter delivered on July 22 was "insufficient to obtain the information requested."

Your request, a copy of which was forwarded, involved "copies of the property records Form EA 3100 for the following tax map number parcels", which you identified. In addition, to enhance your request, you apparently attached an opinion of Counsel to the State Board of Equalization and Assessment for review by Town officials if necessary.

It is your belief that the original request was proper and you have sought assistance in resolving the matter. In this regard, I offer the following comments.

In my view, the request was likely sufficient and proper. Section 89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. It has been held by the State's highest court that a request reasonably

describes the records when an agency can locate and identify the records based on the terms of a request [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. Therefore, if Town officials could locate and identify the records in question based on your original letter of July 22, I believe that the request would have been proper.

Moreover, I do not believe that an agency can require that a request be made on a prescribed form. 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 requests" [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 possesses 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 is unnecessarily serves to delay a response to or deny a request for records.

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. Moreover, 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).

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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Insofar as the records in which you are interested are essentially the equivalent of those described above, I believe that they must be disclosed.

Lastly, it is noted that assessment rolls and related documents have been found judicially to be available to the public, whether they are maintained in paper or computer tape format, and irrespective of the purpose for which a request is made.

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". 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. Nevertheless, 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 or equivalent records 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)(1)). 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 an assessment roll or its equivalent should be disclosed. I point out 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 hope that I have 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 Clerk, Town of Oswego

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 7276

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 12, 1992

Mr. Jossif P. Bartolotti
[redacted]

The staff of the Committee 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. Bartolotti:

I have received your letter of July 30 concerning a request made under the Freedom of Information Law to the Wappingers Central School District. In conjunction with our telephone conversation, you are seeking an advisory opinion on the matter.

As I understand the situation, you made allegations concerning a District employee in letters sent to the District in 1988 and 1989. In your request, you asked whether any investigation was made as a result of your letters and whether any records were kept if there was such an investigation.

In this regard, I offer the following comments.

First, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agency officials to furnish information by responding to questions. Rather, the Freedom of Information Law is a statute that enables any person to request records and that requires agencies to disclose records to the extent that the Law confers rights of access. It is noted, too, that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create or prepare a record in response to a request. If a request involves records that do not exist, I believe that a response to that effect must be given.

Second, the correspondence indicates that the request was initially denied on the ground that the records sought are "part of

investigatory files" and because disclosure would constitute an "unwarranted invasion of personal privacy."

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

The phrase "part of investigatory files" appeared in the Freedom of Information Law as originally enacted in 1974. That enactment was repealed and replaced with the current Freedom of Information Law, which became effective in 1978. The replacement for the "investigatory files" provision, §87(2)(e), states that an agency may withhold records that:

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

In my view, it is unlikely that a school district could properly assert §87(2)(e) as a basis for denial, for that kind of agency ordinarily does not engage in law enforcement functions, nor does it compile records for law enforcement purposes.

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, 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); 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); 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].

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.

Further, 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 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. Records prepared in conjunction with an investigation would in my view constitute intra-agency materials. 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, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy. Findings and conclusions may be available when they constitute final agency determinations.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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: Mr. Marmillo, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7277

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 12, 1992

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

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

Dear Mr. Wenzel:

I have received your letter of July 27 in which you described a "yearly problem" concerning your ability to obtain copies of your daughter's school records from the Center Moriches School District in a timely manner. Your most recent request was made on June 8. However, as of the date of your letter to this office, you had received no response.

In this regard, I offer the following comments.

First, in view of the attachment to your letter, it appears that you may be aware that rights of access to your daughter's education records are not governed by the Freedom of Information Law, but rather by a provision of federal law, the Family Educational Rights and Privacy Act (FERPA).

In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA 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 minor students 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 a student; concurrently, education records are confidential with respect to others, unless the parents of students waive their 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 FERPA by the United States Department of Education to mean a "parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian" (34 CFR 99.3). Further, 34 CFR 99.4 states that:

> "An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes those rights."

Based on the foregoing, in the case of divorce or separation, a school district must, in my view, provide access to both natural parents, custodial and non-custodial, unless there is a legally binding document that specifically removes a parent's rights under FERPA. I believe that a legally binding document would include a court order or other legal paper that prohibits access to educational records, or removes the parent's rights to have knowledge about his or her child's education. Further, 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).

Second, when the Freedom of Information Law is applicable, an agency is required to respond to a request within five business days of the receipt of a request by granting access to the records, denying access in writing, or by acknowledging the receipt of a request in writing and estimating when the request will be granted or denied. However, the federal regulations promulgated under FERPA, §99.10(b), state that:

> "The educational agency or institution shall comply with a request for access to records within a reasonable period of time, but in no case more than 45 days after it has received the request."

If you believe that the School District has failed to comply with FERPA, a complaint may be made to the Family Policy and

Regulations Office, U.S. Department of Education, Washington, DC 20202.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Central Moriches School District

Clerical

Error

No #7278

Clerical

Error

No #7278

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-727

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 12, 1992

Mr. Peter Odentall
92-A-5304 A-1-36
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. Odentall:

I have received your letter of July 24. You wrote that you have experienced difficulty in obtaining your pre-sentence report, and you have sought advice on that subject.

In this regard, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances, is §390.50 of the Criminal Procedure Law, 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 §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 §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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2121
FOIL-AO-7280

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 12, 1992

Ms. Carole F. Fowler
Jervis Public Library
613 N. Washington Street
Rome, NY 13440

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

Dear Ms. Fowler:

As you are aware, I have received your letter of July 30 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, the Jervis Public Library Association, Inc., which you serve as Director, contracts with the City of Rome "to provide library services to the community." The contract with the City states in part that the Library is an "independent contractor", and that its officers, agents, directors and employees "will neither hold themselves out as, nor claim to be, officers or employees of the City of Rome." The Library is incorporated as a not-for-profit corporation and is exempt from tax under the Internal Revenue Code. You added that the City provides about 69% of your budget, the County about 10% and that a contribution from the School District varies between 2% and 3%. Further, although employees "are not civil service classified", the Library's clerical, maintenance and guard personnel are members of CSEA.

The CSEA unit has requested "copies of individual itemized annual salaries for all library employees" for the years 1987 to 1992. In view of its significant receipt of government funding, you have asked whether the Library must disclose the information sought under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §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 of other governmental 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 maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Valley Cottage within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private

> organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to association libraries has arisen in other instances, perhaps because a companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

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

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO-137
FOIL-AO-7281

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 13, 1992

Mr. Tim O'Brien
The Times Union
News Plaza
Box 15000
Albany, NY 12212

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

Dear Mr. O'Brien:

I have received your recent letter and the correspondence attached to it.

You have sought an advisory opinion concerning the propriety of a denial of your request for records concerning misconduct charges sustained by the City of Troy Police Department. The City's Corporation Counsel denied the request on the basis of "Sections 92(8) and 95(7) of the Public Officers Law."

In this regard, I offer the following comments.

First, §§92 and 95 of the Public Officers Law are found within the Personal Privacy Protection Law. That statute in my opinion is inapplicable, for it pertains only to state agencies. For purposes of the Personal Privacy Protection Law, the term "agency" is defined in §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 government 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, since the City of Troy is a unit of a local government, the Personal Privacy Protection Law does not apply and cannot serve as a basis for denial.

Second, I believe that the Freedom of Information Law is applicable, for it includes within its scope state and local

governmental entities [see Public Officers Law, §86(3)]. 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 §87(2)(a) through (i) of the Law. In my view, three of the grounds for denial may be relevant in consideration of rights of access to the records in question.

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the state's highest court, in reviewing the legislative history leading to its enactment, has held that §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 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 §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 decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for 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)].

Assuming that your request has not been made in the context of current or future litigation, in my opinion, §50-a of the Civil Rights Law would not apply to the request insofar as you are seeking records indicating findings of misconduct on the part of police officers.

Also relevant is §87(2)(b) of the Freedom of Information Law which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, 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); 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); 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].

The third ground for denial of significance, §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 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. The records sought in my opinion consist of intra-agency materials. However, insofar as your request involves final agency determinations, I believe that those determinations must be disclosed, again, unless a different ground for denial could be asserted.

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which allegations or charges 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 those 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 §50-a of the Civil Rights Law.

It is also noted, however, that in Scaccia, it was found that although a final determination reflective of a finding of misconduct is public, the records leading to the determination could be withheld. Further, 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, to the extent that charges are dismissed or allegations are found to be without merit, I believe that the records related to and including such charges or allegations may be withheld.

Lastly, the 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 a decision that was cited earlier, 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 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" (Capital Newspapers v. Burns, supra, 565-566).

For the reasons described above, I believe that records reflective of findings of misconduct or disciplinary action taken would be available under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard A. Hanft, Corporation Counsel
Edward Nare, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2123
FOIL-AO-7282

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 13, 1992

Ms. Tinker Twine
Woodstock Times
P.O. Box 808
Woodstock, NY 12498

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

Dear Ms. Twine:

I have received your letter of August 3 and the material attached to it.

You have sought an advisory opinion concerning a denial by the Woodstock Town Supervisor of your request for "correspondence from the Town's adversary in a lawsuit regarding the Town's zoning law." You added that the letter might have been the subject of a recent executive session held by the Town Board. In his denial of your request, the Supervisor wrote that "letters pertaining to lawsuits and other matters discussed in executive session are confidential."

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 §87(2)(a) through (i) of the Law.

Second, whether the record in question was discussed in executive session is in my view largely irrelevant. It is emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session [see Open Meetings Law, §105(1)(a) through (h)] are separate and distinct, and that they are not necessarily

consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and vice versa. Further, in a decision in which the issue was whether discussions occurring during an executive session 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). In this instance, since the Town is involved in litigation, it appears that an executive session to discuss the litigation could properly have been held under §105(1)(d) of the Open Meetings Law. That provision authorizes a public body to conduct an executive session to discuss "proposed, pending or current litigation." Nevertheless, the validity of the executive session does not necessarily result in a conclusion that there is a basis for withholding a record under the Freedom of Information Law that might have been discussed during an executive session.

Third, because the letter in question was transmitted by the Town's adversary in litigation to the Town, I do not believe that it could be characterized as privileged or confidential. The initial ground for denial in the Freedom of Information Law pertains to records that are "specifically exempted from disclosure by state or federal statute." While several statutes relate to records used or prepared for litigation, it does not appear that any of them could properly be asserted in this instance. For example, in general, pursuant to the attorney-client privilege, which is embodied by statute in §4503 of the Civil Practice Law and Rules (CPLR), communications between at attorney and a client may often be privileged and, therefore, exempted from disclosure by statute. However, if a communication is made or disclosed to a person other than the attorney or the client, the privilege is waived. Similarly, although §3101(c) and (d) of the CPLR authorize confidentiality, respectively, regarding the work product of an attorney or material prepared for litigation, those kinds of records remain confidential in my opinion so long as they are not disclosed to an adversary or a court, for example. I do not believe that materials that are served upon or shared with an adversary would be privileged or confidential.

Assuming that the letter in question could not be characterized as "confidential" or exempted from disclosure by statute, I believe that it should be disclosed, for none of the other grounds for denial listed in the Freedom of Information Law would appear to be applicable.

As you requested, in an effort to enhance compliance with and understanding of the issues, copies of this opinion will be forwarded to the persons and entities 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: John Mower, Town Supervisor
Bonnie Lobel, Town Clerk
Town Board
Planning Board
Zoning Board of Appeals
Zoning Evaluation Committee
Joel Sachs, Esq.
James Myers, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7283

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 13, 1992

Mr. William Graham
84-A-6009
135 State Street
Auburn, NY 13021

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

Dear Mr. Graham:

I have received your letter of July 30. As you requested, enclosed is a copy of the Committee's latest annual report to the Governor and the State Legislature.

In addition, you sought assistance in obtain records that "would have been generated by an employee in the discharge of official duties for [a] county", such as "travel vouchers, expense accounts, meal vouchers, lodging vouchers."

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. The records access officer has the duty of coordinating an agency's response to requests.

Second, §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. As such, a request should contain sufficient detail to enable agency officials to locate and identify the records.

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

Relevant to the issue is §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 may be subject to conflicting

interpretations, the courts have provided substantial direction regarding the privacy of public employees. Based upon judicial decisions, 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. Further, 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); 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); 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 my opinion, bills, vouchers, contracts and similar records involving payments to or expenditures by public officers or employees are relevant to the performance of their official duties. As such, those types of records would in my view be available on the ground that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. However, some aspects of those records may be deleted as an unwarranted invasion of personal privacy, as in the case of public employees' home addresses or social security numbers, which may have no relevance to the performance of one's official duties.

In addition, in rare circumstances, depending upon the nature of one's duties, it is possible that certain details might be withheld pursuant to §87(2)(f) on the ground that disclosure would "endanger the life or safety" of a person.

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 7284

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 13, 1992

Mr. Steve Sevits
[redacted]

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

Dear Mr. Sevits:

I have received your letter of August 4, as well as the material related to it.

According to your correspondence, on July 17, you submitted a request to the Town of Schodack for a list of items sold by Town day camp officials sold or to be sold to children who participate at the camp, and receipts for purchase of those items. Until the date of your letter to this office, you had received "no feedback on this request". On that date, however, you were contacted by the administrator of the camp, who informed you that he would "attempt to collect the requested records 'at the end of the program'." You have asked whether the request "has been processed in the fashion outlined for public officials."

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, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if, for example, there is no list of items sold to children participating at the camp, Town officials, in my opinion would not be required to prepare a list on your behalf.

Third, as it pertains to existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. To the extent that the records sought exist, I believe that they must be disclosed, 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: Donna Conlon, Town Clerk
Joseph McCabe, Camp Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7285

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 13, 1992

Mr. P.N. Prentice
[redacted]

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

Dear Mr. Prentice:

I have received your letters of July 30 and 31, as well as related correspondence.

You described a series of events relating to your requests for information directed to the Hyde Park Central School District. Based upon your commentary and your questions, I offer the following comments.

First, although an agency may provide records or information in response to an oral request, an applicant may be required to submit a request in writing. Similarly, while agency officials may respond immediately to requests, they are not required to do so. The Freedom of Information Law, however, provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, one aspect of your correspondence involved a request for lists of financial records and records used in the preparation of a budget, "...not the documents, but a list of documents." In this regard, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if no such lists exist, District officials could, in their discretion, prepare lists on your behalf, but I do not believe that they would be required to do so.

Lastly, you raised questions concerning fees. In this regard, §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."

Based on the foregoing, when photocopies of records up to nine by fourteen inches are requested, an agency may charge up to twenty-five cents per photocopy. In the case of other records, i.e., computer tapes or tape recordings, an agency may charge a fee on the basis of the actual cost of reproduction. For computer generated records, such as printouts, the actual cost may involve computer time and paper. Further, 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. Consequently, a method of minimizing the cost of tracking the District's finances would involve requests to inspect records, rather than seeking copies.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7286

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 13, 1992

Mr. Steven R. Kaufman
Senior Assistant County Attorney
County of Dutchess
22 Market Street
Poughkeepsie, NY 12601

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

Dear Mr. Kaufman:

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

You wrote that Dutchess County "is exploring the possibility of purchasing/developing a computerized geographic information system" and is "desirous of re-couping the estimated $2 Million cost for the G.I.S. System." You expressed concern, however, that the Freedom of Information Law may preclude the County from charging "more than a nominal fee for records access." As such, you have sought advice "as to what fees the County may charge for access to geographic records stored on a computerized data base" and whether "development and acquisition costs are recoverable as part of the F.O.I.L. fee structure."

In my opinion, under existing law, should a GIS system be developed, the County could assess fees based solely upon the actual cost of reproduction.

By way of background, §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 reproduction 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 of 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."

Therefore, 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 is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Further, 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 1401.8)."

Based upon the foregoing, it is likely that a fee for reproducing GIS information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape) to which data is transferred.

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, 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)]. While the cost of purchasing or developing electronic information systems is significant, in most instances agencies purchase or develop those systems for their own governmental purposes. In those cases, the agency would expend public monies, notwithstanding the possibility that requests may or may not be made by the public under the Freedom of Information Law.

Lastly, the Committee on Open Government has recognized that implementation of the Freedom of Information Law may be burdensome and that vast amounts of data are often made available at minimal cost to an applicant. In an effort to lessen constraints regarding agencies' authority to charge different fees, the Committee has recommended legislation which, if enacted, would authorize the establishment of fees in certain circumstances, one of which would pertain to GIS, based upon the commercial utility of records. That legislation (A.9519; S.7500) or legislation similar to it would serve to diminish burdens currently imposed upon state and local agencies.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7287

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 13, 1992

Thomas E. Walsh, II
Assistant County Attorney
County of Rockland
Department of Law
Allison-Parris County Office Building
New City, New York 10956

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

Dear Mr. Walsh:

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

Specifically, you questioned whether the following must be disclosed pursuant to the Freedom of Information Law:

> "A. issued pistol permits;
>
> B. they type and make of pistol which the holder of a pistol permit is authorized to carry;
>
> C. approved pistol permit applications;
>
> D. portions of the approved pistol permit application containing information not submitted by the applicant but nevertheless submitted to the licensing official."

In this regard, I offer the following comments.

First, for purposes of consistency with the language of applicable statutory provisions, rather than referring to "permits", reference will be made to "licenses".

Second, with respect to items C and D, as you are aware, the Court of Appeals in Kwitny v. McGuire [53 NY 2d 968 (1981)] found that approved pistol license applications are available under §400.00(5) of the Penal Law. That provision states in relevant part that "The application for any license, if granted, shall be a public record." It is important to note that in a dissenting opinion that focused on information described in item D of your inquiry, for it was contended that only the information submitted by an applicant should be disclosed. That information, according to subdivision (3) of §400.00 includes:

> "the full name, date of birth, residence, present occupation of each person of individual signing the same, whether or not he is a citizen of the United States, whether or not he complies with each requirement for eligibility specified in subdivision one of this section and such other facts as may be required to show the good character, competency and integrity of each person or individual signing the application."

The dissent referred to additional information that may be acquired by the licensing officer and apparently included in an application, for it was found that "...applications in the record show, applications often, if not always, contain data concerning times when cash is, or other valuables are, transported by the prospective licensee" (id. 970). From there, it was contended that disclosure of those kinds of data should be withheld on the ground that disclosure would endanger the lives or safety of applicants and perhaps others pursuant to §87(2)(f) of the Freedom of Information Law.

Nevertheless, the majority opinion considered the dissent and stated that:

> "In response to the position advanced by the dissent it suffices to observe that while subdivision 3 of section 400.00 of the Penal Law prescribes the inclusion in the application of certain described data, nothing in that subdivision precludes expansion of the application by the licensing officer to require submission of additional relevant information. Nor does anything in subdivision 5 suggest that the 'application' thereby made a 'public record' is limited to the data required to be furnished under subdivision 3. Whether as a matter of sound policy disclosure of the contents of applications should be

> restricted is a matter for consideration and resolution by the legislature."

Moreover, in its introductory commentary, the majority stated its affirmance of the Supreme Court decision in the matter in which it was found that "the legislature must have been deemed to consider the risks [of disclosure] and to have determined the merits of disclosure outweighed the dangers", and that "all applicants had statutory notice that their applications would be a matter of public record" [442 NYS 2d 867, 868 (1979)].

Since the application is a public record under the Penal Law, nothing in the Freedom of Information Law can "limit or abridge" rights of access to those records [see Freedom of Information Law, §89(6)].

With respect to items A and B of your inquiry involving the licenses and the type of firearm an applicant is authorized to carry, §400.00(7) states that a license "shall specify the weapon covered by calibre, make, model, manufacturer's serial number..." and similar details. Further, §400.00(8) states in part that: "Upon demand, the license shall be exhibited for inspection to any peace officer, who is acting pursuant to his special duties, or police officer." From my perspective, since the Penal Law provides no specific direction concerning public access to issued licenses or details concerning weapons, rights of access would be determined by the Freedom of Information Law. I believe that public information contained in an application that also appears on a license would also be public. However, other data, such as that pertaining to weapons, could in my view likely be withheld pursuant to §87(2)(f) on the ground that disclosure could endanger the lives or safety of licensees and potentially others.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7288

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 14, 1992

Rabbi Abraham Maimon
Director of Special Projects
Rockland Community Development Council, Inc.
22 Main Street
Monsey, New York 10952

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

Dear Rabbi Maimon:

I have received your letter of August 10 and related materials. You have sought an advisory opinion concerning the propriety of a denial of access to records by the Division for Youth.

By way of background, the correspondence indicates that a proposal submitted to the Division by the Rockland Community Development Council, Inc. was recently rejected. Following receipt of the letter of rejection, on behalf of the Council, you submitted a request to inspect the proposals that were approved for funding. The request was denied by William Pelgrin, the Division's General Counsel and Records Access Officer, citing §87(2)(c) of the Freedom of Information Law. In your appeal of the denial, you wrote that you were "advised that the rationale for this [the denial] was that it was felt that seeing these records might be considered prejudicial with regard to a new request for proposal which is now out." It is your view that the records sought were "relevant to a grant which was already granted, that's a closed issue and has nothing to do with the new RFP."

In an effort to learn more about the matter, I contacted Mr. Pelgrin on your behalf. Mr. Pelgrin informed me that the records in which you are interested represent the first phase of a two phase process. Although 21 among more than 150 applications were "successful", those applications have been recommended for contract approval. As such, none of the grants have been awarded, and the process has not yet been completed. Mr. Pelgrin also said that, even though applications have been recommended to go to contract, for a variety of reasons, it is possible that some will not result

in contracts. Because the records in question represent the initial phase of the process and no contracts have yet been consummated, Mr. Pelgrin, in accordance with §87(2)(c), offered the view that disclosure at the present time could impede the ability to contract for the projects.

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 Division relied and the only basis for denial of relevance in the context of the facts states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." From my perspective, the key word in the quoted provision is "impair", and the question involves how disclosure would impair the process of awarding contracts.

Section 87(2)(c) often applies in situations in which agencies seek bids or requests for proposals ("RFP's"). While I am not an expert on the subject, I believe that bids and the processes relating to bids and RFP's are different. As I understand the matter, prior to the purchase of goods or services, an agency might solicit bids. So long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency seeks proposals by means of RFP's, there is no obligation to accept the proposal reflective of the lowest cost; rather, the agency may engage in negotiations with the submitters regarding cost as well as the nature or design of goods or services, or the nature of the project in accordance with the goal sought to be accomplished. As such, the process of evaluating RFP's is generally more flexible and discretionary than the process of awarding a contract following the submission of bids.

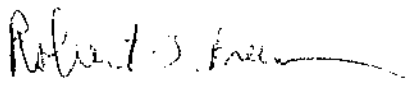
When an agency solicits number of bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, when the deadline for submission of bids has been reached, all of the submitters are on an equal footing and, as suggested earlier, an agency is generally obliged to accept the lowest appropriate bid. In that situation, the bids would, in my opinion, be available.

In the case of RFP's, even though the deadline for submission of proposals might have passed, an agency may engage in negotiations or evaluations with the submitters resulting in alterations in proposals or costs. Whether disclosure at that juncture would "impair" the process of awarding a contract is, in my view, a question of fact. In some instances, disclosure might impair the process; in others, disclosure may have no harmful effect or might encourage firms to be more competitive, thereby resulting in benefit to the agency and the public generally.

In the context of your request, again, one phase of the process has been completed and certain applications have been recommended for approval. In discussing the process with Mr. Pelgrin, he indicated that it involves an evaluation of need within a community. As such, it does not appear that there is any formula or series of specific criteria upon which the Division relies as a means of determining which projects should be funded. If that assumption is correct, it would appear that an analysis based on need would involve a somewhat subjective review of the applications, rather than a review based upon empirical data. If that is so, neither you nor other applicants could likely tailor your applications in a manner that would assure that an application is successful. From my perspective, if the foregoing accurately describes the process, it is difficult to envision how disclosure of the records sought at this juncture would "impair present or imminent contract awards." If premature disclosure would provide you or other applicants with an advantage over other applicants, or if disclosure would preclude the Division from engaging in appropriate contractual agreements, I would agree that §87(2)(c) would serve as a proper basis for denial. However, as I understand the facts and the process, disclosure would not likely result in the impairment envisioned by §87(2)(c).

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: William Pelgrin, General Counsel
Leonard G. Dunston, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7289

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 14, 1992

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 August 5, which pertains to requests for records of the City of Binghamton.

As I understand the situation, the records sought pertain to a fire and an investigation of that incident, which involved juveniles. One of the issues appears to relate to the disclosure of records to an attorney representing a client involved in the incident, but which were withheld from you.

In this regard, it appears that the responses to your requests were appropriate, for the City in my opinion is prohibited from disclosing certain records.

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. Relevant in my opinion is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §784 of the Family Court Act, which states that:

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

> which the order was made or, if the person is subsequently convicted of a crime, of a judge of the court in which he was convicted."

Based on the foregoing, I believe that the City is precluded from disclosing certain of the records.

Also relevant is §87(2)(b), which authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". Since certain of the records contain medical information, it appears that the denial was proper. It also appears that disclosure to the attorney acting as agent of the subject of the records was appropriate.

Lastly, part of your correspondence involves a request that a City official answer questions. Although I believe that an adequate response was given, I point out that the Freedom of Information Law requires agencies to respond to requests for records by granting or denying access; that statute, however, does not require that agency officials provide information by answering questions.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Linda Kingsley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7290

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 14, 1992

Mr. Ricardo A. DiRose
85-C-773
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. DiRose:

I have received your letter of August 5 and the correspondence attached to it.

Your inquiry concerns a request made to the Department of Correctional Services for a Master Job Organizational Table (MJOT) that was partially denied. The portions of the records that were denied are inmates' names and numbers, which were withheld on the grounds that disclosure would constitute an unwarranted invasion of personal privacy and "in conformity with the holding in the matter of Prisoners' Legal Services v. Department of Correctional Services, 73 NY 2d 26 (1988)." You indicated, however, that "all inmates wear their name and number on the breast of their shirts and this 'Name plate' is heat sealed on all items of outer clothing the inmate is issued."

You have sought a "decision" concerning the propriety of the denial. 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 can neither render a "decision" that is binding, nor can it compel an agency to grant or deny access to records.

Second, assuming that I correctly understand the materials, the record that you are seeking identifies inmates by name and identification number. If that is so, I believe that reliance by the Department upon §87(2)(a) of the Freedom of Information Law and Prisoners' Legal Services is misplaced. That case involved a finding that unsubstantiated complaints against correction officers were exempted from disclosure pursuant to §50-a of the Civil Rights Law and, therefore, §87(2)(a) of the Freedom of Information Law.

Section 50-a of the Civil Rights Law pertains to certain personnel records relating to police and correction officers. If your request deals with inmates, neither §87(2)(a) of the Freedom of Information Law nor the decision rendered in Prisoners' Legal Services would be relevant.

Third, the other basis for denial involves the contention that disclosure would constitute an unwarranted invasion of personal privacy under §87(2)(b) of the Freedom of Information Law. Unless I misunderstand the nature of the MJOT, the names of inmates should be disclosed. On the basis of Bensing v. LeFevre [506 NYS 2d 822 (1986)], which involved a grant of access to names of inmates quartered in a segregated housing unit, I believe that disclosure of the names would constitute a permissible rather than an unwarranted invasion of personal privacy and should, therefore, be disclosed.

Lastly, with respect to inmates' identification numbers, again, the issue is whether disclosure would result in an unwarranted invasion of personal privacy. From my perspective, although each such number is unique, there is nothing personally intimate about the number. Unlike a social security number, which is also unique, but which can be used for a variety of purposes, it is doubtful that an inmate's number could be used for purposes other than those involving a person's status as an inmate. Further, inmates' numbers appear on correspondence and other materials. In short, it is doubtful in my view that inmates' identification numbers may justifiably 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-7291

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 14, 1992

Mr. Brownie L. Epps
91-R-3600
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. Epps:

I have received your letter of August 3 and the materials attached to it. In brief, you indicated that a request for records made on June 17 to the Warden at the Rikers Island Detention Center had not been answered as of the date of your letter to this office.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 for the New York City Department of Correction is Robert Daly, General Counsel, whose office is located at 60 Hudson Street, 6th Floor, New York, NY 10013.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brian Conroy, Warden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7292

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 14, 1992

Ms. Betty Andrix
[redacted]

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

Dear Ms. Andrix:

I have received your letter of August 3 and the materials attached to it.

According to a response to an appeal rendered by Robert F. Heller, Superintendent of the Perry Central School District, you requested a letter from the District's attorney pertaining to a petition submitted by District residents. Mr. Heller wrote that the attorney "never wrote a letter to any district official concerning the petition." You also requested "a copy of a legal opinion dealing with three petitions presented at a Special Meeting of the Board of Education..." In denying access to that record, the Superintendent wrote that the opinion was prepared at his request and that it is "exempt from disclosure to the public."

In this regard, I offer the following comments.

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

Second, it appears that two of the grounds for denial would serve to enable the Superintendent to withhold the record.

Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could 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, since the record consists of a legal opinion prepared by the District's attorney, the other ground for denial of possible relevance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by statute." One such statute is §4503 of the Civil Practice Law and Rules, which makes confidential the communications between an attorney and a client, such as a school official 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 the record consists of legal advice provided by counsel to the client, the record would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, §87(2)(a) of the Freedom of Information Law.

In short, it appears that the denial of your request was consistent with law.

I hope that the foregoing serves to enhance your understanding of the law. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert F. Heller, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7293

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 14, 1992

Mr. Hyman Silverman
[redacted]

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

Dear Mr. Silverman:

I have received your letter of August 1 concerning a request made under the Freedom of Information Law to the Office of the Kings County District Attorney.

In response to a request for "the original statements given to the Special Prosecutor's office prior to the first Howard Beach trial by" several individuals, you were informed that "no such statements exist." Since you contend that the statements in question "are the core evidence of all of the Howard Beach trials", you suggested that the response "means that vital, important evidence was destroyed." As such, you sought assistance "in locating and sending to [you] the statements" that you requested.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office does not have custody or control of records generally, including those in which you are interested. Further, the Committee is not empowered to compel an agency to grant or deny access to records.

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required "to prepare any record not possessed or maintained" by the agency.

Third, although the courts and court records are not subject to the Freedom of Information Law, other provisions of law often grant access to court records (see e.g., Judiciary Law, §255). Therefore, if a court maintains the records sought, it is suggested that a request be made to the clerk of the court.

Lastly, it is noted that when a criminal charge is dismissed in favor of an accused, the charge and records related to it are often sealed pursuant to §160.50 of the Criminal Procedure Law. Insofar as the records in which you are interested have been sealed, I believe that they would fall beyond the scope of public rights of access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1294

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 17, 1992

Mr. Robie Drake
[redacted]

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

Dear Mr. Drake:

I have received your letter of August 6, as well as the materials attached to it. Among the attachments is a letter of June 30 in which you requested an advisory opinion that apparently never reached this office. As a matter of practice, this office responds to requests for advisory opinions in the order in which they are received. Had your inquiry been received soon after June 30, an opinion would have been rendered within approximately three weeks of its receipt.

Your inquiry involves a request for records of the Office of the District Attorney of Niagara County. The first category of the request pertains to financial records reflective of expenditures incurred by the Office of the District Attorney in the proceeding in which you were convicted, such as vouchers, bills and requests for reimbursement. The second category relates to telephone records, such as bills describing payments for telephone services provided to the Office of the District Attorney, for the period of December 1, 1981 through December 31, 1982, as well as telephone logs for the same period. In response to the request by Thomas H. Brandt, Assistant District Attorney, it was determined that the financial records "are inter-agency materials and/or grand jury materials and/or compiled for law enforcement purposes and are exempt from disclosure." With respect to telephone bills and logs, Mr. Brandt wrote that they "are also compiled for law enforcement purposes and/or if disclosed would endanger the life or safety of persons."

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 offered in response to the request is based on §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."

For §87(2)(e) to be applicable, I believe that it must be found initially that records were "compiled for law enforcement purposes". In my opinion, bills received from a telephone company, for example, and the records reflective of payments of those bills, could not be characterized as having been compiled for law enforcement purposes. A telephone company does not prepare its bills for law enforcement purposes, but rather in the ordinary course of business, and I believe that records of payments of those bills would also be prepared in the ordinary course of business. With respect to financial records relating to your case, absent knowledge of the nature of those records, I cannot unequivocally characterize them. Some might have been routine and prepared in the ordinary course of business; others, however, depending upon their nature, might possibly have been compiled for law enforcement purposes. With regard to telephone log books, again, absent details concerning their content or function, it is unclear whether those kinds of records could be characterized as having been compiled for law enforcement purposes.

Insofar as the records sought could be considered as having been compiled for law enforcement purposes, the capacity to deny access is limited to the circumstances involving harmful effects of disclosure described in subparagraphs (i) through (iv) of the Freedom of Information Law. At this juncture, it does not appear that disclosure could interfere with an investigation or judicial proceeding or deprive a person of a right to a fair trial; further, the records sought would not appear to reveal any unusual or non-routine criminal investigative technique or procedure. If that is so, subparagraphs (i), (ii) and (iv) would be inapplicable. It is possible, however, that disclosure of portions of the records

sought might "identify a confidential source or disclose confidential information relating to a criminal investigation "in conjunction with subparagraphs (iii) of §87(2)(e). To that extent, portions of the records might justifiably be withheld.

It is assumed that financial records would identify those receiving payments and that telephone logs would identify persons with whom the staff of the Office of the District Attorney engaged in conversations. It is also assumed, however, that telephone bills would not name individuals, but rather might indicate phone numbers, the times that calls were made, the length of calls and the charges.

Aside from §87(2)(e), I believe that four of the grounds for denial may be relevant to a determination of rights of access. The extent to which those provisions could properly be asserted would be dependent upon the contents of the records and the effects of their disclosure.

Of some significance is §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, 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. While some of the records sought would apparently constitute inter-agency or intra-agency materials, it also appears that they would consist largely of statistical or factual information available under §87(2)(g)(i), again, unless a different ground for denial could be asserted.

Another ground for denial that is relevant is §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 may be subject to conflicting interpretations, 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); 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); 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].

When a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to the officer or employee serving as a government official.

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 employee who initiated the call, but rather with respect to the recipient of the call.

There is but one decision of which I am aware that deals with the issue. In Wilson v. Town of Islip, one of the categories of the records sought involved bills involving the use of cellular telephones. In that decision, it was found that:

> "The petitioner requested that the respondents provide copies of the Town of Islip's cellular telephone bills for 1987, 1988 and 1989. The court correctly determined that the

> respondents complied with this request by producing the summary pages of the bills showing costs incurred on each of the cellular phones for the subject period. The petitioner never specifically requested any further or more detailed information with respect to the telephone bills. In view of the information disclosed in the summary pages, which indicated that the amounts were not excessive, it was fair and reasonable for the respondents to conclude that they were fully complying with the petitioner's request" [578 NYS 2d 642, 643, ___ AD 2d ___ (1992)].

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 in most circumstances disclose nothing regarding the nature of a conversation. Further, even thought 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 might 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, witnesses or potential witnesses or perhaps others, disclosure of the numbers might constitute and unwarranted invasion of personal privacy.

In addition, a third ground for denial may also be relevant. Specifically, §87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." In the context of the duties of an office of district attorney or other law enforcement agencies, §87(2)(f) might properly be asserted in a variety of contexts.

With respect to telephone logs or financial records, I believe that a similar analysis would be applicable. In the case of those records, it is assumed that names would appear and that names and perhaps other details could be deleted, when appropriate, pursuant to §87(2)(b), (e) or (f), depending upon the effects of disclosure in accordance with those provisions.

The final ground for denial of possible relevance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." In this regard, §190.25(4) of the Criminal Procedure Law states in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision 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."

It is noted that subdivision (3) of §190.25 makes reference to a district attorney. To the extent that §190.25 of the Criminal Procedure Law is applicable, I believe that it would exempt records from disclosure.

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. In the context of your request, there may be instances in which records no longer exist, for they relate to events that occurred several years ago.

Section 89(3) also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 requests, I must admit to being unfamiliar with the record-keeping systems of the District Attorney's office; whether that agency has the ability to locate and identify all of the records sought in the manner in which you requested them is unknown to me. It is possible, however, that based upon its filing or indexing mechanisms, certain aspects of your request might not have reasonably described the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas H. Brandt, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7295

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 17, 1992

Mr. Ben Crisses
[redacted]

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

Dear Mr. Crisses:

I have received your letter of August 5 and a denial of a request for records by the attorney for the Village of Great Neck Housing Authority.

The nature of the records that you requested is not entirely clear. Based upon the response, information sought pertains to an employee of the Authority, and the denial is based upon a contention that disclosure would constitute an unwarranted invasion of personal privacy. You wrote, however, that you are "under the impression that this information is readily available to the public since these positions are publically [sic] advertised as to duties, salaries, etc." You also wrote that "[i]f payroll information is unavailable/denied, surely attendance/time information should be public."

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

For the following reasons, I believe that both payroll and attendance or time records must be disclosed.

First, 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 §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 of other governmental 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 corporation, and §555 of the Public Housing Law specifies that the Village of Great Neck Housing Authority "shall constitute a body corporate and politic." Since the definition of "agency" includes public corporations, I believe that the Village of Great Neck 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 attendance records or time sheets, as well as payroll records, based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

Of significance is §87(2)(g), which permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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.

Attendance and payroll records could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning the issue of leave time or absences, the times that employees arrive at or leave work, or which identify employees by name and salary would constitute "statistical or factual" information accessible under §87(2)(g)(i).

I point out that, 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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries, as well as attendance records, must be disclosed.

Of relevance is §87(2)(b), which 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.

In a decision dealing with attendance records that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights 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)].

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an

unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates 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 §87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

Lastly, in affirming the Appellate Division decision in Capital Newspapers, 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 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" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, it is clear in my view that payroll and attendance records must be disclosed under the Freedom of Information Law.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Authority and its attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Village of Great Neck Housing Authority
Jack D. Tillem

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7296

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 18, 1992

Mr. Terence Murphy
88-A-2495
Southport Correctional Facility
P.O. Box 2000
Pine City,
NY 14871-2000

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

Dear Mr. Murphy:

I have received your letter of August 10 in which you sought my comments concerning a request directed to the calendar clerk of the Westchester County Court. In response to the request, you were informed that the materials involved "internal office records" and that they are exempt from the Freedom of Information Law.

In this regard, the Freedom of Information Law pertains to records of an agency, and the term "agency" is defined in §86(3) of that statute to include:

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

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

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

As such, the courts and court records are not subject to the Freedom of Information Law.

Further, while court records may often be available under various statutes, those statutes do not include provisions analogous to §89(4)(a) of the Freedom of Information Law, which permits an applicant to seek an administrative appeal of a denial.

In short, the courts and court records fall outside the coverage 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- 7297

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 18, 1992

Hon. Christine Kane
Clerk
Steuben County Legislature
County Office Building
3 East Pulteney Square
Bath, NY 14810

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

Dear Ms. Kane:

I have received your letter of August 4, which reached this office on August 12.

You wrote that when a person "files a 'Statements Access Request' which is similar to a Freedom of Information Request to view the Ethics Financial Disclosure Statement of an individual", the regulations of the Steuben County Ethics Board prohibit the Board from notifying the filer of the Financial Disclosure Statement that a request has been made or the identity of the person who made the request. You added that if the person who filed the statement "makes a written request of the Ethics Board to be notified anytime they are the subject of a request they can be so notified but still cannot know the identity of the requester."

You have asked whether the subject of a disclosure statement may view or copy a request for his or her statement under the Freedom of Information Law.

First, under §810 of the General Municipal Law, I believe that a political subdivision, such as a county, has two options regarding the filing of financial disclosure statements. They can be filed with the Temporary State Commission on Local Government Ethics, or locally, with a county board of ethics, for example. While I believe that the Temporary State Commission may disclose its records only in accordance with §813(a)(18) of the General Municipal Law, the records maintained by a local board of ethics are in my view subject to the Freedom of Information Law. Enclosed is a copy of a recent advisory opinion that dealt exhaustively with the issue.

The foregoing is not intended to suggest that all records of a local board of ethics must be disclosed, for various records or portions of records could likely be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law.

Second, with respect to your question, 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, §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 or a financial disclosure statement that is available to any member of the public, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2130
FOIL-AO-7298

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 19, 1992

Ms. Julianne Russell
Secretary
Board of Trustees
Julia Butterfield Library
Morris Avenue
Cold Spring, NY 10516

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

Dear Ms. Russell:

I have received your letter of August 12 in which you raised questions concerning the Freedom of Information Law and the Open Meetings Law in relation to the Julia Butterfield Library and its Board of Trustees.

By way of background, you wrote that the Julia Butterfield Library, an association library, was established through Julia Butterfield's will in 1913. The Library's income is derived from investment of monies in the will and public funding, which accounts for approximately 43% of its budget. As a result of the recent elimination of a position "due to financial constraints", you have received requests for the last two annual budgets, the Library's charter, a financial report and a budget statement.

In relation to the foregoing, you raised the following questions:

> "1. What is the difference between an Association Library and a Public Library?
>
> 2. What are our legal obligations for providing these documents and others, including minutes of the Board, first as an Association Library with the above cited funding and secondly, under the provisions of the Freedom of Information Act?
>
> 3. What are our legal responsibilities for informing the public of our meetings,

> advertising and holding open meetings, and putting the public on the agenda?

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §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 of other governmental 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 maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Cold Spring within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253

> of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law. This is not suggest that you could not disclose all or part of the records sought, but rather that the records are not subject to disclosure under the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to association libraries has arisen in other instances, perhaps because a companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states that:

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

> provisions of article seven of the public officers law. Provided, however, and notwithstanding the provisions of subdivision one of section ninety-nine of the public officers law, public notice of the time and place of a meeting scheduled at least two weeks prior thereto shall be given to the public and news media at least one week prior to such meeting."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with that statute.

I point out that the Open Meetings Law has been renumbered since the enactment of §260-a of the Education Law and that §104, formerly §99, deals with notice of meetings. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

When read in conjunction with §260-a of the Education Law, if a meeting is scheduled at least a two weeks in advance, notice must be given to the news media and posted at least one week prior to the meeting. If a meeting is scheduled at least one week but less than two weeks in advance, notice of the time and place must be given to the news media and to the public by means of posting not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place 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.

With respect to minutes, §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."

In view of the foregoing, I believe 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, but the language of section 106(3) is clear, in that minutes must be made available "within two weeks of the date of such meeting."

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 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Lastly, nothing in the Open Meetings Law pertains to agendas or "putting the public on the agenda". Further, with regard to public participation at meetings, 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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit 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 answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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 the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I hope that I 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 - 7299

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 19, 1992

Mr. Dennis J. Nolan
[redacted]

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

Dear Mr. Nolan:

I have received your letter of August 12, which relates to requests for records of the Office for the Aging.

You asked initially whether that agency forwarded copies of your appeal and its ensuing determination to this office as required by the Freedom of Information Law. Having reviewed the correspondence pertaining to the matter, you appealed on June 29 on the ground that your request had been constructively denied. This office received a copy of a letter sent to you by Fong Chan, Counsel to the agency, "in response to your letters dated June 8 and June 29." Although Mr. Chan did not characterize his response as a determination of your appeal, it appears that he considered it as such. As you requested, enclosed is a copy of that response.

Second, you asked "[w]hat steps are taken to enforce compliance with this section should an agency fail to comply with this provision of law." Similarly, if an agency fails to comply with the Freedom of Information Law and "establishes a policy of continued non-compliance", you questioned "what is done to bring that agency into compliance with the law."

In this regard, first, §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, 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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to enforce the Law or to compel an agency to grant or deny access to records. It is hoped, however, that advice rendered by this office often serves to enhance compliance with and understanding of the Freedom of Information Law.

And third, I do not believe that the Office for the Aging has established a policy of non-compliance. On the contrary, it is my belief that its staff acts in good faith in an effort to comply with and give effect to the Freedom of Information Law.

Lastly, as you requested, enclosed are copies of the provisions of Article 78 of the Civil Practice Law and Rules.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7300

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 20, 1992

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:

I have received your letter of August 17, as well as the correspondence attached to it.

You have sought an advisory opinion concerning a request made to the Rensselaer County Industrial Development Agency (RCIDA) for "copies of all invoices/itemized bills of IDA Attorney David Dudley which he has publicly indicated to exceed $400,000, since his appointment in 1986."

By way of background, you sought the records in question on July 6. In response to that request, the RCIDA Director, Glen King, forwarded "two itemized bills from David Dudley and Associates found in the RCIDA files." He added that "[n]o other bills exist in our files." You wrote to the Director again on July 16, indicating that the two itemized bills that were disclosed "reflect a small portion of the legal fees charged by the IDA Counsel on but one of the dozens of such projects since his appointment in 1986." As such, in a letter to the Director, you alleged that the RCIDA "neglected to collect those bills which Mr. Dudley obviously submitted for payment and which he acknowledges total $401,000 and which any competent attorney would retain a record of somewhere in his law firm's files." Your statement, therefore, suggests that although RCIDA might not maintain the records sought, Mr. Dudley, in his capacity as its attorney, maintains those records. In response to that letter, the Director wrote that he "already responded to your FOI request." You considered that to be a denial, and you appealed on August 3. On August 11, the Director acknowledged the receipt of the appeal and wrote that the "appeals process for the RCIDA requires that the Agency Board review the appeal and render a decision", and that the Board would consider the appeal at its next meeting. In your final item of correspondence, which is dated August 17, you referred to

§89(4)(a) of the Freedom of Information Law pertaining to the right to appeal and suggested that a decision to be rendered by the Board at its next meeting would be inconsistent with that provision.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §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."

Section 856 of the General Municipal Law deals generally with industrial development agencies, and subdivision (2) states in part that "[a]n agency shall be a corporate governmental agency, constituting a public benefit corporation". Section 66(1) of the General Construction Law states that a "public benefit corporation" is a "public corporation". Further, section 903-d of the General Municipal Law specifically established the "Rensselaer County Industrial Development Agency" as "a body corporate and politic" subject to the requirements of Article 18-A of the General Municipal Law. Based on the foregoing, I believe that the RCIDA is an "agency" required to comply with the Freedom of Information Law.

Second, in my opinion, the physical possession by RCIDA of the records sought, or the absence thereof, is not necessarily determinative of rights of access. If your assumption is correct, that the attorney for RCIDA maintains the remainder of the records sought, I believe that those documents would be subject to rights conferred by the Freedom of Information Law.

As indicated previously, the Freedom of Information Law pertains to agency records, and section 86(4) of that statute defines the term "record" expansively to include:

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

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that

dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

From my perspective, based upon its specific language, the definition of "record" includes not only documents that are physically maintained by an agency; it refers to documents are that are "kept, held, filed, produced or reproduced by, with or for an agency." Again, if your assumption is accurate, the records kept by the attorney would be maintained in his capacity as the attorney for RCIDA. Why that agency does not possess records of payments made to its attorney is unknown to me; however, if the attorney maintains those documents for, on behalf of or in his capacity as attorney for the agency, I believe that they would fall within the coverage of the Freedom of Information Law.

Although different from the instant situation, an analogy might be made between this case and the judicial interpretation of the Freedom of Information Law concerning records prepared by outside consultants retained by agencies. When an agency lacks the

resources, staff or expertise needed to develop opinions or obtain facts concerning a function to be carried out by government, it might retain a consultant to provide needed expertise. Even though consultants or consulting firms may be private entities rather than governmental entities, it has been found that the records prepared by those entities or firms should be treated as if they were prepared by an agency. As stated by the Court of Appeals:

> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material" even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed in the same manner as a record prepared by the staff of an agency. I would contend that a consultant's report, information "produced for" an agency, would fall within the scope of the Freedom of Information Law even if it is in the physical possession of a consultant rather than the agency. Any other conclusion would, in my opinion, serve to negate the effect of the decision rendered by the Court of Appeals.

Moreover, in a decision cited earlier, the Court of Appeals discussed the scope and intent of the Freedom of Information Law and found that:

> "Key is the Legislature's own unmistakably broad declaration that, '[as] state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability *wherever and whenever* feasible' (emphasis added; Public Officers Law, section 84).

> "...For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester-Rockland Newspapers, supra, at 579].

To be consistent with the intent of the Freedom of Information Law and its broad interpretation by the state's highest court, I believe that the RCIDA must give effect to the Law so as to "extend public accountability wherever and whenever feasible."

If the attorney in question maintains records for or on behalf of RCIDA, that agency should in my opinion direct him to release records to the extent required by the Freedom of Information Law, or, alternatively, the agency could obtain the records sought or copies thereof from the attorney for the purpose of reviewing them and determining the extent to which the Freedom of Information Law requires disclosure.

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

In my opinion, bills, vouchers, contracts, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable. With specific respect to payments to attorneys, I point out that, while the communications between an attorney and client are often 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 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 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". 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. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys should be disclosed.

Lastly, since you appealed a denial of your request on August 3 and you were informed that the RCIDA Board would determine the appeal at its next meeting, I point out that §89(4)(a) of the Freedom of Information Law imposes a limitation on the time in which an agency must respond to an appeal. The cited provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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: Glen King, Director
Joanne DiLorenzo
Mark Hammond
Joe Picchi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7301

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 20, 1992

Ms. Laura R. Johnson
Special Litigation Unit
The Legal Aid Society
Criminal Defense Division
15 Park Row - 10th Floor
New York, NY 10038

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

Dear Ms. Johnson:

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

According to your correspondence, several months ago, you submitted a request to the Office of the New York County District Attorney for "records that reflected (1) the number of pending cases in which formal accusatory instruments had been filed by each of two specialized divisions within the District Attorney's Office; and (2) the particular court part to which each pending case filed by those two divisions was assigned." Although the data sought is maintained in its computer system, the agency denied the request on the ground that it does not "compile or maintain the particular statistical information sought" and that it is not obliged to create a record in response to a request. Your ensuing appeal was denied on essentially the same basis, and you received a "summary of the steps required to generate the information" that you requested.

You wrote that, from your perspective, "the primary issue here is the question of when using a computer to retrieve information constitutes creating a 'new' record." Based on the summary of steps need to generate the data described by the District Attorney's office, the computer manager in your office estimated that "executing the search described by the D.A. would take roughly 18 keystrokes and a minute or two at most." Further, you enclosed a copy of a portion of an affidavit prepared by the District Attorney in an unrelated matter that contains information analogous to that requested and which suggests the agency does and can generate the data.

You have requested my views concerning the propriety of the denial. In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. 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. Moreover, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than ten years 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)].

Second, 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. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. 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 or disk. 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. The latter kind of situation would be similar to that found in Guerrier v. Hernandez-Cuebas [165 AD 2d 218 (1991)], which was cited in the correspondence from the District Attorney. In Guerrier, although the agency maintained the information sought in its computer, the agency did not "have a computer program that would analyze the relevant data and compile statistical information" that had been requested (id., 219).

However, if in the case of your request, the District Attorney's office has the ability, based upon its existing programs, to generate or retrieve the data sought, particularly if the process is as simple as your computer manager suggests, I believe that it would be obliged to do so 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: Gary J. Galperin, Assistant District Attorney
Irving B. Hirsch, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7302

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 20, 1992

Mr. Anthony Jones
85-A-3616 A-8-38
Auburn Correctional Facility
135 State Street
Box 618
Auburn, NY 13024-9000

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

Dear Mr. Jones:

I have received your letter of August 11 concerning your unsuccessful efforts in proceedings before the Parole Board and a denial of your request for a copy of a district attorney's recommendation forwarded to the Board. You have sought my comments on the matter.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, this office has neither the authority nor the expertise to consider issues involving determinations relating to parole. However, I offer the following comments concerning the denial of the request for the recommendation offered by the district attorney.

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 in my view is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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. Assuming that the record submitted by the district attorney consists of a recommendation, that record could in my opinion be withheld pursuant to §87(2)(g) of the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1803

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 21, 1992

Mr. Edward Feldman
Attorney At Law
107 West 86th Street
New York, NY 10024

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

Dear Mr. Feldman:

I have received your letter of August 14 in which you sought an advisory opinion in an effort to obviate the need for litigation.

The issues that you raised involve:

> "1. access to Real Property Tax Assessment Rolls,
>
> 2. permissible charge for retrieving same (actual cost of reproduction) and
>
> 3. the requirement to reproduce requested file from existing file."

In this regard, I offer the following comments.

First, by way of background, 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. 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 more than ten years 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)].

Second, 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. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. 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 or disk. 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 information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

One of the decisions referenced in the correspondence appears to be relevant to the matter at issue. In Brownstone Publishers Inc. v. New York City Department of Buildings, the question involved 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 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.
>
> "Public Officers Law [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" [166 Ad 2d, 294, 295 (1990)].

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. When records are accessible under the Law, §87(2) specifies that they are available for inspection and copying. Further, §89(3) requires that agencies prepare copies of accessible records upon payment of the appropriate fee.

With respect to assessment rolls, although those records identify owners of real property, judicial decisions in my view indicate that such records must be disclosed.

By way of background, §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. Nevertheless, 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 or equivalent records 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)(1)). 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 an assessment roll or its equivalent should be disclosed. I point out 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].

Lastly, with regard to fees, §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 cent 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 I interpret the language quoted above, unless a different statute provides direction, the first clause provides that an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches. The next clause, which deals with the "actual cost of reproduction", pertains to "other" records, i.e., those records that cannot be photocopied, such as photographs, tape recordings, computer tapes or disks, etc., or those records that are larger than nine by fourteen inches. With respect to those records, the regulations promulgated by the Committee on Open Government indicate that the actual cost of reproduction "is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries" [21 NYCRR §1401.8(c)(3)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Josette Polzella, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7304

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 31, 1992

David C. 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, unless otherwise indicated.

Dear Mr. Becker:

As you are aware, I have received your letter of August 14, pertaining to a request for records of the State Education Department.

Since you referred to delays in responding to requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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)].

Although the other issues that you would relate to the dissemination of information by libraries, they are largely irrelevant to the Freedom of Information Law and are, therefore, beyond the jurisdiction of this office.

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-7305

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 31, 1992

Mr. Robert E. Koller
[redacted]

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

Dear Mr. Koller:

I have received your letter of August 14, in which you requested assistance in obtaining a copy of the resume of the Superintendent of the Sharon Springs School District.

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 §87(2)(a) through (i) of the Law.

Second, in my opinion, the only relevant basis for denial is §87(2)(b), which authorizes an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first of which was cited as the basis for denial. That provision states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

In my opinion, the provisions cited above might serve to enable an agency to withhold some aspects of a resume. Nevertheless, it is likely that other aspects of a resume must be disclosed.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers

employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard 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 a their 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); 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); 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].

With respect to access to a resume or application of a public officer or employee, if, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications 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 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 resumes or similar records 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 §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.

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: Mr. Wissick, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7306

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 31, 1992

Betty Andrix
[redacted]

The staff of the Committee 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. Andrix:

As you are aware, I have received your letter of August 13, concerning a denial of a request by the Perry Central School District of the names, addresses and dates of birth of students in the ninth through twelfth grades. In addition, you informed me by phone that you appealed the denial but received no response as of August 21.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89 (3) of the statute states in part that an agency need not create a record in response to a request. Therefore, if, for example, the District maintains no list of the names and addresses of the students that you categorized, it would not be obligated to prepare such a list on your behalf.

Second, 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 Education Rights and Privacy Act (FERPA), 20 U.S.C. §1232g.

In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA 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 students or parents of students and their addresses 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 student, or the students as the case may be.

Since you referred to an unanswered appeal, I point out that §89(4)(a) of the Freedom of Information Law imposes a limitation on the time in which an agency must respond to an appeal. The cited provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 applicable law and that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Heller, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7307

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 1, 1992

Mr. Jorge Sprau
#86-A-7925
Attica Correctional Facility
Attica, NY 14011-0149

Dear Mr. Sprau:

I have received your letter of August 19, in which you appealed an alleged denial of a request by the New York City Police Department.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office is not empowered to render determinations following appeals or to compel an agency to grant or deny access to records.

The provision pertaining to the right to appeal a denial is found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

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

Having reviewed the correspondence attached to your letter, the Department's records access officer indicated that a search for the record sought was made and that the record could not be

located. If that is so, I do not believe that his response could be characterized as a denial of access. Rather, it appears that the Department could neither grant nor deny access to the requested record because that record could not be found.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Capasso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1308

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 2, 1992

Carl E. Knight
#90-A-6022
Green Haven Correctional Facility
Drawer B
Stormville, N.Y. 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. Knight:

I have received your letter of August 10, and the correspondence attached to it.

As I understand the situation, you requested records relating to your arrest from the City of Middletown Police Department. Although an arrest report was sent to you, you were informed that in order to obtain other records that you requested, "you must petition the City of Middletown Court for a subpoena to release these records". You later applied to the court to accept a letter as a subpoena. You have asked for my views on the matter.

In this regard, I offer the following comments.

First, your correspondence does not indicate the nature of the records that you requested. Therefore I cannot ascertain whether the response by the Police Department was accurate in terms of rights of access under the Freedom of Information Law.

Second, the Freedom of Information is applicable to all records of an agency, such as a municipality or its police department. 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. This is not to suggest that all records that you requested must be disclosed under the Freedom of Information Law, for rights of access under that statute would be dependent upon the nature and content of the records sought, as well as the effects of disclosure.

Third, as indicated in previous correspondence, when a request for records is denied, a denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. To reiterate commentary offered earlier, that provision states in relevant part that:

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

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)].

Therefore, when a request is denied, the person issuing the denial is required to inform 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.

Lastly, while I am not an expert on the subject, I do not believe that a person can require the production of records simply by attempting to obtain them by means of a subpoena. Various qualifications or requirements must be met before records can be acquired by means of subpoenas. While it is possible that the records sought might not be obtained under the Freedom of Information Law, it appears that the response by the Police Department was not entirely inadequate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Louis Ogden
City Court, City of Middletown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7309

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 2, 1992

Mr. Terence Murphy
88-A-2495
Southport Correctional Facility
Pine City, NY 14871-2000

Dear Mr. Murphy:

I have received your letter of August 17. As in the case of previous correspondence, your inquiry concerns your ability to obtain a monograph authored by a faculty member at Skidmore College relating to inmate behavior in college programs.

As stated in my earlier response, Skidmore College, a private institution, is not an "agency" subject to the Freedom of Information Law. Therefore, if it is the publisher of the work, it would not be obliged to disclose the work under the Freedom of Information Law.

You asked whether the Inmate Higher Education Program of New York State can be considered an agency. In this regard, I have contacted the Bureau of Education and Vocational Training at the Department and was informed that the Inmate Higher Education Program is operated under that office. Consequently, the program in question is run by an agency, and its records would be subject to rights conferred by the Freedom of Information Law. The address of that office is:

Bureau of Education and Vocational Training
NYS Department of Correctional Services
State Campus
Correctional Services Building
Albany, NY 12226

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-7310

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 2, 1992

Mr. William Barber
89-A-9497 (J-3-23)
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. Barber:

I have received your letter of August 17 in which you sought information concerning delays in responses 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, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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: Robert Johnson, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7311

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 2, 1992

Mr. Paul D. West, Sr.
[redacted]

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

Dear Mr. West:

I have received your letter of August 15 which pertains to your request for records relating to the development of the budget by the Johnsburg Central School District.

As I understand the facts, various preliminary figures were presented at open meetings and shown to the public on transparencies with the use of a projector. Having discussed the matter with the Superintendent, I was informed that, during the meetings in question and as part of the process, she wrote in figures with marking pens in order to update what had previously been prepared and disclosed. The Superintendent also indicated that the District has disclosed final or current figures to you, and we agreed that the preliminary figures that you want are public records. Nevertheless, because the different figures were used and developed our the course of a number of meetings, she informed me that she has offered to disclose all of the records she maintains involved in your requests, but that she has been unable to ascertain which particular records you want.

In short, based upon my discussions with the Superintendent, there is no unwillingness to disclose the records to you; the issue appears to involve a designation of the records you seek.

In this regard, §89(3) of the Freedom of Information Law states that an applicant for records must "reasonably describe" the records sought. As such, a request should include sufficient detail to enable an agency to locate and identify requested records. If you can meet the standard of reasonably describing the records, I believe that the District would be willing and obliged to disclose them to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ann M. Adams, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 732

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 3, 1992

Mr. Dennis Brockenshire
#92-B-1168
Elmira Correctional Facility
P.O. Box 500
Elmira, N.Y. 14902-00500

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

Dear Mr. Brockenshire:

I have received your recent letter, which reached this office on August 20.

You asked whether you can obtain criminal charges pertaining to a particular individual and records "of when he was in Cattaraugus County Jail". It is your belief that charges against him may have been dismissed because he testified in your case.

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, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §160.50 of the Criminal Procedure Law. In brief, that provision generally requires that when charges are dismissed in favor of an accused, the records pertaining to the charges or arrest become confidential. Therefore, if the charges pertaining to the person in question were dismissed, it is likely that records relating to his arrest would be outside the scope of rights conferred by the Freedom of Information Law.

On the other hand, if charges are still pending or if the person in question was convicted, I believe that records of those charges would be available from the arresting agency.

Lastly, again assuming that charges have not been dismissed, of possible relevance to the matter is §500-f of the Correction Law, which pertains to 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."

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-1313

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 3, 1992

Mr. Craig Steven Rose
#91-A-5838
Clinton Correctional Facility
Clinton Annex, Box 2002
Dannemora, N.Y. 12929-2002

Dear Mr. Rose:

I have received your letter of August 29, in which you appealed an alleged denial of access to records by the Clinton Correctional Facility.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee cannot compel an agency to grant or deny access to records and it is not empowered to determine appeals.

The provision concerning the right to appeal a denial of a request for records is §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1314

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 3, 1992

Mr. Anthony F. Logallo
90-B-1210
Clinton Correctional Facility
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. Logallo:

I have received your letter, which was received on August 20.

You have asked whether an adoptee "can obtain information regarding his biological brothers and sisters who were never adopted."

In this regard, as indicated in an opinion on June 19, records relating to adoptions are generally confidential pursuant to §114 of the Domestic Relations Law. Further, if an adoptee cannot obtain records identifying his or her biological parents, I question how the adoptee, absent the parents' names, would know where or how to obtain records about that person's biological siblings. If your question is whether confidential adoption records that include reference to an adoptee's biological siblings must be disclosed to the extent that they identify those siblings, I believe that the Domestic Relations Law would likely prohibit disclosure of those aspects of the records. Disclosure of those details would in my view tend to defeat the purpose of the statute.

As explained in previously, if records are exempted from disclosure by statute, the Freedom of Information Law would not serve as a basis for disclosure.

Lastly, as you requested, enclosed is a copy of the 1991 report of the Committee on Open Government. The 1992 report has not yet been prepared.

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- 7315

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 3, 1992

Mr. Carl Jones
90-A-8613 E-5-257
Drawer B
Stormville, NY 12582

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

Dear Mr. Jones:

I have received your letter in which you sought assistance in obtaining copies of your trial and grand jury minutes from the Westchester County Court.

In this regard, the Freedom of Information Law pertains to records of an agency, and the term "agency" is defined in §86(3) of that statute to include:

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

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

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

As such, the courts and court records are not subject to the Freedom of Information Law. While court records are often available under other statutes, the Freedom of Information Law would not represent the appropriate vehicle for attempting to obtain them. Further, in view of your indigency, it is suggested that you discuss the matter with your attorney or perhaps a representative of a legal aid society.

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-7316

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 8, 1992

Peter L. Dziedzic
[redacted]

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

Dear Mr. Dziedzic:

I have received your letter of August 19, as well as the materials attached to it.

You have sought an advisory opinion concerning the propriety of a partial denial of access to EA 3100 forms by the attorney for the Town of Oswego. In brief, the front sides of the forms, with the exception of those portions involving sales data, were found to be available, for they include "information that is readily available or is able to be observed from outside the residence and impacts no privacy right interest." The reverse sides of the form were withheld, however, based on a contention that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §§87(2)(b) and 89(2) of the Freedom of Information Law. That information, according to the Town's attorney, "can readily be obtained only from an internal visual inspection of the home or based upon information imparted directly from an owner or occupant of said property".

In this regard, I offer the following comments.

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

Second, the denial of access to portions of the forms indicating sales data was, in my view, likely proper. 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 prices of parcels when real property is transferred.

To give effect to §574(5) of the Real Property Tax Law, I believe that information derived from EA 5217 forms that is transferred to other records should be considered confidential to the same extent as that statute confers confidentially with respect to the original forms [see Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)]. Any different result would, in my opinion, essentially nullify the direction given in §574(5). Further, while the Freedom of Information Law grants broad rights of access to records, the first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". In this instance, §574(5) of the Real Property Tax Law, a statute, would exempt sales data from disclosure, except as otherwise provided in that statute. If EA 5217 forms or other records containing information derived from the forms are requested in conjunction with a grievance (i.e., the administrative review of an assessment), the confidentiality restrictions otherwise imposed by §574(5) would not apply. In that kind of case, I believe that sales data contained in the forms would be accessible.

Third, records 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 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).

Due to the similarity of the records found to be available in Sears Roebuck and the data contained on the second side of the forms in question, I believe that those portions of the forms are accessible under the Freedom of Information Law. I point out that in another case cited earlier, Property Valuation Analysts, a 1990 decision, it was conceded that property cards were available.

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

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

If my assumption is accurate, that the second sides of the forms in question are the equivalent of the property cards considered in Sears Roebuck and Property Valuation Analysts, again, I believe that they must be disclosed. Since that equivalent data was determined to be available judicially, under the Freedom of Information Law and other provisions that preceded its enactment, nothing in the Freedom of Information Law could in my opinion be cited to 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald E. Todd
W. David White, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7317

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 9, 1992

Mr. Kevin Conlon
The Gazette Newspapers
2345 Maxon Road
Schenectady, NY 12301-1090

<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. Conlon:

I have received your letter of August 20 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you were denied access to records by the Division of State Police relating to a criminal case involving Mr. Garry Douglas. Various news media accounts indicate that an investigation was conducted with respect to Mr. Douglas, an employee of the Village of Waterford, and his handling of the "Waterford Village Festival Account." You wrote that the Division of State Police relied on §160.50 of the Criminal Procedure Law as the basis for its denial. However, Mr. Douglas entered a plea of guilty involving official misconduct.

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 §87(2)(a) through (i) of the Law.

Second, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is §160.50 of the Criminal Procedure Law, which generally requires that records relating to an arrest be kept confidential when charges have been dismissed in favor of an accused. In this instance, since Mr. Douglas entered a plea of guilty, §160.50 would in my opinion be inapplicable, and I do not believe that it would serve as a valid basis for denial of your request.

Third, although the reason offered by the Division of State Police would not in my opinion justify a denial, there may be other provisions relevant to a determination of rights of access.

Perhaps most important in relation to records pertinent to a law enforcement investigation is §87(2)(e) of the Freedom of Information Law. That provision permits an agency to withhold records that:

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

It is emphasized that not all records used, reviewed or relevant to an investigation might have been compiled for law enforcement purposes; some might have been prepared in the ordinary course of business. For example, books of account, ledgers, bills, minutes of meetings and similar documents might have been used in the investigation in question. Those kinds of records, however, would have been prepared independent of the investigation, and I do not believe that §87(2)(e) could be asserted to withhold those kinds of records. In a situation in which minutes of meetings of a village board of trustees were transferred to a district attorney pursuant to a grand jury subpoena and were later requested by the village clerk, the subject of the investigation, it was found that those records were available, for they could not be characterized as having been "compiled for law enforcement purposes" (King v. Dillon, Supreme Court, Nassau County, December 19, 1984).

To the extent that the records sought were compiled for law enforcement purposes, an agency may withhold them only to the extent that the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e) would arise by means of disclosure. At this juncture, since Mr. Douglas pleaded guilty, it would appear that the investigation has ended. If that is so, neither subparagraphs (i) or (ii) of §87(2)(e) would be applicable. With respect to §87(2)(e)(iii), if the records identify confidential sources, for example, names or other identifying details could be deleted. Moreover, to qualify as a confidential source, it has been held that an individual must have been given a promise 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 with 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 §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); see also, Laureano v. Grimes, 579 NYS 2d 357, ___ AD 2d ___ (1992)].

Further, there is no indication in your correspondence that the disclosure would reveal non-routine criminal investigative techniques or procedures. In short, I believe that the ability to assert §87(2)(e) as a basis for denial, particularly after an investigation has been closed, is limited.

Also of potential significance is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Since I am unfamiliar with the contents of the records, it is unclear whether that provision may be applicable. However, where appropriate, names or other identifying details could be deleted from records that would otherwise be available to protect against unwarranted invasions of personal privacy [see Freedom of Information Law, §89(2)(a)].

The remaining ground for denial of possible relevance is §87(2)(g), which enables an agency to withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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 in the case of provisions discussed earlier, 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 subject 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) 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 lve 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)].

Similarly, the Court of Appeals has 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).

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, it is emphasized that the 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 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 courts 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 rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was 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 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" (id., 565-566).

As you requested, and in an effort to enhance compliance with and understanding of the Freedom of Information Law, and to obviate the necessity of engaging in litigation, a copy of this opinion will be forwarded to the Division of State Police.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Inspector, Public Access to Records

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7318

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 9, 1992

Helen A. Bartone
Office of County Clerk
County Office Bldg.
P.O. Box 1500
Fonda, N.Y. 12068-1500

Dear Mrs. Bartone:

I have received your letter of August 21, in which you asked that I comment with respect to a revised request form, as well as legality of charging "$1.00 per page for copies."

In this regard, I offer the following comments.

First, having reviewed the form, I believe that it is appropriate. The only change that might be made would be the inclusion of the business address and phone number of the County Attorney as the appeals officer.

It is noted, however, that in my view, an agency cannot require that a request be made on a prescribed form. The Freedom of Information Law, §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 requests" [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 possesses 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.

Second, with respect to fees for copies, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee in excess of twenty-five cents per photocopy, no such fee may be assessed.

By way of background, §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 of 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 is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

As you are aware in your capacity as County Clerk, there are a variety of circumstances in which statutes authorize you to charge fees that exceed twenty-five cents per photocopy (see e.g., Civil Practice Law and Rules, §§8020 and 8021). However, with respect to other offices in county government, it is rare that a statute authorizes the assessment of fees at a rate higher than twenty-five cents per photocopy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7319

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 9, 1992

Edward Feldman
Attorney at Law
107 West 86th Street
New York, N.Y. 10024

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

Dear Mr. Feldman:

I have received your letter of August 19, in which you requested an advisory opinion concerning access to real property valuation data described in 9 NYCRR 192-3.2.

In this regard, I offer the following comments.

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

Records 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 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).

Due to the similarity of the records found to be available in Sears Roebuck and the data in which you are interested, I believe that the data would be accessible under the Freedom of Information Law. I point out that in another more recent decision, Property Valuation Analysts, Inc. v. Williams [164 Ad 2d 131 (1990)], it was conceded that property cards were available.

Second, the regulations deal in part with data regarding the sale of real property. Here I point out that §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 prices of parcels when real property is transferred.

To give effect to §574(5) of the Real Property Tax Law, I believe that information derived from EA 5217 forms that is transferred to other records should be considered confidential to the same extent as that statute confers confidentially with respect to the original forms [see Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)]. Any different result would, in my opinion, essentially nullify the direction given in §574(5). Further, while the Freedom of Information Law grants broad rights of access to records, the first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". In this instance, §574(5) of the Real Property Tax Law, a statute, would exempt sales data from disclosure, except as otherwise provided in that statute. If EA 5217 forms or other records containing information derived from the forms are requested in conjunction with a grievance (i.e., the administrative review of an assessment) or the judicial review of an assessment, the confidentiality restrictions otherwise imposed by §574(5) would not apply In that kind of case, I believe that sales data would be accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2137
FOIL-AO- 7320

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 10, 1992

Ms. Jeannette Armstrong
Springfield Town Clerk
P.O. Box 235
Springfield Center, NY 12468

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

Dear Ms. Armstrong:

I have received your letter of August 27, as well as the materials attached to it.

The issue that you raised involves the inclusion of reference to a discussion in minutes of a meeting that you prepared in your capacity as Town Clerk of the Town Springfield. The correspondence indicates that Town Board meetings are scheduled to begin at 7 p.m. The discussion in question began at that time, but before the meeting was officially called to order, concerning a refund of a boat slip reservation that was effectively revoked. At the end of that discussion, a motion was made and seconded to raise the issue again after the arrival of the Town Attorney. You wrote that the Supervisor said "all in favor? Passed" and you added that "[a]ll did not vote but the Supervisor said passed so it must have been the majority."

Nevertheless, the Supervisor has "directed [you] to strike everything written before the call to order at 7:40 p.m." In a related issue, you were told to strike a paragraph in the minutes concerning a zoning matter, even though a tape recording of the meeting indicates that "three of the Board members were involved in an important discussion that lasted several minutes."

The question is whether the deletions from the minutes ordered by the Supervisor must be made.

In this regard, I offer the following comments.

First, on the basis of correspondence, it is clear that the Board was scheduled to meet at 7 p.m. and that it began its deliberations, as a body, at that time. From my perspective, whether or not the meeting was "officially" called to order at that time is largely irrelevant. To characterize the gathering as

something other than a meeting because there was no call to order would, in my view, place form over substance in a manner inconsistent with the Open Meetings Law. Further, a motion was made and carried during the period prior to the official call to order.

I point out 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)].

It is noted that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of

> this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. In this instance, if the Board intended to convene at 7 p.m. and a majority did so for the purpose of discussing public business, I believe that the meeting began at that time, even though it might not officially have been called to order until 7:40.

Second, §30 of the Town Law is entitled "Powers and duties of town clerk" and states in part that the 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." Therefore, as town clerk, I believe that you have a responsibility to maintain minutes that are "complete and accurate". Further, a town supervisor does not in my opinion have the authority to alter minutes or to direct the town clerk to make deletions from minutes. In short, the preparation of minutes is a "power and duty" of a clerk, not a supervisor or a board.

Further, even if the minutes did not make reference to the matters of discussion to which you alluded, it is noted that a tape recording of an open meeting is a record accessible under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, Dec. 27, 1978). In addition, it has been held that any person may tape record open meetings [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)].

Lastly, with respect to a record of votes by the Board, §87(3)(a) of the Freedom of Information Law requires that each agency, such as a town board, shall maintain "a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, when votes are taken on motions, for example, a record must be prepared, generally as part of the minutes, that indicates how each member cast his or her vote. Similarly, §63 of the Town Law states in part that "[t]he vote upon every question shall be taken by ayes and noes..."

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 7321

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 10, 1992

Charles Van Slyke
[redacted]

The staff of the Committee on Open 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 Slyke:

I have received your letter of August 17, which reached this office on August 26.

You have questioned the propriety of the denial of your request for the resume submitted by the Superintentent of the Riverhead Central School District when he applied for that position. The documentation attached to your letter indicates that the request was denied pursuant to §87(2)(b) 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 §87(2)(a) through (i) of the Law.

Second, in my opinion, the only relevant basis for denial would be the provision cited by the records access officer, §87(2)(b), which authorizes an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first of which states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

In my opinion, the provisions cited above might serve to enable an agency to withhold some aspects of a resume. Nevertheless, it is likely that other aspects of a resume must be disclosed.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard 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 a their 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); 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); 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].

With respect to access to a resume or application of a public officer or employee, if, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications 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 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 resumes or similar records 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 §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.

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:pb

cc: Dr. Lipsky, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7322

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 9, 1992

Nelson Luna
Din 88A0029
Green Haven Correctional Services
Drawer B, RT. #216
Stormville, N.Y. 12582

Dear Mr. Luna:

I have received your recent letter in which you asked whether this office could release records concerning retired employees of the Department of Correctional Services. You also referred to the possibility of retaining this office "in a legal matter."

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 custody or control of records generally, such as those in which you are interested. Similarly, this office cannot compel an agency to grant or deny access to records. However, I offer the following comments.

First, a request for records under the Freedom of Information Law should be made to the agency that maintains the records. Under regulations promulgated by the Department of Correctional Services, a request for records maintained at a correctional facility may be made to the facility superintendent; for records kept at the Department's main offices, a request may be made to the deputy commissioner for administration.

Second, §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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7323

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 9, 1992

Terrence Webster
89-T-3845
P.O. Box 51 (D-5-9)
Comstock, N.Y. 12821

Dear Mr. Webster:

I have received your letter of August 21, as well as the correspondence attached to it.

In brief, you wrote that you have attempted for some time to obtain a copy of a record from the Office of the Kings County District Attorney. Officials of that agency have neither granted nor denied access to the record in question but rather have indicated that, despite their efforts, they have been unable to locate the record. Most recently, you were informed that the search for the record was continuing, and that you would be contacted when it is found. You have requested assistance in the matter.

In this regard, an agency in my view can neither grant nor deny access to a record that it does not maintain or cannot locate. Under the circumstances, it appears that the Office of the District Attorney is engaging in a good faith effort attempt to locate the record. If it is determined that the record cannot be found, and if it is useful in your opinion to do so, you may request a certification to that effect under §89(3) of the Freedom of Information Law. That provision states in part, that when an agency cannot locate a record, an applicant 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".

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7324

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 10, 1992

Mr. Joel E. Taromino
[redacted]

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

Dear Mr. Taromino:

I have received your letter of August 12, which reached this office on August 27.

According to your letter, you submitted a request under the Freedom of Information Law to "Oswego County N.C.I.C." on or about July 6. As of the date of your letter to this office, you had received no response, and you have sought assistance in the matter.

In this regard, I offer the following comments.

First, although the entity in question appears to be part of Oswego County government, I am unaware of what "N.C.I.C." means. If it is an agency, the Freedom of Information Law would be applicable. The term "agency" is defined in §86(3) of the Freedom of Information Law to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental 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, assuming that it is an agency, I point out that the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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: Oswego County N.C.I.C.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7325

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 11, 1992

Mr. Curtis A. Morrison
92-A-5346 A-4-7
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. Morrison:

I have received your letter of August 24 in which you sought assistance in obtaining records under the Freedom of Information Law pertaining to your case from the Bronx County Supreme Court.

In this regard, it is noted 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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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

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

Based on 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 statutes often provide access to those records (see e.g., Judiciary Law, §255). It is suggested that you request the records under an applicable provision of law or 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

OML-AO 2139
FOIL-AO 7326

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 11, 1992

Mr. Clifford Richner, Publisher
Richner Publications, Inc.
379 Central Avenue
Lawrence, NY 11559

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

Dear Mr. Richner:

I have received your letter of August 31, as well as the materials attached to it. You have sought an advisory opinion concerning issues that have arisen in the Village of Hewlett Bay Park. One involves the denial of a request made under the Freedom of Information Law; the other pertains to the Open Meetings Law and the propriety of an executive session held by the Village Board of Trustees.

By way of background, you wrote that the Village Board "is currently considering whether to take, by eminent domain, the land commonly known as the Lawrence County Day School (LCDS) property." You added that:

> "This acquisition is controversial because the property was purchased by a group which intends to operate a parochial high school for Orthodox Jewish girls on the site. The Herald has taken the editorial position that the motivation for the proposed condemnation is not a suddenly recognized need for parkland in the village, but rather a desire to keep the Orthodox out.
>
> "The Village conducted a survey of its residents soliciting their opinion on what should be done regarding the LCDS property."

Having requested "surveys completed by the residents", the Village denied access in response to your initial request and the ensuing appeal, citing §87(2)(g) of the Freedom of Information Law in both instances.

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, §87(2)(g) pertains to "inter-agency" and "intra-agency" materials. 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 of other governmental 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, an agency is an entity of state or local government. Based on the definition of "agency", "inter-agency materials" would involve written communications between or among officials of two or more agencies; "intra-agency materials" would consist of communications between or among officials within an agency. When a member of the public, acting in that capacity, communicates with government, the communication, in my view, could not be characterized as "inter-agency or intra-agency materials", for that person neither is nor represents an agency.

In the context of your request, the records sought, "surveys completed by the residents", would have been exchanged or communicated between an agency, the Village, and residents. Since a resident would not constitute an agency, a response to a survey by a resident would fall outside of the scope of §87(2)(g), for it would not consist of inter-agency or intra-agency material.

In a case dealing with dissimilar facts but the same principle as that described above, the court referred to an advisory opinion prepared by this office concerning access to communications between a New York City agency and "outside parties" with whom the agency was negotiating. The court agreed with the opinion that §87(2)(g) was "not relevant because the communication sought is not between officials within an agency of the City or among officials of different agencies of the City" (Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Similarly, in rejecting a denial based upon §87(2)(g) involving correspondence between the New York City Bureau of Labor Services and private child care institutions, it was determined that those institutions "cannot satisfy the term 'agency' as defined in Public Officers Law §86(3)..."(Lowry v. Bureau of Labor Services, Supreme Court, New York County, March 9, 1984).

Based upon the foregoing analysis, I do not believe that §87(2)(g) is applicable as a basis for denial.

I am unfamiliar with the residents' responses to the survey. If, for example, they include names or addresses of those who responded, I believe that those identifying details could be withheld on the ground that disclosure would result an "unwarranted invasion of personal privacy" under §87(2)(b) of the Freedom of Information Law. If identifying details are included in the responses, they could be deleted from the records pursuant to §89(2)(a), and the remainder of the responses would be available, for no other ground for denial would be in my view be applicable. If no identifying details are included in the responses, I believe that the responses would be available in their entirely.

The second issue relates to the same controversy. You wrote that on August 18, the Board held a special meeting to discuss the LCDS property, and that, on the advice of its attorney, the Board entered into executive session on the ground that it would discuss "proposed, pending or current litigation." You added, however, that "[t]he only litigation cited was the application by the former owners of LCDS to construct swimming pools on the property", and that "[g]iven that the property has since changed hands and the new owners have not indicated any desire to construct swimming pools, citing this case as the basis for executive session was merely a ruse to avoid public scrutiny of their deliberations". You contended further that "to allow a government body to go into executive session when it is discussing a controversial subject on the theory that its decision is likely to provoke litigation in the future, would undermine the guiding purpose of the law..." You indicated that the village attorney also mentioned "the exemption for the proposed acquisition of real property."

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that the subject matter may properly be considered during executive sessions. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be

considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

One of the grounds for entry into executive session is §105(1)(d), which permits a public body to conduct 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 is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meeting' (Matter of Concerned Citizens 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)].

Therefore, unless the Board was discussing litigation strategy, it does not appear that §105(1)(d) could justifiably have been cited to conduct an executive session. Further, as indicated in the passage quoted above, the possibility that litigation might ensue would not constitute a valid basis for entry into executive session.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v.

Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981), emphasis added by court].

Lastly, since the Village Attorney alluded to a provision involving discussions relating to real property transactions, I point out that the exception concerning issues pertaining to such transactions is limited. Specifically, §105(1)(b) permits a public body to enter into an executive session to discuss:

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

Therefore, a public body may discuss the proposed acquisition of real property, for example, behind closed doors "only when publicity would substantially affect the value" of the property. Under the circumstances described in your correspondence, the location of the property in question and various issues relating to it are well known to the public. Consequently, I do not believe that publicity would have affected the value of the property or that §105(1)(h) could properly have been asserted as a basis for entry into executive session.

In an effort to enhance compliance with and understanding of the Freedom of Information Law and the Open Meetings Law,and to obviate the need to engage in litigation, a copy of this opinion will be forwarded to the Board of Trustees.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7327

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 11, 1992

Mr. Anthony Jones
85-A-3616
135 State Street
Box 618
Auburn, NY 13024-9000

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

Dear Mr. Jones:

I have received your letter of August 24 in which you expressed an interest in obtaining from the Division of Parole information relating to a "Full Board Case Review". The information sought includes the date of a hearing in which you were involved approximately seven years ago, the names of the Board members present, their determination and the reason for the 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.

Second, although you referred to certain provisions of regulations promulgated by the Division, I believe that §8005.21, entitled "Delinquent time case review", pertains to the hearing that you described. Further, insofar as the information in which you are interested exists, I believe that it would be available to you, for none of the grounds for denial would be applicable. However, I was informed by an official at the Division that the record of the hearing does not identify members of the Board who participated, for all or at least a quorum of the Board would be involved. In addition, although the determination would be available, I was told that the record does not include reasons for the determination.

I point out that the Freedom of Information Law pertains to existing records [see Freedom of Information Law, §89(3)]. Therefore, although the record maintained by the Division would apparently not include each item of information in which you are interested, there would be no obligation on the part of the agency to create a record containing the information 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

FOIL-AO 7328

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 14, 1992

Donald Calhoun
92-B-1473
Box 500
Elmira, N.Y. 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. Calhoun:

I have received your letter of August 24.

According to your letter, having requested trial transcripts under the Freedom of Information Law from the Oswego County Court Clerk, you were directed to contact the court reporter to seek the transcripts. Although you did so on July 27, you had not yet received a response as of the date of your letter to this office, and you asked for assistance in the matter.

In this regard, it is noted that the Freedom of Information Law is applicable to agency records. Section 86(3) of the statute defines that term "agency" to include:

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

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

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

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

It is suggested that your remind the court reporter of your

request or that you discuss the matter with your attorney.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 1329

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 14, 1992

John A. MacKinnon
[redacted]

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

Dear Mr. MacKinnon:

I have received your letter of August 26, and the correspondence attached to it.

You have complained with respect to an ongoing pattern of delays by the New York City Human Resources Administration in disclosing records sought under the Freedom of Information Law. By means of example, you enclosed a letter dated August 11 by that agency's records access officer in which he referred to "your various Freedom of Information Law (FOIL) requests dating from April 15, 1992 to June 10, 1992". He asked that you "forgive the long delay", and indicated that he hoped "to send a written [response in] the near future."

You have sought the "intervention" of this office. In this regard, as you may be aware, the Committee on Open Government is authorized to advise concerning the Freedom of Information Law. The Committee is not empowered to enforce the Law or to compel an agency to grant or deny access to records. However, in an effort to assist you, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §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 denies..."

In this instance, while the letter from the records access officer of August 11 might have acknowledged the receipt of your requests, his letter does not include an estimate of the date when your requests would be granted or denied as required by §89(3). In my opinion, 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 be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 direct your attention to a case involving a situation in which an applicant encountered continual delays that forestalled either a final grant or denial of access to records. When the applicant initiated a judicial proceeding, the agency contended that petitioner had failed to exhaust his or 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 within 30 days to the agency head as provided in Public Officers Law §89(4)(a) and, therefore, may not bring this proceeding.
>
> "The petitioner alleges that Public Officers Law §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 §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).

Enclosed is a copy of the decision cited above for your review, for the facts may be in some ways analogous to your experience.

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:pb
cc: Ralph Penington, Jr., Foil Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1330

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 14, 1992

Otis Hemmings
Southport Corr. Fac.
91-A-6284/P.O. Box 2000
Pine City, N.Y. 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. Hemmings:

I have received your letter of August 31.

You indicated that having made a request under the Freedom of Information Law to the Division of Criminal Justice Services on August 4, you received a response on August 10 stating that your date of birth would be needed to process the request. You forwarded that information on the following day, but you had received no further response as of the date of your letter to this office. You wrote that you "have no idea to whom or where" an appeal of a constructive denial of a request may be directed.

In this regard, the provision in the Freedom of Information Law pertaining to the right to appeal, §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 thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I believe that the person to whom you may appeal is Ms. M. Dawn Herkenham, Counsel to the Commissioner, Division of Criminal Justice Services, Executive Park Tower, Stuyvesant Plaza, Albany, NY 12203.

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-7331

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 15, 1992

Mr. G. Dupree
88-A-9843
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. Dupree:

I have received your letter of August 26.

Attached to your letter is an appeal addressed to Assistant Commissioner Rosenberg of the New York City Police Department in which you indicated that a request made to that agency had been denied on November 6, 1991. You wrote, however, that soon after the receipt of the denial, you were placed in solitary confinement and that your property was "withheld and-or misplaced, for the last nine months..." You explained that, for those reasons, you could not appeal until recently.

If your appeal is denied, you asked what the "next step" might be, and you sought assistance in obtaining the records, which you described as "UF-61 Investigation Reports" and "DD5-Forms."

In this regard, I offer the following comments.

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

Second, the provision in the Freedom of Information Law pertaining to the right to appeal a denial of access to records, §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 thereof designated by such head, chief

> executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Based on the foregoing, I believe that Assistant Commissioner Rosenberg could dismiss your appeal on the ground that it is untimely, for more than thirty days have elapsed since your request was denied. If she does so, you could resubmit your request to the records access officer, and begin the process again. Conversely, Assistant Commissioner Rosenberg could waive the requirements of §89(4)(a) and grant or deny access to the records in whole or in part. Insofar as an appeal results in a denial of access, the applicant may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [see Freedom of Information Law, §89(4)(b)].

Lastly, with respect to rights of access to records, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of 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 provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision 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 §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 §87(2)(e).

Another possible ground for denial is §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 §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 and communicated within the department or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld. However, factual information, such as the date of the destruction of evidence, would be available under §87(2)(g)(i), unless a different ground for denial could be asserted.

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 o 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. Further, although the courts are not subject to the Freedom of Information Law, court records are often available under other provisions of law (see e.g., Judiciary Law, §255) from the clerk of the court in which a proceeding was conducted.

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-7332

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 15, 1992

Mr. Marvin B. Mitzner
Davidoff & Malito
34th Floor
605 Third Avenue
New York, NY 10138

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

Dear Mr. Mitzner:

I have received your letter of September 3 in which you sought an advisory opinion concerning the propriety of a denial of access to a record by the Office of the Comptroller of New York City.

By way of background, you wrote that the Comptroller maintains a record in conjunction with the duties imposed by §328 of the New York City Charter, which is entitled "Registration of contracts by the comptroller". Subdivision c of §328 states that:

> "The comptroller may, within thirty days of filing of the contract with the comptroller's office, object in writing to the registration of the contract, if in the comptroller's judgment there is sufficient reason to believe that there is possible corruption in the letting of the contract or that the proposed contractor is involved in corrupt activity. Such objection shall be delivered within such thirty day period to the mayor setting forth in detail the grounds for the comptroller's determination. After the mayor has responded to the comptroller's objections in writing, indicating (i) the corrective actions if any, that have been taken or will be taken in response to the comptroller's objections, or (ii) the reasons why the mayor disagrees with the comptroller's objections, the mayor may require registration of the contract despite the comptroller's objections. Such response by the mayor shall not serve as the basis for

> further objection by the comptroller, and the comptroller shall register the contract within ten days of receipt of the mayor's response."

In response to your request for the record identifying the persons or entities believed by the Comptroller possibly to be or have been engaged in corruption ("the List"), the Comptroller denied access pursuant to §§87(2)(e)(i), 87(2)(g), 87(2)(b) and 89(2)(b) of the Freedom of Information Law. The following paragraphs will include a review of the contentions expressed in the denial, as well as those offered in your letter.

The initial basis for denial, §87(2)(e)(i), states that an agency may withhold records "compiled for law enforcement purposes" when disclosure would "interfere with law enforcement investigations or judicial proceedings." In conjunction with that claim, General Counsel to the Comptroller wrote that the "primary purpose of the CID list is to identify persons or entities whose contracts the Director of the Office of Contract Administration believes should receive heightened scrutiny in the §328(c) process", and that disclosure of the List "would interfere with Comptroller's ability to investigate possible corruption in the contract process." It is your view that the list was prepared in the ordinary course of business, that the Comptroller's authority "does not include law enforcement activities" and that disclosure "does not in any way interfere with a law enforcement investigation."

While it is clear that criminal law enforcement agencies may assert §87(2)(e) as a basis for denial in appropriate circumstances, there is little decisional law that deals with the assertion of that provision by other kinds of agencies. Nevertheless, in my view, entities other than criminal law enforcement agencies may in certain circumstances cite §87(2)(e) as a basis for denial. For example, although the Department of Environmental Conservation is not a criminal law enforcement agency, it conducts investigations that may result in criminal law enforcement. Therefore, in some instances, I believe that it may compile records for law enforcement purposes and that disclosure, depending upon the facts, could interfere with law enforcement investigations. Similarly, while many agencies conduct audits in the ordinary course of their business, if in the course of the audit, the possibility of illegality is discovered, the process may in some ways be transformed. At that point, the process may become other than routine, and records may be compiled for a law enforcement purpose.

Further, it is my understanding that the Comptroller has the authority to "investigate" all matters relating to city finances and the ability to issue subpoenas relating to that authority.

In the context of your inquiry, it is arguable in my view that the List might be characterized as having been compiled for law enforcement purposes. If the List is made available, it is

possible that persons or entities identified in the List could tailor their activities to evade detection and that disclosure could interfere with investigations.

With respect to the second basis for denial, it was contended by the Comptroller that the appearance of a name on the List "does not represent a final agency determination", and that, therefore, §87(2)(g)(iii) permits a denial. You have contended that the List is "a factual tabulation and not an agency policy or determination", and that "release of the list does not harm the consultative functions of the Comptroller's office..."

I disagree with both contentions. Nevertheless, I believe that §87(2)(g) is relevant in determining rights of access to the List. 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 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.

The List in my view constitutes "intra-agency material"; an objection directed to the Mayor identifying a person or entity on the List would constitute "inter-agency material". I do not believe that the List or the components of the List could be characterized as a final agency policy or determinations, for there appears to be nothing "final" about its contents. Further, although a record characterized as a "list" would physically or visually appear to constitute a "factual tabulation", as I understand its contents, it consists, in essence, of a series of opinions expressed by the Comptroller. As stated in §328(c) of the

City Charter, the Comptroller may object to the registration of a contract when there is "sufficient reason to believe that there is possible corruption in the letting of a contract or that the proposed contractor is involved in corrupt activity." As such, an objection is based upon a belief, not a finding, that a person or entity may be or have been engaged in possible corruption.

From my perspective, when an official of one agency communicates to an official of another agency and advises to the effect that a firm may possibly be or have been involved in corrupt activity, such a communication is an expression of opinion, rather than fact, that may be withheld under §87(2)(g). The list, in my view, similarly is reflective of a series of opinions. It may physically be constructed in tabular form, but I believe that its character is in the nature of advice or opinion. As such, I believe that it could be withheld.

In a decision involving a different kind of documents but perhaps an analogous principle, the issue involved access to certain notations contained in assessment records. In describing the situation, it was stated that:

> "When an assessor learns of a property transfer, the details of the transaction are analyzed and the transfer is placed into one of two categories for assessment purposes; either significant, denominated by an 'S', or insignificant, denominated by an 'I'. The Assessment Bureau submits the S/I notations to the city's Department of Finance which enters the indicators on the city's computer. Computer tapes which include the S/I indicator are sent by the City to SBEA" [David v. Lewisohn, 142 AD 2d 305, 307 (1988)].

Although the lower court found that the "S/I indicators" consisted of statistical or factual data and "instructions to staff that affect the public" that are available, respectively, under §87(2)(g)(i) and (ii), the Appellate Division reversed. The Court held that the S/I indicators were opinions that could be withheld, stating that:

> "The words 'significant' and 'insignificant' do not denote facts. They simply report tentative opinions of city assessors resulting from their review of transfer tax returns. The reasoning behind the protection of opinions from disclosure is that the inherent dangers involved in releasing nonfinal recommendations which may be based on reasoning rejected, or never adopted, by the final decision maker will not only impinge on the agency's predecisional process, but mislead the public (see, *Matter of McAulay v*

> *Board of Educ.*, 61 AD2d 1048, *affd* 48 NY2d 659; *see also, Ingram v Axelrod*, 90 AD2d 658, 569-570).
>
> "Nor can we agree with the analysis of Supreme Court that the notations 'initially based upon the opinion of individual City assessors' are transformed into statistical data when communicated to SBEA. (*Supra*, 135 Misc 2d, at 330.) A predecisional opinion does not undergo a transformation into a fact when it is transferred to another agency" (id., 308).

Since the contents of the List are reflective of beliefs involving the possibility of corruption, I believe that they are opinions that may be withheld under §87(2)(g).

Lastly, although §87(2)(g) in my opinion serves as the most important provision regarding the matter, the final basis for denial cited by the Comptroller involves a claim that disclosure would result in an unwarranted invasion of personal privacy, for disclosure "may unfairly stigmatize those individuals listed, as well as the officers of listed entities, as possibly corrupt". You contend, however, that the List "does not contain personal information relating to natural persons", and that the List is relevant to the Comptroller's work and does not fall within the exemption for personal or economic harm."

Again, the List, as I understand it, does not state that persons or entities are or have engaged in corrupt activities, but rather that there is reason to believe that they might possibly be or have been so engaged. While I agree that the privacy provisions of the Freedom of Information Law are intended to deal with natural persons, it may be difficult to separate or distinguish between one's personal and business or professional activities when an allegation or opinion has been expressed, but not proven, that a person or firm may be corrupt. In other contexts, it has been advised that when allegations have been made but have not resulted in any final determination to the effect that a person has engaged in misconduct, those allegations may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. I am unaware of any judicial decisions concerning requests for records involving possible corrupt activities on the part of persons associated with business entities. As such, I believe that the application of §§87(2)(b) or 89(2)(b) would be conjectural and dependent upon the ability to distinguish between personal as opposed to business activities. Nevertheless, for reasons expressed earlier, the List in my opinion would be deniable under §87(2)(g) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sue Ellen Dodell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7333

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 17, 1992

Ms. Faith Crouchley
Assistant District Attorney
District Attorney of Kings County
Municipal Building
Brooklyn, NY 11201-13745

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

Dear Ms. Crouchley:

I have received your correspondence of August 31 and September 15.

In your capacity as Assistant District Attorney in Kings County, you sought an advisory opinion:

> "...about whether the District Attorney's Office should grant a defendant's request for documents (ie: Grand Jury minutes) pursuant to the Freedom of Information Law, because the documents may or may not be Rosario material that had never been turned over at trial, or may contain information leading to such Rosario material."

In conjunction with the foregoing, you expressed the view that:

> "...what we are required to turn over to a defendant for his trial under the Rosario rule and what the Freedom of Information Law requires us to turn over to the public, are two entirely separate obligations. The Freedom of Information Law should not be a vehicle that a defendant can use, in the course of a fishing expedition for potential Rosario material, in order to receive documents that this office is otherwise not compelled to turn over."

In this regard, I offer the following comments.

While I am unaware of judicial decisions that have specifically considered the relationship between the Freedom of Information Law and disclosure devices available in conjunction with criminal proceedings, the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings. In my view, the principle would be the same, that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the disclosure provisions of the CPLR or the Criminal Procedure Law (CPL), for example, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the

> prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

You referred by means of example to grand jury minutes. In my opinion, those records could clearly be withheld if requested under the Freedom of Information Law. Although that statute is based on a presumption of access, the first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the CPL, states in relevant 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."

Further, as you are aware, "subdivision three" of §190.25 includes specific reference to the district attorney.

Based upon the foregoing, grand jury minutes would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold records, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7334

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 17, 1992

Mr. Tony L. Greene
91-B-2397
P.O. Box 2001
Dannemora, N.Y. 12929-2001

<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. Greene:

I have received your letter of August 31.

You wrote that you "have been trying to get a list of a particular subject that the State Library has on its shelves", and that two requests have been made under the Freedom of Information Law for that information. Nevertheless, the requests have been returned, "neither denying nor providing the information requested." You indicated that you are unaware of the identity of the person to whom an appeal may be made.

In this regard, I offer the following comments.

First, I have contacted the State Library on your behalf to learn more of the matter. In brief, the State Library maintains no list of the titles that it has on its shelves at any given time. Further, since §89(3) of the Freedom of Information Law does not require an agency to create a record in response to a request, the State Library would not be obliged to prepare the kind of list that you requested.

Second, I believe that the State Library maintains a computerized catalogue of its holdings. If a subject can be properly identified, a printout indicating the titles within that subject can be generated and made available.

Finally, operating within the State Library is the New York State Prisoner Project, which assists inmates in acquiring library materials. As such, it may be worthwhile to contact:

Darrel Welch
New York State Prisoner Project
State Library
Cultural Education Center
Albany, N.Y. 12230

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7335

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 17, 1992

George Gatto
86-A-6763
Drawer B
Stormville, N.Y. 12582

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

Dear Mr. Gatto:

I have received your letter of August 28.

You wrote that, prior to your incarceration, you were a partner in a firm that incurred substantial debt and was later involved in bankruptcy proceedings. However, you added that large amounts of monies are owed to the firm and that there is pending litigation to recover payments. You have sought assistance concerning "interrogatories that [you] should state on [your] F.O.I.L. request to both [your] partner and the bank who handled [y]our business transactions."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records and §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 of other governmental 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 applies to records of state and local government; it would not apply to records maintained by your partner or a bank.

Second, there may be other methods of acquiring financial and similar records concerning the firm. Fox example, although the courts and court records are not subject to the Freedom of Information Law, those records are often available under other provisions of law (see e.g., Judiciary Law, §255). Therefore, you could likely obtain records relating to the firm's finances that have been filed with the courts in conjunction with litigation.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2143
FOIL-AO 7336

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 18, 1992

Mr. Hans Luebbert
[redacted]

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

Dear Mr. Luebbert:

I have received your letter of September 1, and materials related to it. You have sought an advisory opinion concerning rights of access to materials requested from the Town of Newburgh.

The first aspect of the request involves minutes of executive sessions held to discuss litigation by the Newburgh Town Board, as well as "a delineation of 'all matters currently being handled by'" Gallagher and Bassett.

In this regard, §106(2) of the Open Meetings Law deals specifically with minutes of executive sessions and states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

In addition, subdivision (3) of §106 provides that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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 on the foregoing, when a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. It is noted, however, that if a public body merely 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 am unaware of whether the Board took action by means of formal vote at the executive sessions to which you referred. Again, if no action was taken, minutes need not have been prepared. Further, even if action was taken, there would be no requirement that the minutes include reference to statements by or conversations among the members or others. In short, minutes need not be so detailed as to contain reference to those kinds of commentary.

With respect to a "delineation" of matters being handled by a particular firm, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if no delineation exists, the Town in my opinion would not be required to create such a record on your behalf. However, for reasons to be discussed in conjunction with the second aspect of your request, I believe that records indicating the general nature of services for which a firm is retained or indicating services rendered would be available.

The second portion of the request involves vouchers for legal bills relating to certain litigation in which the Town is involved.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial could appropriately be asserted in conjunction with a claim that disclosure would be "strategically unsound".

Second, with regard to expenses incurred, as a general matter, 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 specific 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 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 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 liable 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 CPR 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. Hennessy, supra.) As a communication regarding a fee has no direct

> relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys 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:pb
cc: Doris Greene, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 7337

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 21, 1992

Mr. Robert Brock
88-A-4368
Wallkill Correctional Facility
Box G
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. Brock:

I have received your letter of September 1 and the materials attached to it.

You wrote that you are an inmate student at Ulster County Community College. Having requested an English professor's grade book and copies of "grievances and outcomes dated back to January 1990", the College denied access on the ground that disclosure "would constitute an invasion of privacy of others." Based upon your appeal, it is your view that the records should be disclosed following the deletion of names of students.

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

First, it is assumed that "grievances and outcomes" relate to grades issued by the professor or similar issues, and my remarks will be based on that assumption.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is noted, too, that the introductory language of §87(2) refers to an agency's authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. Based on the phrase quoted in the preceding sentence, there may be instances in which a single record might contain both accessible and deniable information. Further, that phrase in my view imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Following such a review, I believe that the agency would

be obliged to disclose those portions that are accessible under the Law, while deleting those portions that might properly be withheld.

Third, in my opinion, two of the grounds for denial are relevant to determining rights of access to the records in question.

The initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." As you are aware, one such statute is the Family Educational Rights and Privacy Act (FERPA), which is a federal law (20 U.S.C. 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 colleges. 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, or to students over the age of eighteen. Concurrently, it generally requires that education records be kept confidential, unless the parents or the students, as the case may be, waive the right to confidentiality. In my opinion, to the extent that the records in question would identify students, their names or other identifying details may be withheld.

Similarly, the second ground for denial, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Further, §89(2)(c)(i) states that disclosure shall not constitute an unwarranted invasion of personal privacy when identifying details are deleted from records otherwise available.

In a case that may have been similar in some aspects to the situation that you presented, a request was made for records indicating students test scores that appeared in alphabetical order. In Kryston v. Board of Education, [77 AD 2d 896 (1980)], the Appellate Division ordered disclosure of the records after names were deleted and, because names appeared alphabetically, the court ordered that the records be rearranged so as to preclude the possible identification of students.

In sum, I believe that the records, as I understand their contents, must be disclosed following the deletion of identifying details in order to protect students' privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7338

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 21, 1992

Mr. Anthony Logallo
90-B-1210
C.C.F.
Box 2001
Dannermora, N.Y. 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. Logallo:

I have received your letter of "8/92", which reached this office on September 8.

According to your letter, you have requested that the New York City Police Department allow you to inspect "all log books that have all reports of abandonments for the month of August, 1971". Based upon your assumption that the log books are voluminous and due to your incarceration, you asked "to have a police representative come to [your] facility with the papers or that they have the Department of Correction bring you to police headquarters for the purpose of inspecting these records."

You have asked whether you may inspect police reports relating to abandonment, including a report pertaining to you, under the Freedom of Information Law and whether you must pay to inspect the records. You also raised additional questions concerning the ability to have a court order that an agency escort you to the New York City Police Department to inspect the records.

In this regard, I offer the following comments.

First, as a general matter, when records are accessible under the Freedom of Information Law, they are available for inspection and copying. Further, while an agency may charge a fee for photocopies [see Freedom of Information Law, §87(1)(b)(iii)], unless a statute so permits, the regulations promulgated by the Committee on Open Government state that no fee may be charged for the inspection of records [see 21 NYCRR §1401.8(a)].

Those regulations also state that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). I know of no provision that would require an agency, such as the New York City Police Department, to transfer records to a different location, such as a state correctional facility, in order to accommodate an inmate or other person seeking records. Similarly, I know of no provision of law that would require that a person seeking records be moved to a location where records are kept, nor am I familiar with any situation in which a court has ordered or permitted an inmate to be moved to a certain location in order that he may inspect records. As such, I do not believe that an agency would be required to transfer the records to a location convenient to you or that you have a right to be escorted to a distant location where they are kept.

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. In the context of your inquiry, there may be instances in which records do not exist because the events to which they relate occurred more than twenty years ago.

Section 89(3) also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 Police Department's record-keeping systems; whether it has the ability to locate and identify all of the records sought in the manner in which you requested them is unknown to me. It is possible, however, that based upon its filing or indexing mechanisms, your request might not reasonably describe the records.

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

Fourth, I am unfamiliar with the nature and contents of "reports of abandonments". However, if they include names and other identifying details, particularly with respect to children, it is possible that disclosure of those portions of the records could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. When an agency may properly delete identifying details or other portions of records, a member of the public in my opinion, could not inspect them before the appropriate deletions are made. Further, under §372 of the Social Services Law, entities charged with duties relating to abandoned and other children may disclose records concerning those children only in conjunction with conditions described in that statute, and such records are generally confidential. While it is unclear whether §372 is relevant to your inquiry, it often has a bearing upon an agency's authority to disclose records relating to abandoned children.

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-7339

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 21, 1992

Hon. Paul J. Feiner
Town Supervisor
Town of Greenburgh
P.O. Box 205
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 Supervisor Feiner:

I have received your letter of September 3 in which you sought an advisory opinion concerning the Freedom of Information Law.

As I understand your comments, a consultant was retained by the Town of Greenburgh to conduct a "management review" of Town government. The review involves evaluations of various town officers and employees, as well as recommendations in a variety of areas. It is your view that the record in question need not be made public.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 may be treated as "intra-agency" materials that fall within the scope of §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 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.

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 materials, prepared to assist an agency decision maker***in arriving at his decision' (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 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 for 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 based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents. In my view, insofar as the record in question consists of advice, recommendations or opinions, it 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 7340

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 21, 1992

Mr. George Silberman
[redacted]

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

Dear Mr. Silberman:

I have received your letter of September 5, in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter and the correspondence attached to it, several months ago, you requested records indicating the total overtime pay earned by an employee of the New York City Human Resources Administration during 1991. As of the date of your letter to this office, you had not yet reserved the records sought.

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 requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, I believe that records indicating overtime payments of public employees must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although the Freedom of Information Law generally does not require that agencies maintain or prepare records [see §89(3)], an exception involves payroll information. Specifically, §87(3) of the Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

While §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", 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].

Based upon the foregoing, it is clear in my view that records reflective of salaries of public employees must be prepared and made available. Similarly, records reflective of participation in work-related activities, such as attendance at conferences, as well as payments or reimbursements for expenses to public employees, would be available, for those records in my view would be relevant to the performance of one's official duties. Insofar as vouchers or related records include public employees' social security numbers or home addresses, for example, I believe that those items could be deleted from records based upon considerations of personal privacy, for they are largely irrelevant to the performance of one's duties. It is noted that one of the decisions cited above, Capital Newspapers v. Burns, supra, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer. The Appellate Division found that those records must be disclosed, and the Court of Appeals affirmed. The decision indicates that the public has both economic and safety reasons for knowing whether public employees perform their duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of payment of overtime must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Ralph J. Pennington, Jr., Records Access Officer
Barry Ensminger, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7341

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 21, 1992

Ms. Betty Dolan
Mr. Richard Dolan
[redacted]

The staff of the Committee on Open 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. Dolan:

I have received your letter of September 3, in which you described a series of difficulties in your attempts to obtain records from the Town of Keene.

In brief, you asked what penalty there may be in cases in which agencies fail to comply with the Freedom of Information Law, whether this office has the authority to "oversee the enforcement of these penalties," and who you should contact "to start procedures to change this mess".

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. Neither the Committee nor any other state agency is empowered to enforce the Freedom of Information Law or to compel an agency to grant or deny access to records.

Second, if a request is denied access following an appeal, an applicant may seek judicial review of the denial by initiating a judicial proceeding under Article 78 of the Civil Practice Law and Rules. It is noted when such a proceeding is brought under the Freedom of Information Law, the agency has the burden of proof. Further, although there is no "penalty" that may be imposed, a court may award attorney's fees, payable by an agency, in certain circumstances. Specifically, §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."

Lastly, if you believe that the Freedom of Information Law does not operate as it should, it is suggested that you express your point of view to your state senator or assemblyman.

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:pb
cc: Town Board, Town of Keene

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7342

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 22, 1992

Mr. Frederick S. Martin
[redacted]

Dear Mr. Martin:

I have received your letter of September 8, which relates to a denial of a request for records by the Mayor of the City of Fulton.

According to the form attached to your letter, you requested records of the Mayor's office, specifically: "All letters, correspondence, and notes from Mayor's office to Fulton Greater Chamber of Commerce - regarding proposed vendors licenses and regulations from 6/24/92 on." The Mayor denied the request and marked two reasons for the denial. One pertains to "Confidential Disclosure"; the other is marked "Other" and refers to "Work Product." The form also indicates that you have the right to appeal the denial and any such appeal should be made to the Mayor.

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. Based upon your description of the records sought, it does not appear that any of the grounds for denial could properly be asserted to withhold the records.

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 that the records access officer and the person who determines appeals cannot be the same individual [§1401.7(b)]. For obvious reasons, an appeal is less than meaningful when it is determined by the same person who initially denied a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Hon. George C. Valette, Mayor
Joseph Tetro, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7343

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 25, 1992

Mr. David G. Quimby
[redacted]

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

Dear Mr. Quimby:

I have received your letter of September 11, and the correspondence attached to it.

In brief, you wrote that you were "terminated unjustly by Marist College" approximately a year ago, and that you have initated a complaint with the State Division of Human Rights. Your problem involves your unsuccessful attempts to obtain your personnel file under the Freedom of Information Law from the College.

In this regard, the Freedom of Information Law is applicable to agency records. Section 86(3) of that statue defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law generally pertains to records maintained by entities of state and local government in New York. It does not apply to private institutions, such as Marist College.

Since the Freedom of Information Law would not serve as a basis for obtaining the records in question, it is suggested that you discuss the matter with a representative of the Division of

Human Rights, for that agency may have the ability to obtain the records for you or on your behalf in conjunction with your complaint against the College.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7344

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 25, 1992

Mr. Andrew Curro
91-A-0522
Wende Correctional Facility
3622 Wende Rd. P.O. Box 1187
Alden, N.Y. 14004-1187

Dear Mr. Curro:

I have received your letter of September 10, which relates to a request for records of the New York City Police Department sought under the Freedom of Information Law that led to the initiation of litigation. Attached to your letter is an order signed by a justice of State Supreme Court in which it was found that the agency defaulted and was directed to comply with your request.

It is your view that the order has "finalized" the litigation. As such, you asked whether you are "now entitled, in light of the enclosed order, to all the records in [your] original F.O.I.L. request, even thought some of those records may be, or are, considered exempt under Public Officer[s] Law."

First, having reviewed previous correspondence, it was stated in an advisory opinion that clear advice could not be offered due to my lack of familiarity with the records sought or the effects of their disclosure. Further, it appeared that some of the records might have been sealed.

Second, it is possible that the agency in default may appeal or attempt to reargue the case. In either of these circumstances, the litigation would not yet be "finalized."

Lastly, in a case in which an agency, also the New York City Police Department, failed to determine an appeal within the statutory time limit, it was found that the applicant's request was constructively denied, that he had exhausted his administrative remedies and that, therefore, he could bring an action under Article 78 of the Civil Practice Law and Rules. Since the agency offered no basis for denial, the Supreme Court held that all of the records sought must be disclosed [Floyd v. McGuire, 437 NYS 2d 886 (1981)]. However, the Appellate Division [87 AD 2d 388 (1982)] found the Supreme Court's decision to be "too rigid an interpretation" and that although the Freedom of Information Law

requires prompt responses, it "also expresses the public policy that some kinds of material should be exempt from disclosure... To say that even the slightest default in timely explanation destroys the exemption seems to us too draconian" (id., 390). Therefore, the Appellate Division remanded the matter to the lower court to determine the extent to which the records must be disclosed or may be withheld.

While I cannot conjecture as to whether the litigation is indeed final, case law indicates that a "default" would not necessarily require the disclosure of all of the requested records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7345

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 25, 1992

Mr. Frank Givriano
[redacted]

Dear Mr. Givriano:

I have received your recent letter in which you requested records from this office concerning an arrest in New York City.

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 custody or control of records generally, such as those in which you are interested. Similarly, this office cannot compel an agency to grant or deny access to records. However, I offer the following comments.

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, which in this instance is the New York City Police Department The records access officer has the duty of coordinating an agency's response to a request. The records access officer for the New York City Police Department is Sgt. Louis J. Capasso, whose address is 1 Police Plaza, Room 110C, New York, NY 10038.

Second, §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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7346

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 25, 1992

Mr. Leslie White
The Perinton-Fairport Post
P.O. Box C
Fishers, N.Y. 14453

The staff of the Committee on Open 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 correspondence of September 11 and the materials relating to it. You have sought an advisory opinion concerning the propriety of a denial of access to records by officials of the Fairport Central School District.

By way of background, on August 31 you submitted a request to the District Clerk for "a copy of the questions that are being asked of school district residents by Gordon S. Black Corp. surveyors, as part of the school district poll." Your request was denied on September 3 for the following reasons:

> "1. The poll is being conducted by Gordon S. Black Corporation, not the school district. The District does not have a final copy of the questions being asked and, therefore, there is no District record to be disclosed under the Freedom of Information Law.
>
> 2. Even if the District had a copy of the questions, there has been no final District determination, therefore, such questions would qualify as intra-agency materials not yet discoverable."

You appealed the denial, and the initial determination was uphold by the Superintendent. He wrote that "the poll is conducted by the Gordon S. Black Corporation and the final questions are under the custody and control of that Corporation. Therefore, there is no

District 'record' as defined in the Freedom of Information Law under that Law." In addition, he wrote that the poll consists of "pre-decision information...commissioned by the Board with respect to the facilities needs of the District" and cited a judicial decision to justify a denial on that basis.

A news article attached to your letter indicates that the District paid the Corporation more than $15,000 to conduct a telephone survey "to help board members understand why a $9.2 million expansion plan was rejected..and guide them in how to move forward and get classroom construction approved by the voters." Another article states that 534 people participated in the survey and that they were chosen at random.

In this regard, I offer the following comments.

First, in my opinion, the physical possession by the District of the records sought, or the absence thereof, is not necessarily determinative of rights of access. The Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the

> spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

From my perspective, based upon its specific language, the definition of "record" includes not only documents that are physically maintained by an agency; it refers to documents are that are "kept, held, filed, produced or reproduced by, with or for an agency." While the District may not have physical possession of the survey questions, the District paid the polling firm a substantial amount of money to prepare the questions and conduct the survey. As such, it is clear in my view that the questions constitute "records", for they consist of information produced for an agency, the District. Consequently, even though they are not physically maintained by the District, I believe that the questions are District records subject to rights conferred by the Freedom of Information Law.

Although different from the instant situation, an analogy might be made between this case and the judicial interpretation of the Freedom of Information Law concerning records prepared by outside consultants retained by agencies. When an agency lacks the resources, staff or expertise needed to develop opinions or obtain facts concerning a function to be carried out by government, it might retain a consultant to provide needed expertise. Even though consultants or consulting firms may be private entities rather than governmental entities, it has been found that the records prepared by those entities or firms should be treated as if they were prepared by an agency. As stated by the Court of Appeals:

> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material" even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed in the same manner as a record prepared by the staff of an agency. I would contend that a consultant's report, information "produced for" an agency, would fall within the scope of the Freedom of Information Law even if it is in the physical possession of a consultant rather than the agency. Any other conclusion would, in my opinion, serve to negate the effect of the decision rendered by the Court of Appeals.

Moreover, in a decision cited earlier, the Court of Appeals discussed the scope and intent of the Freedom of Information Law and found that:

> "Key is the Legislature's own unmistakably broad declaration that, '[as] state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability *wherever and whenever* feasible' (emphasis added; Public Officers Law, section 84).
>
> "...For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed

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

To be consistent with the intent of the Freedom of Information Law and its broad interpretation by the state's highest court, I believe that the District must give effect to the Law so as to "extend public accountability wherever and whenever feasible."

If the polling firm maintains records for or on behalf of the District, that agency should in my opinion direct the firm to release records to the extent required by the Freedom of Information Law, or, alternatively, the agency could obtain the records sought or copies thereof from the firm for the purpose of reviewing them and determining the extent to which the Freedom of Information Law requires disclosure.

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.

In my opinion, none of the grounds for denial could appropriately be asserted to withhold the records. Records containing the questions have, by means of the survey, been disclosed to more than 500 residents of the District. Therefore, there appears to be nothing secret about them. Further, I do not believe that the survey questions could be characterized as intra-agency materials.

Section 87(2)(g) of the Freedom of Information Law pertains to "inter-agency" and "intra-agency" materials. 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 of other governmental 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, an agency is an entity of state or local government. Based on the definition of "agency", "inter-agency materials" would involve written communications between or among officials of two or more agencies; "intra-agency materials" would consist of communications between or among officials within an agency. When a member of the public, acting in that capacity, communicates with government or its representative (i.e; a polling firm), the communication, in my view, could not be characterized as "inter-agency or intra-agency materials", for that person neither is nor represents an agency.

In the context of your request, the records sought, survey questions, would have been communicated and disclosed by the District's representative to residents. Since a resident would not constitute an agency, a survey question would fall outside of the scope of §87(2)(g), for it would not consist of inter-agency or intra-agency material.

In a case dealing with dissimilar facts but the same principle as that described above, the court referred to an advisory opinion prepared by this office concerning access to communications between a New York City agency and "outside parties" with whom the agency was negotiating. The court agreed with the opinion that §87(2)(g) was "not relevant because the communication sought is not between officials within an agency of the City or among officials of different agencies of the City" (Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Similarly, in rejecting a denial based upon §87(2)(g) involving correspondence between the New York City Bureau of Labor Services and private child care institutions, it was determined that those institutions "cannot satisfy the term 'agency' as defined in Public Officers Law §86(3)..."(Lowry v. Bureau of Labor Services, Supreme Court, New York County, March 9, 1984).

Based upon the foregoing analysis, I do not believe that §87(2)(g) is applicable as a basis for denial.

Similarly, as indicated earlier, records prepared by consultants for agencies may be characterized as intra-agency materials. However, in my opinion, in preparing and using the survey questions, the polling firm would not have been acting in the role of an advisor or an entity that offers recommendations; rather, in so doing, the firm would merely be carrying out a contractual duty. If the firm had been hired to analyze the results of the survey and recommend a course of action to the District, I would agree that records prepared in that capacity would constitute intra-agency materials that could be withheld insofar as they consist of advice, opinions or recommendations. Nevertheless, that does not appear to have been the function of the

firm. As I understand the matter, it was hired to prepare survey questions and conduct a survey. If that is so, I do not believe that the survey questions would fall within the scope of any of the grounds for denial. Moveover, since the questions have been disclosed to hundreds of residents, any basis for denial would, in my opinion, have been effectively waived.

In sum, based on the preceding analysis, it is my view that the survey questions constitute agency records, for they were produced for the District, and that the District is obliged to disclose them, for none of the grounds for denial could appropriately be asserted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Paul Doyle, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7347

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 1, 1992

Mr. Maxwell D. Weinstein
Attorney At Law
121 Beverly Road
South Huntington, N.Y. 11746-4521

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

Dear Mr. Weinstein:

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

You have sought an advisory opinion concerning delays in responding to requests for records of the Village of Ocean Beach. The documents were requested on August 12 and include assessment records pertaining to specific parcels, as well as "any and all Building Department Records, Special Use Permits, Zoning Proceedings, Alteration records, Renovation records, Building Plans, or other construction and alteration records for each of the above premises form January 1, 1970 to date and continuing on file with any department or agency of the Village...."

Since you had not received any of the records as of the date of your letter to this office, it is your view that the delay is unjustified and that records should be "readily available". The records access officer for the Village advised on August 31 the "we are endeavoring to search for certain records, which are not immediately accessible, and will provide you with a schedule of availability of same as soon as possible."

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies may respond to requests. Specifically, §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..."

Based upon the foregoing, I believe that the records access officer should have acknowledged receipt of your request within five business days of its receipt and that she should have included an estimate of the date when the records would be made available or denied. Further, if neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 you may be aware, §89(3) also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 Village's record-keeping systems; whether it has the ability to locate and identify all of the records sought in the manner in which you requested them is unknown to me.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Nancy J. Balarezo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7348

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 1, 1992

Ms. Ellen George
Acting Public Access Officer
Adirondack Park Agency
P.O. Box 99
Ray Brook, NY 12977

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

Dear Ms. George:

I have received your letter of September 17. Enclosed, as requested, is a copy of our latest annual report.

You have sought guidance concerning the fees that may be imposed when producing computer printouts. In this regard, as you are aware, §87(1)(b)(iii) of the Freedom of Information Law states that the fee in such circumstances should be based upon "the actual cost of reproduction." Further, the regulations promulgated by the Committee state in part that the actual cost exludes fixed costs of an agency (21 NYCRR 1401.8).

From my perspective, actual cost would include the kinds of considerations to which you referred in your letter, such as the cost of paper and, perhaps most importantly, computer time. It is suggested that the appropriate staff attempt to determine what it costs to run the Agency's computer. Actual cost may vary based upon the nature of the hardware; similarly, the size and sophistication of a computer are factors used in determining actual costs. Depending on the nature of their equipment, other agencies have arrived at figures based upon use time by hour, by minutes or even by second.

It is noted that the Committee has recommended legislation to update the Freedom of Information Law in relation to agencies' responsibilities concerning electronic information and fees. One aspect of the legislation deals with computer printouts, and, if enacted, it would authorize agencies to charge the same fees assessed for photocopies. Therefore, if a printout involves ten pages, an agency could charge up to twenty-five cents per page. That proposal would remove the necessity of attempting to ascertain

actual cost when printouts are prepared based upon existing computer programs.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7349

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 2, 1992

Mr. David G. Sholes
Assistant Superintendent
Red Creek Central School District
Administration Center
P.O. Box 190
Red Creek, N.Y. 13143

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

Dear Mr. Sholes:

I have received your letter of September 11 in which you sought an advisory opinion concerning a request made by residents of the Red Creek Central School District under the "Freedom of Information and Privacy Act."

Having reviewed the request, the applicants have asked that the District answer questions relating to the "historic" performance of seventh grade students.

In this regard, I offer the following comments.

First, the statute that generally deals with rights of access to records of a school district is the New York Freedom of Information Law. It appears that the reference to the "Freedom of Information and Privacy" might have been intended to mean the federal Freedom of Information and Privacy Acts. Those statutes pertain to records of federal agencies. Further, although New York has enacted a state counterpart to the federal Privacy Act, the Personal Privacy Protection Law, that statue is applicable only to state agencies; it does not apply to units of local governments, such as school districts.

Second, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of

Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if, for example, the District does not maintain records indicating the pass/fail ratios or numbers regarding seventh graders in particular subjects, I do not believe that staff would be required by the Freedom of Information Law to prepare new records on behalf of the applicants.

Based upon the foregoing, in a technical sense, the District in my view is not obliged to provide the information sought by answering the questions raised in the request. Nevertheless, in conjunction with the general thrust, intent and spirit of the Freedom of Information Law, it is likely that the District maintains records reflective of some of the information sought, and that it can readily disclose "information" derived from existing records. For instance,if "performance standards" have been devised to determine whether teachers are carrying out their duties, those standards could be disclosed. Similarly, one of the questions is whether a certain teacher has or has not taught seventh grade English for the past ten years. Since §87(3)(b) of the Freedom of Information Law requires agencies to maintain records indicating the name, public office address, title and salary of every officer or employee, even though the information was sought by means of a question, there would appear to be no valid reason for not answering, for records containing the information sought would clearly be available under the law.

If the information sought had been requested differently (i.e., if the applicants sought records containing certain information instead of seeking to elicit information through responses to questions), and insofar as such information exists in the form of a record or records, I believe that, with one exception, it would be available. That exception relates to the portion of the request pertaining to any charges that might have been made against a teacher, as well as action that might have been taken.

By way of background, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. One of the grounds for denial §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 is flexible and may be subject to conflicting interpretations, 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); 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); 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].

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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7351

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 5, 1992

Mr. Alfred E. Di Lorenzo Jr.
Great Meadow Correctional Facility
Box 51
Comstock, N.Y. 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. Di Lorenzo:

I have received your letter of September 11, as well as the materials attached to it.

In brief, the correspondence indicates that you sent a request for records to the records access officer at the Office of the Westchester County District Attorney on July 29. However, you had received no response to the request as of the date of your letter to this office. As such, you sought assistance in the matter.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 your request, one of the items sought is a "list of any and all documents pertaining to [your] case." Here I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, if no such list exists, the agency in my opinion would not be required to prepare such a record on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7352

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 8, 1992

Mr. Arnold Lewis
81-A-3786
Box 388
Napanoch, NY 12458

Dear Mr. Lewis:

I have received your letter of September 29, which reached this office on October 6.

You have requested "papers on how the Parole System got started", as well as information concerning "good time". 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 this office has no records pertaining to the subjects of your interest.

To seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that you believe maintains the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests.

In addition, I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records.

Lastly, since some of the records that you are seeking appear to be historical in nature, it is suggested that you discuss the matter with your facility librarian. That person might be able to obtain records on your behalf from the State Library.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7353

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 9, 1992

Mr. Jitendra Lakram
92-A-2581
Elmira Correctional Facility
Box 500
Elmira, NY 14902

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

Dear Mr. Lakram:

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

First, you referred to the definition of "agency" in §86(3) of the Freedom of Information Law and asked where it specifically refers to police departments. There is no specific reference to police departments. However, the definition include any "municipal department...office or other governmental entity performing a governmental function for...anyone or more municipalities." Since a police department operates within a municipality, i.e., a county, city, town or village, I believe that it would clearly constitute an agency subject to the Freedom of Information Law.

Second, you asked "how explicit" a request must be to reasonably describe the records sought. In my view, an applicant is not required to identify a particular record or records when making a request. To reasonably describe the record, an applicant should provide sufficient detail to enable agency officials to locate and identify requested records.

Lastly, you asked what you should do if a police department ignores a request. In this regard, 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. Further, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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-7354

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 9, 1992

Mr. Marvin Datz
[redacted]

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

Dear Mr. Datz:

I have received your letter of September 15 in which you sought assistance concerning a request directed to the New York City Police Department.

The request pertains to various aspects of a so-called "Red Light Violation Program". While I believe that certain of the records sought, such as rules, regulations and procedures concerning the program, as well as records indicating the name, job title, and duties of a police officer, are likely available under the Freedom of Information Law, I offer the following comments regarding certain other portions of your request.

The first involves an internal investigation of a police officer. 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 §87(2)(a) through (i) of the Law.

The initial ground for denial, §87(2)(a), enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute is §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 a department of correction of individuals employed as correction officers...shall be considered confidential and not subject to inspection or review with the express written consent of such correction 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 §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 §50-a of the Civil Rights Law applies to personnel records of correction officers and police officers, it is likely some of the records falling within the first part of your request could be withheld. For example, if allegations or charges were found to have been without merit, records involving those claims could in my view 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 v. Village Board of Trustees, 372 NYS 2d 905 (1975), Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981, Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988), Sinicropi v. County of Nassau, 76 AD 2d 838 (1980)]. Three of these decisions, Powhida, Scaccia and Farrell, involved findings of misconduct concerning police officers. Scaccia dealt specifically with a determination by the Division of State Police to discipline a state police investigator. In that case, although it was found that records leading to the determination could be withheld, the Court rejected contentions that the determination could be withheld as an unwarranted invasion of personal privacy or on the basis of §50-a of the Civil Rights Law.

Other aspects of your request involve broad attempts to obtain records, i.e., "[a]ny and all other violations and investigations of the Red-Light Violation Program, from January 1, 1985 to date." In the regard, §89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 [Baselon, 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 retracting 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 systems; whether it has the ability to locate and identify of the records sought in the manner in which you requested them is unknown to me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7355

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 9, 1992

Mr. Michael Serrano
89-T-1255
Cayuga Correctional Facility
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. Serrano:

I have received your letter of August 27, which reached this office on September 17.

You have sought assistance in obtaining records from the Kings County District Attorney's office, particularly minutes of your judicial proceeding.

Attached to your letter is a response to your request by Faith Crouchley, Assistant District Attorney, who denied your request for minutes on the basis of the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)]. Moore involved a request for a variety of records from an office of a district attorney and stated in part that such an office "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id., 680).

Although the Freedom of Information Law does not apply to the courts or court records, other provisions of law (see e.g., Judiciary Law, §255) often provide rights of access to those records. As such, it is suggested that you seek court records from the clerk of the appropriate court.

Ms. Crouchley's response also indicates that you requested a "Vaughn index". The basis for such a request is Vaughn v. Rosen [484 F2d 820 (1973)], which 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 a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Faith Crouchley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7356

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 9, 1992

Mr. Frederick S. Martin
[redacted]

Hon. George C. Valette
Mayor
City of Fulton
Municipal Building
141 South First Street
Fulton, NY 13069-1765

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

Dear Mr. Martin and Mayor Valette:

I have received your letters, which are respectively dated September 15 and October 1.

Both letters and related materials pertain to issues involving the City of Fulton's vendor policy and Mr. Martin's request for correspondence "between the Mayor's office and any other interested persons" concerning the issue. In response to the request, the Mayor wrote in part that:

> "The records requested in said application were not official records of the City, but were letters and correspondence that were confidential communication between the undersigned and the Fulton Greater Chamber of Commerce and not intended for publication by either writer, and are not relevant to any proposed vendors licenses and regulations, but only contained comments by the undersigned and the director of the Chamber of Commerce. These letters and correspondence would have no bearing upon the action of the Common Council of the City of Fulton, and would be of no value to the applicant, who I would assume would be affected by such regulations."

The Mayor added that records sought are "inter-agency communications that are deniable pursuant to §87(2)(g) of the Freedom of Information Law."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the

Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

Additionally, in another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Based upon the decisions cited above, all of which were rendered by the State's highest court, the documents in question in my view constitute "records" subject to rights conferred by the Freedom of Information Law, irrespective of whether they were intended for publication, are relevant to licenses or regulations, are of no value, or are characterized as unofficial.

Second, in my opinion, an assertion or 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 §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, supra,; 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 records sought exempted from disclosure by statute.

Third, as indicated in previous correspondence, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, assuming that the records consist of correspondence between the Mayor and a chamber of commerce or similar entity, I do not believe that §87(2)(g) would serve as a basis for withholding.

That provision pertains to "inter-agency" and "intra-agency" materials. 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 of other governmental 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, an agency is an entity of state or local government. Based on the definition of "agency", "inter-agency materials" would involve written communications between or among officials of two or more agencies; "intra-agency materials" would consist of communications between or among officials within an agency. When a member of the public, or a representative of an entity outside of government communicates with government, the communication, in my view, could not be characterized as "inter-agency or intra-agency materials", for that person neither is nor represents an agency.

In the context of your request, a chamber of commerce, for example, would not constitute an agency, and correspondence between the Mayor and a chamber of commerce would fall outside of the scope of §87(2)(g), for it would not consist of inter-agency or intra-agency material.

In a case dealing with dissimilar facts but the same principle as that described above, the court referred to an advisory opinion prepared by this office concerning access to communications between a New York City agency and "outside parties" with whom the agency was negotiating. The court agreed with the opinion that §87(2)(g) was "not relevant because the communication sought is not between officials within an agency of the City or among officials of different agencies of the City" (Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Similarly, in rejecting a denial based upon §87(2)(g) involving correspondence between the New York City Bureau of Labor Services and private child care institutions, it was determined that those institutions "cannot satisfy the term 'agency' as defined in Public Officers Law §86(3)..."(Lowry v. Bureau of Labor Services, Supreme Court, New York County, March 9, 1984).

Based upon the foregoing analysis and my understanding of the facts, I do not believe that §87(2)(g) would have been applicable as a basis for denial. Further, it does not appear that any other ground for denial would apply.

Finally, since his appeal has been denied, Mr. Martin asked what additional "rights and procedures" may be available. In this regard, although my comments constitute an advisory opinion, it is my hope that they are educational, persuasive and that they enhance compliance with and understanding of the Freedom of Information Law. At this juncture, although a proceeding may be initiated under Article 78 of the Civil Practice Law and Rules to seek judicial review of the denial, it is my hope that this opinion will serve to negate the necessity of litigation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7357

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 12, 1992

Mr. Richard Reade
Trustee
Village of Old Field
Box 2831
Setauket, NY 11733

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

Dear Mr. Reade:

I have received your letter of September 15 in which you requested an advisory opinion concerning the Freedom of Information Law.

By way of background, you serve on the Village of Old Field Board of Trustees. Your inquiry pertains to a denial of your request for a report consisting of findings and recommendations of an attorney retained by the Village, Stephen Behar, to investigate "Constabulary Matters" concerning your charges against three constables and their charges against you "as their direct supervisor". You added that you "held the collateral duty of Police Commissioner, which [you] no longer hold as result of this report, the findings which are known only to the Mayor, the other trustees and the Village Attorney, the man who selected Behar for the task." The report was denied "based on the attorney-client contractual relationship between Mr. Behar and the Village" and because "the release of such information is deemed not to be in the best interest of the Village and the personnel involved." It is your view that the report is a "white-wash", for the constables were "cleared of thirty-one charges" due to "insufficient evidence" and you were cleared "of their one charge, yet [you were] penalized, they weren't."

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.

Of relevance is §87(2)(a), the first ground for denial, which pertains to records that "are specifically exempted from disclosure by statute." One such statute is §4503 of the Civil Practice Law and Rules, which makes confidential the communications between an attorney and a client, such as Village 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, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §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 v. 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)].

A key issue concerning the foregoing is your status in relation to the matter. Specifically, the issue is who the client is. It is unclear whether the report was prepared for the entire Board of Trustees as the client, or whether you were considered as

separate from the Board and the report was prepared for the Board, except yourself, as the client.

In my view, if you, as a member of the Board, are considered, with the other members of the Board, to be the client, you should enjoy the same rights as those others members to know of the contents of the report. On the other hand, if, for purposes of investigation, you could not be characterized as a client of the attorney who prepared by the report, it appears that the report would be exempted from disclosure in conjunction with the attorney-client privilege.

I hope that I 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-7358

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 13, 1992

Ms. Theresa C. Lonergan
[redacted]

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

Dear Ms. Lonergan:

I have received your letter of September 18 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you requested from a municipality in your vicinity "the federal employer identification number used when submitting report forms to the IRS." The request was denied in your view "on the assumption that it would be detrimental to the community to release it because it is also their non-profit entity number", and because "they were assuming that a criminal use would be made of the number...a wrongful assumption they had no right to make." You wrote that you "repeated the request in the context of a federal quarterly report form with a summation of wages, etc., for the quarter, or the annual report form to the IRS." The request was again denied, and the Supervisor indicated that his reason was based on a contention that "the quarterly report form was or is not related to research of local history, and therefore there was no need or obligation to supply it to [you]."

In this regard, I offer the following comments.

First, as a general matter, the purpose for which a request is made is irrelevant to rights of access. It has been held that when 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 M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY 2d 75 (1984), Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)].

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions

thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Third, although tangential to your inquiry, I point out that payroll information pertaining to public employees must generally be made available. In particular, §87(3)(b) of the Freedom of Information Law states that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their wages 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 [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)].

I am unfamiliar with specific contents of the forms or reports in which you are interested. However, insofar as the contents include public employees' identities and their wages, I believe that the records must be disclosed. If other aspects of the records include employees' social security numbers or home addresses, for example, those portions could in my view be withheld as an unwarranted invasion of personal privacy, for those kinds of items are personal and are irrelevant to the performance of the employees' official duties. The Town's identification number would in my opinion be accessible, for none of the grounds for denial would be applicable. Unlike a social security number that pertains to a natural person, an identification number pertaining to a municipality relates to an entity. For that reason, I do not believe that there are any personal privacy considerations that could be raised with respect to a municipality's identification number.

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- 7359

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 13, 1992

Mr. Raymond Campanale
88-A-6177
Elmira Correctional Facility
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. Campanale:

I have received your letter of September 16 and the materials attached to it.

According to your letter, in response to a request for "reproductions" of photographs used against you in your criminal case, the records access officer of the New York City Police Department provided photocopies but rejected your request for duplicates of the photos. You enclosed copies of the photos which, in your view, provide "no detail whatsoever". You also wrote that the records access officer's response failed to include information concerning the right to appeal a denial.

In this regard, I offer the following comments.

First, based upon §86(4) of the Freedom of Information Law, photographs maintained by an agency in my view clearly constitute records subject to rights of access. In this case, there appears to be no issue relating to whether the photos are available, for photocopies were made.

Second, §89(3) of the Freedom of Information Law states in part that, upon payment of the appropriate fee, an agency "shall provide a copy of such record." Further, the provision in the Law pertaining to fees, §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 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 authorizes other fees, 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 duplicated by means of photocopying. In my view, if a photocopy of a photograph serves as an adequate reproduction of such a record, a photocopy would likely suffice to comply with the Law. However, if a photocopy does not serve to provide an accurate method of reproducing what appears on a photograph, as agency, in my view, would be obliged to "copy" the record, i.e., prepare a reprint of a photograph upon payment of the actual cost of reproduction.

It is noted that in a recent decision, it was stated that the Freedom of Information Law "no where suggests that an agency must provide reprints of photographs" [Adams v. Hirsch, 582 NYS 2d 724 (1992)]. However, in that case, the agency could not locate the photographs. Further, in other contexts, it is clear that agencies have been required to produce records in the medium suggested when they have the ability to do so. For example, it has been found that an agency was required to supply data on a computer tape, rather than by means of computer printouts, when it had the capacity to do so and the applicant was willing to pay the actual cost of reproduction [see e.g., Brownstone Publishers, Inc. v. New York City Department of Buildings, 166 AD 2d 294 (1990)].

Lastly, it appears that the records access officer did not inform you of the right to appeal because he provided photocopies. Nevertheless, the person designated to determine appeals at the New York City Police Department is 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: Sgt. Louis J. Capasso, Records Access officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7360

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 13, 1992

Mr. Darnell Lloyd
91-B-2388 C-26-38
Attica Correctional Facility
Attica, NY 14011-0149

Dear Mr. Lloyd:

I have received your letter of October 7 in which you requested a variety of data from this office.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not maintain records generally nor does it serve as a repository of records. In short, I cannot provide the data sought because this office does not maintain it.

As a general matter, requests for 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 responses to requests. On the basis of your letter, it appears that requests should be made to the City of Buffalo Police Department and the Office of the Erie County District Attorney.

It is also 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 create a record in response to a request. Therefore, insofar as the data in which you are interested has not been prepared, an agency would not be obliged to create new records containing the information sought in order to comply with a request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7361

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 13, 1992

Mr. Tyrone Jefferson
76-A-4556
Attica Correctional Facility
Attica, NY 14011-0149

Dear Mr. Jefferson:

I have received two letters from you in which you appealed denials of requests for records made at the Attica Correctional Facility.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office cannot render determinations of appeals, nor is it empowered to compel an agency to grant or deny access to records.

The provision dealing with the right to appeal, §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 thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Therefore, an appeal is not made to this office, but rather to the head of an agency or a person designated by the head of an agency.

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 7362

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 14, 1992

Mr. Santo Fulvio Forcone
[redacted]

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

Dear Mr. Forcone:

As you are aware, I have received your letter of September 21 and the materials attached to it. You have sought assistance in obtaining records from the Town of Babylon.

By way of background, on July 30, you submitted a request for any application for a permit relating to construction modification or alterations presented to the Town concerning a particular building, as well as any application or permit for the sale and consumption of food at that location. Although you were shown three pages of blueprints on August 4 and requested copies of those records, you were told to submit another request and that copies could not be made because the blueprints were not yet signed. You were also directed to bring your request to the Town Attorney's office, where you were informed that copies would be ready in five days. Thereafter, you encountered a series of delays until August 20, when you were presented with a single microfilm copy, which you declined to accept because it was illegible, and because in your view, it appeared to be different from the blueprint seen on August 4. In addition two pages of blueprints, as well as an accompanying letter, were missing and could not be found.

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 opinion and based upon the facts that you provided, the records in question should be available, for none of the grounds for denial could appropriately be asserted to withhold the records, whether or not they have been signed. It is also noted that the Freedom of

Information Law authorizes the public to inspect and copy accessible records, and that §89(3) of the Law requires agencies to prepare copies of records upon payment of the requisite fee.

Second, with respect to the delays that you encountered, I point out that the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to a request. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 suggested that you seek a certification from the records access officer as described in §89(3) of the Freedom of Information Law. That provision states in part that, following a request for a record, an agency "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 addition, while I am unaware of its relevance to the situation, §89(8) of the Freedom of Information Law states that:

> "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."

Lastly, while it is unclear whether any of the records sought might have been disposed of or destroyed, it is noted that statutes other than Freedom of Information Law provide direction concerning the retention and disposal of records. Specifically, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. 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...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorizes to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

As such, records cannot be destroyed without the consent of the Commissioner of Education, and 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 records in question. However, I believe that a retention schedule applicable to town records may be obtained from the Town Clerk or the State Education Department, State Archives and Records Administration, Cultural Education Center, Albany, NY 12230.

In an effort to enhance compliance with and understanding of applicable 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: Ellen T. McVeety, Town Clerk
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7363

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 14, 1992

Mr. Todd Young
89-A-6469
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. Young:

I have received your letter of September 24. You have asked whether "complaint follow-ups (DD-5's)" prepared by the New York City Police Department are available.

In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since the contents of the records in question and the effects of their disclosure may differ from one record to another, I cannot offer specific guidance. However, the following paragraphs will review the provisions that may be significant in determining rights of access to those records.

Of potential significance is section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision 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 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 and communicated within the department or to another agency 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 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 o 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.

You also listed many advisory opinions prepared by this office and asked for as many as possible. Since the opinions are numbered chronologically, the most recent are the most up to date and relevant. As such, enclosed are the opinions numbered 5,000 and above. In addition, as requested, enclosed is the Committee's latest annual report.

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-7364

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 14, 1992

Mr. Charles E. Fenson
[redacted]

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

Dear Mr. Fenson:

I have received your letter of September 23 in which you questioned the legality of a certain fee charged by the Broome County Health Department.

Specifically, the Department "demands payment of $15.00 before a search will be performed...for the file of a septic system on a specific parcel or tax map no."

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 records or to charge more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed.

By way of background, §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 of 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 is 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 states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:

(1) inspection of records;

(2) search for records; or
(3) any certification pursuant to this Part" (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)].

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:pb
cc: Commissioner, Broome County Health Department
Broome County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7365

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 14, 1992

Mr. Edward Dumanis
[redacted]

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

Dear Mr. Dumanis:

I have received your letter of September 22 and the correspondence attached to it.

According to your letter, at a meeting of the Board of Education of the Amherst Central School District, a report was presented regarding savings that might be realized under an early retirement plan. The presentation "was accomplished by displaying some tables with numerical data through an overhead projector." Since you could not see well from where you sat, you requested copies of the displayed materials after the meeting. A few days later, the Superintendent denied your request. Following a discussion of the matter, the Superintendent apparently decided to disclose the materials so long as you requested them in writing. You did so and brought your request to the District's offices, at which time the Superintendent asked "why [you] need those copies." After you replied, you indicated that the Superintendent said that you have no "legal right to get those materials from him because it was his own study, and consequently, his own property." When he said he would make them available "just as a favor", you refused to accept them on that basis, and insisted on asserting your rights under the Freedom of Information Law. He disagreed and said that you must submit a new request "because the original written request was not made on the special form pertinent to the Freedom of Information Act."

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

First, the Freedom of Information Law pertains to agency records, and §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, I believe that the materials in question clearly constitute "records" subject to rights of access. They are maintained by the District and were apparently prepared, used and displayed by District officials in the performance of their duties. If that is so, again, in my view, they are records that fall within the scope of the Law and could not be characterized as personal or private property.

Second, since the materials were displayed at an open meeting during which any member of the public could have been present, they were publicly disclosed. As such, in my opinion, there would be no basis for withholding them following the meeting. Moreover, since you described the displays as "tables with numerical data", I believe that they must be disclosed under the Freedom of Information Law. While the records in question would consist of "intra-agency materials", it is emphasized that the provision dealing with those materials often requires disclosure. Specifically, §87(2)(g) of the Freedom of Information Law states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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. It is noted that in a decision that was later affirmed by the state's highest court, it was held that worksheets containing numerical estimates and projections, which were not reflective of "objective reality" and which were subject to revision, nonetheless constituted statistical tabulations available under the Freedom of Information Law [see Dunlea v. Goldmark, 54 AD 2d 446, affirmed 43 NY 2d 754 (1977)]. Based upon that decision and §87(2)(g)(i) of the Freedom of Information Law, I believe that tables with numerical data would be public even if they had not been publicly displayed.

Third, when records are accessible under the Freedom of Information Law, it has been found that they must be made equally available to any person without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Therefore, the reason for requesting records is generally irrelevant to the rights of access.

Lastly, I do not believe that an agency can require that a request be made on a prescribed form. 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 requests" [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 possesses 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 is unnecessarily serves to delay a response to or deny a request for records.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded 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: Dr. R. Timothy O'Neill, Superintendent
Robert L. Eicher, Assistant Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7366

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 15, 1992

Mr. Joseph G. Dell
Martin, Van De Walle,
Guarino & Donohue
P.O. Box 2074
Great Neck, N.Y. 11022-2074

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

Dear Mr. Dell:

I have received your letter of September 24 and the materials attached to it.

The attachments consist of resumes of public employees made available to your client under the Freedom of Information Law. Since various deletions were made prior to disclosure, it is your view "that the editing done by the Town government officials was overly broad and in violation of the F.O.I.L. Act." You have requested my views on the matter.

Having reviewed the resumes, it appears that deletions were made with respect to personal information, such as home addresses, marital status, and personal interests, the colleges and law schools attended by those employees, and the employers of those persons other than public employers. If my assumptions regarding the general nature of the deletions are accurate, I believe that they were properly made and that the agency complied with the Freedom of Information Law.

In this regard, I offer the following comments.

In my opinion, the only relevant basis for denial would be §87(2)(b), which authorizes an agency to withhold records or portions thereof to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first of which states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

In my opinion, although various aspects of resumes of public employees must often be disclosed, it is likely that other portions of those documents could properly be withheld.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard 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 a their 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); 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); 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].

With respect to access to a resume or application of a public officer or employee, if, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications 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 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 resumes or similar records 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.

Since most of the resumes that you enclosed pertain to attorneys, I believe that reference to the degrees that they received, for example, must be disclosed, for those items are clearly relevant to the performance of one's duties as an attorney. While the degrees are relevant to the performance of those duties, the schools that employees attended in my view are not.

Further, as indicated earlier, employment histories may be withheld. As such, I believe that the identities or locations of public employees' former private employers were appropriately deleted. The Town did not delete references to its employees' previous public employment, in all likelihood because the fact of a person's public employment is a matter of public record, and records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7368

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 15, 1992

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 September 22 and the correspondence attached to it.

According to the materials, you recently submitted a request to inspect records under the Freedom of Information Law to the Springs School District. In a response to the request, you were informed by the District's records management officer, who apparently also serves as its records access officer, that you could inspect the records on a particular day "between 3-3:30 p.m." As the "sole owner and employee of a small business", you wrote that it is "almost impossible for [you] to know whether [you] will be free from 3 PM to 3:30 PM (for example) on a date two weeks in the future." You wrote that it appears that the district office is regularly open from 8 a.m. to 5 p.m. five days a week and that one or more staff persons are in the office at all times. The person who responded is a full time employee, and she stated that "she, and only she, must personally sit next to [you] while [you] inspect any public records."

You have sought my views on the matter. In this regard, I offer the following comments.

First, by way of background, §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, §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 board of a public corporation, the Springs School District, is the Board of Education, 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."

As such, the Board has the ability to designate "one or more persons as records access officer". Further, section 1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests.

Third, §1401.4(a) of the regulations referenced earlier states that "Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business." If indeed the District office operates within regular business hours, I believe that restricting your ability to inspect records to a specific half hour period on a particular day is inconsistent with the regulations and the clear intent of the Freedom of Information Law. As stated in the legislative declaration appearing in §84 of the Law, "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." In my view, to comply with law, the District could make records available, perhaps from 9 a.m. to noon and 1 to 4 p.m. on business days within a certain period, i.e., two weeks. Further, it is unnecessary in my view for the records access officer to be present at all times that the public inspects records. Since the records access officer has the duty of

"coordinating" an agency's response to requests, that person could designate another staff member to be present while records are reviewed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded 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: Ann S. Nassauer, District Clerk
Peter M. Lisi, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7369

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 16, 1992

Mr. George W. Williams
87-C-0316
Auburn Correctional Facility
135 State Street
Auburn, NY 13021

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

Dear Mr. Abdullah:

I have received your letter of September 28 in which you sought advice concerning the means by which you may obtain a copy of your pre-sentence report.

In this regard, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances, is §390.50 of the Criminal Procedure Law, 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 §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 §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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7370

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 16, 1992

Mr. Louis F. Bowers
91-B-2158
Elmira Correctional Facility
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. Bowers:

I have received your letter of September 24 and the materials attached to it.

The materials consist of requests for records directed to the Essex County District Attorney and the Commander of the Westport State Police Barracks on September 6 and 7 respectively. As of the date of your letter to this office, it appears that you received no responses.

By way of background, as I understand the facts, the State Police received a call concerning an accident involving a pick-up truck in a swamp. The first trooper to arrive spoke to you but made no arrest. Following the arrival of a second trooper, an arrest was made. Further, the first trooper testified at your trial that he entered the truck and found a pamphlet entitled "How to make or obtain illegal license plates", as well as other items he could not identify. Your requests involve the accident report, an inventory of items found in the truck, and reports or statements made or taken by the troopers.

You have asked whether the requests are proper, whether the records sought fall within the Freedom of Information Law, and what steps might be taken if you receive no responses to the requests.

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. Although neither of the requests was addressed to a records access officer, I

believe that those in receipt of the requests would be obliged to respond or to forward a request to the records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, motor vehicle accident reports are available under §66-a of the Public Officers Law, except to the extent that "disclosure...would interfere with the investigation or prosecution...of a crime involved in or connected with the accident." That provision, for reasons to be discussed later, is consistent with similar language appearing in the Freedom of Information Law.

Finally, the remaining records are in my view subject to rights conferred by the Freedom of Information Law, which is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 records in question or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the provisions that may be significant in determining rights of access to those records.

Of potential significance is section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision 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 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 law enforcement agency and communicated within the agency or to another agency 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 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 o 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-7371

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 16, 1992

Mr. Danny Lau
91-A-5116/G5-11
Elmira Correctional Facility
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. Lau:

I have received your letter of September 21, which reached this office on September 29.

According to your letter and the materials attached to it, you have encountered difficulty in obtaining records from the Nassau County Police Department and the Office of the District Attorney. You have sought guidance in the matter. Based upon a review of the correspondence, I offer the following comments.

First, in my view, the purpose of your request and the intended use of the records in question are irrelevant to a determination of rights under the Freedom of Information Law. In brief, if records are accessible under the Freedom of Information Law, they must be made available, 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)].

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 §87(2)(a) through (i) of the Law. Since I am unaware of 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 provisions that may be significant in determining rights of access to those records.

Of potential significance is §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". That provision 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 §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 §87(2)(e).

Another possible ground for denial is §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 §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

Records prepared by employees of a law enforcement agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Further, 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 o 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, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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: Fred B. Klein, Assistant District Attorney
Sgt. Thomas J. King

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7372

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 19, 1992

Mr. Michael T. Larkin
[redacted]

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

Dear Mr. Larkin:

I have received your letter of September 26. As in the case of previous correspondence, your inquiry involves your efforts in obtaining the "cover to cover" contract pertaining to the Superintendent of the Islip Union Free School District.

In brief, you wrote that an amendment to the Superintendent's 1991-92 contract was approved at an August meeting of the Board of Education, and the minutes of that meeting state that the Board "approved the salary agreement and conditions of employment with the Superintendent of Schools". That has not yet been made available, despite your request, and you have sought assistance in the matter.

In this regard, having reviewed my letter to you of August 11 in which it was advised that the contract is available under the Freedom of Information Law, there is little of substance that I can add to it. However, I offer the following suggestions.

First, it would appear that a contract would have existed prior to the recent amendment. If that is so, I believe that the contract should be disclosed on request.

Second, based upon the minutes, reference is made to a salary agreement and conditions of employment. As such, it appears that certain documentation was prepared and approved for inclusion in the contract. Due to the approval by the Board, I believe that any such documentation would be available, even if it has not yet been included as part of a completed amended contract.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James Matthews

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7373

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 20, 1992

Mr. Mark Inabinet
88-A-0289 A-5-16
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. Inabinet:

I have received your letter of September 30 in which you sought assistant in obtaining tape recordings of a Tier 3 disciplinary proceeding made "outside [your] presence." In response to your first request, which was apparently made to the facility where the hearing was held, you were informed that you should seek the record from the Office of Counsel at the Department of Correctional Services in Albany. However, in response to that request, you were told that you should write to the superintendent at your facility.

In this regard, I offer the following comments.

First, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that requests for records kept at a correctional facility should be made to the facility superintendent or his designee. With respect to records kept at the Department's Albany offices, requests may be made to the deputy commissioner for administration. I believe that records pertaining to inmates are generally kept at the facilities where they are housed. Similarly, if an inmate is transferred, I believe that records are transferred with him.

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.

Finally, a provision of the Department's regulations that may relevant, §254.5(b), states in part that "[w]here an inmate is not

permitted to have a witness present, such witness may be interviewed out of the presence of the inmate and such interview tape recorded. The recording of the witness' statement is to be made available to the inmate at the hearing unless the hearing officer determines that so doing would jeopardize institutional safety or correctional goals."

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 7374

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 20, 1992

Mr. George Heidcamp
[redacted]

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

Dear Mr. Heidcamp:

I have received your letter of September 28, as well as the materials attached to it.

You have sought an advisory opinion concerning rights of access to bills submitted to the Town of Saugerties for payment for legal services. Although vouchers for payment have been disclosed, the bills were withheld following an appeal to the Town Attorney on the ground that the records fall within the scope of the attorney-client privilege and because disclosure "would impair present contract awards or collective bargaining negotiations."

In this regard, I offer the following comments.

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

Second, with regard to expenses incurred, as a general matter, 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 specific 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 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 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. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name

> of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

The other basis for denial involves §87(2)(c) of the Freedom of Information Law, which authorizes an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." From my perspective, bills or records indicating payment represent actions that have occurred. Consequently, I do not believe that §87(2)(c) would serve as an appropriate basis for withholding the records sought.

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys 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:pb
cc: Joseph C. Scala, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 7375

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 20, 1992

Mr. Joseph J. Cerbone
Attorney at Law
P.O. Box 449
Mt. 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 September 30 in which you asked that I comment with respect to your correspondence with the Town/Village of Mount Kisco and delays in responding to your requests.

In this regard, as you are aware, we have communicated previously concerning matters relating to the correspondence. I do not believe that it is necessary to reiterate earlier commentary.

I point out that, in several items, you referred to a requirement that a request made under the Freedom of Information Law must be answered within thirty days. While there is no such requirement, that statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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: John T. Pierpont, Village Manager
Maryalice Barnett, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7376

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 20, 1992

Mr. Daniel J. Dorn
[redacted]

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

Dear Mr. Dorn:

I have received your letter of September 30, as well as a letter attached to it that you received from Marist College.

In response to a request for records pertaining to your employment at the College, you were informed that "New York State Open Government Laws pertain to state agencies, not private institutions." You have questioned the accuracy of that statement.

In this regard, the Freedom of Information Law is applicable to agency records, and §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 of other governmental 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 maintained by entities of state and local government in New York; it does not apply to records of private institutions, such as Marist College.

Since the Freedom of Information Law could not be used to obtain the records in which you are interested, it is suggested that you discuss the issue 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-7377

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 20, 1992

Mr. James E. Cliff
92-A-2300
Clinton Correctional Facility
Box B
Dannemora, NY 12929

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

Dear Mr. Cliff:

I have received your letter of September 28 in which you sought assistance.

Specifically, you wrote that you are interested in obtaining hospital records pertaining to a particular individual, as well as records indicating that the same individual was "on medication" while being held in a county jail.

In this regard, although the Freedom of Information Law provides broad rights of access, I believe that the records in question could be withheld. In brief, medical records are generally confidential under provisions of the Public Health Law. Further, the Freedom of Information Law permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b), 89(2)(b)]. Section 89(2)(b) includes examples of unwarranted invasions of personal privacy, the first two of which involve:

> "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..."

Based on the foregoing, absent a release from the subject of the records in question, I do not believe you could obtain them under the Freedom of Information Law.

It is suggested that you discuss the matter with your attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 7378

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 20, 1992

Ms. Barbara Weed, President
PO Box 101
Schuylerville, N.Y. 12871

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

Dear Ms. Weed:

I have received your letter of September 29 in which you sought an advisory opinion concerning the propriety of a fee of one dollar per page established by means of a resolution adopted by the Washington County Board of Supervisors.

In this regard, in my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee in excess of twenty-five cents per photocopy for records up to nine by fourteen inches, no such fee may be assessed.

By way of background, §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 of 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 is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. In Sheehan, the City of Syracuse enacted an ordinance authorizing a fee in excess of twenty-five cents per photocopy that was invalidated. I believe that the same result would be reached in the situation that you have described.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to County officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Board of Supervisors
Kenneth E. Wheeler, Superintendent of Public Works

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 138
FOIL-AO 7379

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 21, 1992

Mr. Charles R. Voels
[redacted]

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

Dear Mr. Voels:

I have received your letter of September 30 and the materials attached to it.

By way of background, you submitted a request under the Freedom of Information Law to the Department of Social Services in which you sought information concerning "canvasses and appointments" from a certain eligible list, specifically, the name of each person appointed, and that person's title and grade prior to the appointment. Although the Department disclosed the information sought, a memorandum was given to those about whom the information was disclosed indicating that you made a request and that the information was being provided to satisfy your request.

In conjunction with the foregoing, you asked whether:

- The issuance of such a memorandum is permissible under past or current provisions of the Freedom of Information Law & Personal Privacy Protection Act or may violate the intent and/or spirit of those statutes.

- The Department of Social Services has the authority, discretion or option to issue such a memorandum in the absence of any restrictive provisions within the law.

- The Department of Social Services has any obligation to protect the privacy and anonymity of the requestor of the information.

In this regard, I offer the following comments.

First, there is no requirement in the Freedom of Information Law or the Personal Privacy Protection 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 either statute that would preclude an agency from informing an individual that a request has been made for records pertaining to him or her.

Second, 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 opinion would involve situations in which requests, by their nature, would if disclosed constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §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, or perhaps the position previously held by a public employee in an agency, 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.

When disclosure of the name of an applicant for records would not constitute an unwarranted invasion of personal privacy, I do not believe that the Personal Privacy Protection Law or any other provision of law would preclude an agency from disclosing the name of the applicant or that person's request. Rather, a request in such a circumstance would in my opinion be accessible under the Freedom of Information Law. I point out, too, that although §96(1) of the Personal Privacy Protection Law prohibits the disclosure of personal information unless the disclosure is made in accordance with an exception described in that provision, one of the exceptions involves disclosure required by the Freedom of Information Law [see Personal Privacy Protection Law, §96(1)(c)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7380

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 21, 1992

Ms. Sharon M. Billings
District Clerk/Records Access
Cohoes Board of Education
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 Mr. Billings:

I have received your letter of October 5 in which you sought an advisory opinion concerning a request made under the Freedom of Information Law.

The issue involves a "Memorandum of Agreement" that was requested after a contract between the District and its teachers' association was ratified, but before the preparation of the contract in its final form. You wrote that "releasing such information would not have any impact on the negotiations process", presumably because negotiations have ended.

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. However, based upon the facts that you presented, neither of those grounds could appropriately be asserted.

Section 87(2)(g) pertains to "inter-agency" and "intra-agency" materials. 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 of other governmental 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, an agency is an entity of state or local government, such as a school district. Based on the definition of "agency", "inter-agency materials" would involve written communications between or among officials of two or more agencies; "intra-agency materials" would consist of communications between or among officials within an agency. When a public employee union or its representative communicates with government, the communication, in my view, could not be characterized as "inter-agency or intra-agency materials", for the union neither is nor represents an agency.

In the context of your inquiry, the memorandum of agreement would have been exchanged or communicated between an agency, the District, and the union. Since the union would not constitute an agency, the memorandum of agreement would fall outside of the scope of §87(2)(g), for it would not consist of inter-agency or intra-agency material.

In a case dealing with dissimilar facts but the same principle as that described above, the court referred to an advisory opinion prepared by this office concerning access to communications between a New York City agency and "outside parties" with whom the agency was negotiating. The court agreed with the opinion that §87(2)(g) was "not relevant because the communication sought is not between officials within an agency of the City or among officials of different agencies of the City" (Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Similarly, in rejecting a denial based upon §87(2)(g) involving correspondence between the New York City Bureau of Labor Services and private child care institutions, it was determined that those institutions "cannot satisfy the term 'agency' as defined in Public Officers Law §86(3)..."(Lowry v. Bureau of Labor Services, Supreme Court, New York County, March 9, 1984).

Based upon the foregoing analysis, I do not believe that §87(2)(g) would be applicable as a basis for denial.

The other provision of potential significance is §87(2)(c), which authorizes an agency to withhold records insofar as disclosure "would impair present or imminent contract awards or collective bargaining negotiations." In my view, the key word in the quoted language is "impair". Under the circumstances that you presented, disclosure would not impair the negotiation process, because an agreement has been reached, and because the negotiations have ended.

Assuming that my understanding of the facts is accurate, the memorandum of agreement must be disclosed, for none of the grounds for denial could justifiably be asserted to withhold that record.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7381

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 22, 1992

Mr. William Lent
87-T-1369
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. Lent:

I have received your letter of October 5. You wrote that your request for records addressed to the Chief of the Albany Police Department has not been answered. You have sought assistance in the matter.

In this regard, I offer the following comments.

First, a request should be directed to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests. Although I believe that the Chief should have responded to the request or forwarded it to the appropriate person, it is suggested that you resubmit your request to Pamela Primomo Alley, City Clerk and Records Access Officer, City Hall, Albany, NY 12207.

Second, I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records.

Lastly, for future reference, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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-7382

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 22, 1992

Mr. Quintin Fair
90-C-1375 F-3-13
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. Fair:

I have received your letter of September 22, which reached this office on October 7. You complained that your requests directed to a senior parole officer at your facility 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 request. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 Division of Parole is Counsel to the Division.

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-7383

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 22, 1992

Mr. Tong-Chun Won
89-B-1179
Cayuga Correctional Facility
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. Won:

I have received your letter of October 3 in which you complained with respect to delays in responses to requests directed to the Office of the Kings 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, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 also wrote that you are having difficulty obtaining records from your former attorney. Since the Freedom of Information Law pertains to records maintained by government agencies in New York, it would be inapplicable to records maintained by an attorney outside of government. It is suggested that you contact your former attorney, as well as your current 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-7384

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 22, 1992

Mr. Jossif Bartolotti
[redacted]

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

Dear Mr. Bartolotti:

I have received your letter of October 7 and the correspondence attached to it.

You have alleged that the Wappingers Central School District has engaged in violations of the Freedom of Information Law concerning your request for records. The request focused on activities of a named administrator. You asked that I provide an "evaluation of the District's refusal to provide the requested information" and sought information concerning the award of attorney's fees in cases brought under the Freedom of Information Law, particularly cases in which "putative" damages have been awarded.

In this regard, based upon a review of the materials, I offer the following comments.

First, since you alleged that the District engaged in violations relating to the timeliness of its response and the appeal process, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to appeals. Specifically, §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 §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, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of the Freedom of Information Law states in part that an agency need not create records in response to a request.

That provision also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 [Baselon, 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 retracting 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 am unfamiliar with the record-keeping systems maintained by the District and whether it has the ability to locate and identify all of the records in the manner in which you described them. On the basis of the response to your request, certain of the information sought (items 3a through d) is not retrievable by means of employees' names. However, since the Assistant Superintendent wrote that records containing the data requested would be made available, it appears that the District complied with that aspect of your request. The same would appear to be so with respect to items 3i, 3j and 3l pertaining respectively to minutes of meetings of the Board of Education, decisions made concerning your complaints, and policies of the District.

With respect to minutes of meetings, the Open Meetings Law contains what may be characterized as minimum requirements concerning the contents of minutes. 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."

As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. To reiterate, 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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, 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. Therefore, it would be unusual for a board of education to prepare minutes of executive sessions.

Records involving the administrator's credentials and his attendance records were withheld. In this regard, 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, October 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.

In my opinion, the only relevant basis for denial regarding records containing qualifications or credentials would be §87(2)(b), which authorizes an agency to withhold records or portions thereof to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first of which states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

In my view, although various aspects of records concerning the backgrounds of public employees may be withheld, I believe that other portions of those documents must be disclosed.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard 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 a their 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); 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); 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].

If, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications as a condition precedent to serving in a particular position, records of or containing that kind of information 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 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.

In a decision dealing with attendance records that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights 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)].

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates 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 §87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

In affirming the Appellate Division decision in Capital Newspapers, 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 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" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, it is clear in my view that attendance records must be disclosed under the Freedom of Information Law.

One aspect of your request involved §87(3)(c) concerning the District's subject matter list. You complained that you did not request that record, but rather a list of categories of records pertaining to the administrator in question. The cited provision states that each agency shall maintain:

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

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. A subject matter list need not refer to or be prepared with respect to records concerning a particular employee. It appears that you might have misunderstood that aspect of the Law and that the District made available the list that it is required to maintain.

Some aspects of your request pertain to complaints and disciplinary topics. I believe that those subjects were considered in my opinion of August 12 prepared at your request. As such, reiteration of that commentary is unnecessary.

Lastly, if a request is denied access following an appeal, an applicant may seek judicial review of the denial by initiating a judicial proceeding under Article 78 of the Civil Practice Law and Rules. When such a proceeding is brought under the Freedom of Information Law, the agency has the burden of proof. Further,

although there is no provision in the Freedom of Information Law concerning the award of punitive damages, a court may award attorney's fees, payable by an agency, in certain circumstances. Specifically, §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
Executive Director

RJF:jm

cc: John Marmillo, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7385

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 22, 1992

Ms. Lola Locker
President
Board of Managers
The Estates at North Hills - II
2 Estates Terrace North
Manhasset, 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.</u>

Dear Ms. Locker:

I have received your letter of October 6 in which you sought assistance concerning a request for records of the Village of North Hills made on August 11.

You have questioned the appropriateness of the request and asked whether, if you are unaware of the manner in which records are kept, the records access officer is required to assist you "by identifying the record in some way, to enable [you] to make a proper request." In addition, if vouchers are kept in chronological order, you questioned whether you may "reasonably ask for assistance in identifying vendors and approximate months of purchase [you] have reasonably identified." Further, in your request, which is quite extensive, you wrote that, in lieu of receiving copies of what could be many documents, you would be amenable to receiving summaries of those items.

In this regard, I offer the following comments.

First, by way of background, when the Freedom of Information Law was originally enacted in 1974, it required that an applicant request "identifiable" records. That standard resulted in difficulty and frustration, for members of the public in many instances were unable to name a record or identify a record with particularity. However, the original law was repealed and replaced with the current statute, which became effective in 1978. Among the alterations was a change in the standard for requesting records. Section 89(3) of the Freedom of Information Law currently states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 [Baselon, 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 retracting 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, the agency was able to locate more than 2,000 pages of records on the basis of an inmate's name and identification number.

In the context of your request, I am unfamiliar with the record-keeping systems maintained by the Village, and its ability to locate and identify of the records in the manner in which you described them is unknown.

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 part that agency personnel are required to "[a]ssist the requester in identifying requested records, if necessary" [§1401.2(b)(2)]. Therefore, if records are not kept in the format or in a manner consistent with the terms of a request, I believe that agency staff must describe the means by which records are maintained, assist an applicant in identifying records of interest and provide guidance in a manner that gives effect to the intent of the Freedom of Information Law. As stated in the legislative declaration appearing at the beginning of the Freedom of Information Law, §84:

> "As 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."

Third, insofar as records can be located and identified, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 items requested are contracts, which, in my view, must be disclosed, for none of the grounds for denial would apply. Although §87(2)(c) authorizes agencies to withhold records when disclosure "would impair present or imminent contract awards", it has been held that successful bids resulting in contract awards must be disclosed [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (1988)]. Similarly, books of account, bills and vouchers are accessible.

One of the few instances in which the Freedom of Information Law requires the maintenance of records involves payroll information. Section 87(3)(b) of the Law requires that "[e]ach agency shall maintain...a record setting forth the name, public office address, title and salary of every officer of employee of the agency". As such, payroll records and similar documents indicating payments made to or compensation of public officers and employees must in my view be disclosed.

With regard to job descriptions and resumes, the former would in my opinion be available, because none of the grounds for denial could be asserted to withhold those records. With respect to the latter, I believe that the only relevant basis for denial would be §87(2)(b), which authorizes an agency to withhold records or portions thereof to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first of which states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

In my opinion, although various aspects of resumes of public employees must often be disclosed, it is likely that other portions of those documents could properly be withheld.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided

substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard 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 a their 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); 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); 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].

With respect to access to a resume or application of a public officer or employee, if, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications 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 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 resumes or similar records 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.

As indicated earlier, employment histories may be withheld. While I believe that the identities or locations of public employees' former private employers could be withheld, the fact of a person's public employment is a matter of public record. Therefore, insofar as employment histories indicate prior public employment, those items in my opinion would be available.

The privacy provision also is pertinent to bills involving the use of a cellular phone by the Mayor. When a public officer or employee uses a mobile telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to the officer or employee serving as a government official.

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 employee who initiated the call, but rather with respect to the recipient of the call.

There is but one decision of which I am aware that deals with the issue. In Wilson v. Town of Islip, one of the categories of the records sought involved bills involving the use of cellular telephones. In that decision, it was found that:

> "The petitioner requested that the respondents provide copies of the Town of Islip's cellular telephone bills for 1987, 1988 and 1989. The court correctly determined that the respondents complied with this request by producing the summary pages of the bills showing costs incurred on each of the cellular phones for the subject period. The petitioner never specifically requested any further or more detailed information with respect to the telephone bills. In view of the information disclosed in the summary pages, which indicated that the amounts were not excessive, it was fair and reasonable for the respondents to conclude that they were fully complying with the petitioner's request" [578 NYS 2d 642, 643, ___ AD 2d ___ (1992)].

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 thought 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 might 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 §87(2)(f) of the Freedom of Information Law.

I would conjecture that, in the case of calls made by a mayor, phone calls may be made to a great variety of persons in a broad variety of contexts. Unlike the caseworker who routinely phones a class of persons having a particular status (i.e., recipients of public assistance), it is likely that the calls made by a commissioner would involve an array of issues and persons who do not fall within any special identifiable class or status. If my assumption is accurate, disclosure of a phone number would not alone signify a person detail involving the recipient of a call. Further, as indicated previously, disclosure of the number would not necessarily indicate who received the call, nor would it disclose anything about the nature of a conversation.

In short, subject to the unusual kinds of exceptions discussed earlier, it appears that the phone bills should be disclosed under the Freedom of Information Law.

With regard to "memoranda used to justify individual budget items" and similar or related records, §87(2)(g) would 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 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.

Since you requested minutes of meetings, I point out that the Open Meetings Law provides minimum requirements concerning the contents of minutes. Section 106 of that statute provides that:

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

Based upon the foregoing, although minutes may be expansive, they must include reference only to those details described in §106.

I point out that, as a general rule, a public body may take action during a properly convened executive session, unless the actin involves the appropriation of public money [see Open Meetings Law, §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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to

requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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: Nancy Calderon, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7386

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 26, 1992

Ms. Diane Errico-Murphy
[redacted]

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

Dear Ms. Murphy:

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

You have asked that I review your letter of September 10 addressed to David M. Marden, Chief of the Town of Bedford Police Department, in which you requested "copies of departmental procedures, rules and regulations in the handling of domestic violence calls or written statements for...police officers." In addition, you asked that the Chief answer several questions concerning issues relating to domestic violence. The Chief denied the request for the procedures, rules and regulations stating that the Department "has only a statement of policy regarding domestic violence calls, same are not properly within a request under Article 6 of the Public Officers Law..." Further, he cited the decision rendered in Town of Oyster Bay v. Williams, 134 AD 2d 267 (1987), as the basis for denying the request and for his refusal to provide information in response to your questions.

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law, in terms of its title, may be somewhat misleading. That statute is vehicle under which the public may seek and potentially obtain government records. That statute, however, does not require that agency officials provide information in response to questions. Similarly, the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency need not create a record in response to a request. In short, while I believe that the Chief or other Town officials would be obliged to grant or deny access to existing records in accordance with the Freedom of Information Law, agency officials

would not be required by that statute to provide information by answering questions.

Second, it is also noted that the Freedom of Information Law pertains to all agency records. Section 86(4) of the Law defines the term "record" expansively to include:

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

Third, insofar as agency records 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. I am unfamiliar with the specific contents of the records in which you are interested. However, 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 procedures, rules and regulations would be available, unless a different basis for denial could be asserted.

Further, it appears that the Chief's reliance upon the Town of Oyster Bay decision may be based on a misinterpretation of the Court's holding in that case. The court characterized the records at issue in that case as "opinions, advice, evaluations, deliberations, proposals, policy formulations, conclusions or recommendations" and found that "government agency deliberative functions would certainly be hindered by the disclosure of such subjective matter" (id., 268). It is clear in my view that the court was referring to predecisional materials that involved a written account of agency officials' thought processes used in attempting to reach decisions. Those kinds of records are in my opinion different from procedures, rules, and regulations that have been adopted and upon which an agency relies in carrying out its duties. While the former may be withheld, the latter must be disclosed, again, unless a different ground for denial is applicable.

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 provision 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 scrupulous 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

> 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 [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 in question might be deniable, others must in my opinion be disclosed 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
Executive Director

RJF:pb
cc: David M. Marden, Chief of Police
Lawrence E. Dwyer, Jr., Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7387

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2781

October 26, 1992

Mr. Terrence Murphy
[redacted]

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

Dear Mr. Murphy:

I have received your letter of October 5 in which you requested an advisory opinion concerning a denial of access to a record.

According to your letter, you recently requested a "violation of probation report" from the Westchester County Probation Department prepared pursuant to §410.70 of the Criminal Procedure Law relating to your co-defendant. The request was denied pursuant to §§87(2)(a) of the Freedom of Information Law and 390.50 of the Criminal Procedure Law.

In this regard, I offer the following comments.

First, §390.50 of the Criminal Procedure Law pertains to pre-sentence reports, which are generally confidential pursuant to the statutes cited in the denial. The record that you seek is in my view different from a pre-sentence report and falls outside the scope of the confidentiality requirements imposed by that statute.

Second, §470.10(2) of the Criminal Procedure Law states in relevant part that:

> "The court must file or cause to be filed with the clerk of the court a statement setting forth the condition or conditions of the sentence violated and a reasonable description of the time, place and manner in which the violation occurred."

Although the Freedom of Information Law does not apply to the courts or court records, such records when filed with a clerk are generally available under other statutes (see e.g., Judiciary Law,

§255). Assuming that the record in question is accessible from the clerk of the court with which it was filed, it would be most appropriate in my view to seek to obtain it from the clerk. However, if a copy is maintained by a probation department, I believe that it would be equally available from that agency. Stated differently, if a record is available from one government office, the same record in my view should be available from another.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Anthony P. D'Angelo, Assistant Commissioner
Marilyn J. Slaaten, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7388

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 28, 1992

Mr. Paul S. Foy
The Daily Gazette
State Capitol Bureau
LCA Press Room
State Capitol
Albany, N.Y. 12224

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

Dear Mr. Foy:

As you are aware, I have received your letter of September 15 and various correspondence related to it.

By way of background, on July 14, you directed a request to the Office of General Services "to inspect documents concerning the purchase by state agencies of what [that agency] says is 747 new vehicles, including sedans, station wagons, passenger vans, police cruisers and Jeeps." You added that you wanted to "view records that indicate which agencies ordered the vehicles and for what purposes" and to inspect those "justifying the purchase of equipment options and large engines."

The request was denied for two reasons, that disclosure would "endanger the life or safety of any person", and because the "information is protected as 'inter-agency or intra-agency communications'." You appealed the denial and "limited" your request to "factual records or lists that indicate which state agencies ordered the cars, how much they cost, and for what purpose they'll be used." In response to the appeal, Commissioner Robert B. Adams responded by letter and provided data reflective of the total cost of the vehicles, a lump sum figure, and identified those agencies that received vehicles. He added that the vehicles "included sedans, passenger vans and wagons to be used for institutional ward transport, law enforcement and security, as well as general agency purposes." Commissioner Adams also asserted that "[a] substantial number of the vehicles were purchased for undercover work for law enforcement investigations, necessitating our conclusion that disclosure of the records you seek would in

fact and in law pose danger to life or safety of persons involved in such investigations." He reasserted, too, that the records fall within the exception concerning inter-agency and intra-agency materials.

It is your contention that "Office of General Services can still disclose the number and even type of vehicles bought for undercover work, and list the agencies doing this work, without identifying particular undercover agents or jeopardizing their safety." You have sought an advisory opinion concerning this matter.

In this regard, I offer the following comments.

First, although the Commissioner provided information in response to your appeal, no records were made available. In my view, the Freedom of Information Law pertains to records, and in responding to a request, an agency is obliged to disclose records or portions thereof to the extent required by law. I am unfamiliar with the nature or specific content of records falling within the scope of your request as limited by the statement made in your appeal. However, the Freedom of Information Law is applicable to existing records, and §89(3) of the Law states in part that an agency need not create or prepare a new record in response to a request. Concurrently, I point out that §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."

Therefore, documentation or other information existing in some physical form that is maintained by an agency would constitute a "record" subject to rights conferred by the Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §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 there may be situations in which a single record might contain both accessible and deniable information. That phrase in my opinion also indicates that an agency is obliged to review records sought in their entirely to determine which portions, if any, may justifiably be withheld.

Following such a review, the agency must disclose those aspects of a record that do not fall within any ground for denial, perhaps after having made deletions as permitted by the exceptions to rights of access.

When records are available under the Law in their entirety, an applicant may inspect them at no charge. If however, an agency is authorized to withhold portions of records, I do not believe that an applicant would have the right to inspect them. In that event, an agency might copy the records, make appropriate redactions, and assess a fee for copies in accordance with §87(1)(b)(iii) of the Freedom of Information Law. In brief, unless a statute other than the Freedom of Information Law is applicable, an agency may charge a fee of up to twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproduction of other records.

In my opinion, assuming that records exist containing the information in which you are interested, two of the grounds for denial, both of which are referenced in the correspondence, are relevant in ascertaining rights of access.

The initial ground for denial of significance, §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.

In my opinion, while the information sought in your modified request would constitute inter-agency or intra-agency materials,

records or lists indicating which agencies received vehicles, the kinds of vehicles acquired, their cost and purpose would consist of factual information that must be disclosed under §87(2)(g)(i), unless a different ground may be asserted. I point out that a portion of your original request, that aspect of the request involving agencies' justifications for requesting vehicles with certain options, would in my view constitute information deniable under §87(2)(g). A justification, from my perspective, would essentially represent an agency's opinion concerning its needs. In contrast, the information sought in your more limited request, as I understand it, would consist solely of factual information. Further, in a case involving intra-agency materials, the Court of Appeals specified that the contents of those materials determine the extent to which they may be available or withheld, for it was 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, even though statistical or factual information may be "intertwined" with opinions, for example, the statistical or factual portions, if any, would be available, unless a different ground for denial could properly be asserted.

The other potentially relevant basis for denial, §87(2)(f), states that an agency may withhold records or portions thereof when disclosure "would endanger the life or safety of any person." I believe that details regarding certain vehicles could if disclosed endanger lives and safety. For instance, if a vehicle used by a law enforcement agency is specially equipped, or if its top speed is known, potential lawbreakers might be able to tailor their activities accordingly and in a manner that could endanger lives and safety. However, if it can be assumed that the public is generally aware that an agency uses sedans or vans to transport inmates, patients or its own employees, the disclosure of basic information, such as the number and nature of vehicles purchased, by agency, by category (i.e., sedans), and the cost of categories of vehicles, it is unlikely in my view that disclosure would endanger life or safety. Further, there may be little danger, if any, in the case of disclosure of the use of vehicles by agencies that are not involved in criminal law enforcement.

In sum, insofar as records exist that contain factual information in which you are interested, I believe that they should be made available, except to the extent that disclosure would endanger the life or safety of any person. Those portions of the records, in my opinion, 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:pb
cc: Robert B. Adams, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7389

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 28, 1992

Ms. Betty A. Loriz
[redacted]

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

Dear Ms. Loriz:

I have received your letter of October 5, which reached this office on October 13.

According to your letter, you have made several requests to the District Clerk of the Monticello Central School District for a list of its employees and their salaries. Since your request has not been honored, you have sought advice on 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.

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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries 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 [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.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 your requests have been denied either in writing or due to a failure to respond within the requisite time limits, as indicated in the form attached to your letter, you may appeal to the Superintendent of Schools.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded 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: Superintendent of Schools
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7390

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 28, 1992

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 October 10 and the correspondence attached to it.

By way of background, on February 28, following the receipt of a complaint, you were informed that the City of Amsterdam Health Department inspected your property, found it to be a health hazard and ordered that it be "cleaned up." Thereafter, you requested records relating to the complaint and subsequent inspection. Although you specified that the "identity of the complainant is not of interest" to you, the request was denied on the basis of §87(2)(b) and (e) of the Freedom of Information Law. Further, you wrote to the City Attorney to seek reconsideration of the denial. Nevertheless, those requests have been unanswered.

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

First, each agency, such as the City of Amsterdam, is required to designate one or more "record access officers." The records access officer has the duty to coordinate an agency's response to requests. It is suggested that you attempt to ascertain the identity of the record access officer and resubmit your request.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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.

It has been advised that, insofar as complaints identify complainants, identifying details may be withheld on the ground that disclosure would result in "an unwarranted invasion of personal property" [see Freedom of Information Law, §§87(2)(b) and 89(2). Further, §89(2)(a) states that "an agency may delete identifying details when it makes records available," and §89(2)(c)(i) provides that when records are otherwise available, disclosure shall not be construed to constitute an unwarranted invasion of personal property "when identifying details are deleted." Therefore, if deletion of a complainant's name or other identifying details would serve to protect that person's privacy, the remainder of a compliant must in my opinion be disclosed.

The other provision cited in the correspondence as a basis for denial, §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."

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 §87(2)(e). It is questionable, however, whether the records sought could be characterized as having been compiled for law enforcement purposes. Moreover, even if they could be so characterized, it appears that the only aspect of the records that could be withheld under §87(2)(e) would be the complainant's identity, if that person is considered a "confidential source."

Also relevant is §87(2)(g). The cited provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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.

An inspection report would consist of intra-agency material. However, to the extent that it contains the kinds of information described in subparagraphs (i) through (iv) of §87(2)(g), I believe that it 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:pb
cc: Felix J. Catena, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7391

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 28, 1992

Mr. Kevin M. Farrell
#82-C-0451
Clinton Correctional Facility
P.O. Box 2001
Dannemora, N.Y. 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. Farrell:

I have received your letter of September 28 addressed to William Bookman, Chair of the Committee, and the materials attached to it. Please note that your correspondence reached this office on October 13. As indicated above, the staff of the Committee is authorized to prepare advisory opinions on its behalf.

You have sought an opinion concerning an unanswered request for records of the Division of State Police concerning a homicide for which you were prosecuted.

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 §87(2)(a) through (i) of the Law. Since I am unaware of 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 provisions that may be significant in determining rights of access to those records.

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §677 of the County Law, which pertains to autopsy reports. In brief, under that statute, autopsy reports are available to the next of kin and a district attorney; in other cases, a court order is needed to acquire an autopsy report prepared by a medical examiner or coroner.

Of potential significance is §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". That provision 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 §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 §87(2)(e).

Another possible ground for denial is §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 §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

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

Records prepared by employees of a law enforcement agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Further, 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 o 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7392

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 28, 1992

Mr. Gennaro J. Faiella
Village Manager
Municipal Building
16 Croton Avenue
Ossining, N.Y. 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. Faiella:

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

You have sought clarification concerning the "point in time the Freedom of Information Law can be characterized as a vehicle of harassment as opposed to acting as a legitimate mechanism for seeking information on government operations." Due to the volume and nature of requests, you indicated that you "are finding it increasingly difficult to meet the requirements of the law. The attachments to you letter involve, for example, requests for information sought by asking questions. Further, you wrote that "[m]uch of the information requested had been previously released and certain questions have been addressed by [y]our office."

In this regard, I offer the following comments.

First, I am unaware of any judicial decisions rendered under the Freedom of Information Law that deal directly with its use for purposes of harassment. However, as a general matter, the Law does not distinguish among applicants, it does not restrict the number of requests that may be made, and the purpose for which requests are made is generally irrelevant.

Second, however, if you or your staff have been providing information in response to the kinds of questions raised by applicants, it appears that you have acted above and beyond the requirements of the Freedom of Information Law. The title of that statute may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by

law. As such, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if, for example, the Village does not maintain statistics indicating summonses issued for parking violations between 3 and 6 p.m. during the month of August, I do not believe that staff would be required by the Freedom of Information Law to review existing records and prepare new records on behalf of an applicant.

Third, §89(3) of the Law also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 [Baselon, 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 retracting 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, if, due to the nature of an agency's record-keeping system, staff cannot retrieve a record based on the manner in which it is requested or must search,

individually, all of its records within a particular unit, I do not believe that the request would reasonably describe the record sought.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to appeals. Specifically, §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. However, if the receipt of request is acknowledged, and the approximate date of determining whether to grant or deny access to records represents a reasonable time, I believe that an agency would be acting in compliance with law.

Lastly, it is suggested that applicants be informed that the Freedom of Information Law does not require agencies to create records or provide information by answering questions. Further, if records and information have been previously provided, it is suggested that applicants be informed that repeated requests for the same records or information will not be honored in view of prior disclosures.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7393

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 29, 1992

Ms. Grace H. Madera
Human Resources Officer
4355 Lake Shore Drive
Canandaigua, N.Y. 14424-8395

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

Dear Ms. Madera:

As you are aware, I have received your letter of October 9 and the materials attached to it.

In your capacity as Human Resources Officer for the Community College of the Finger Lakes, you wrote that you are installing a "relational database system...which includes a personnel/payroll module." Since you are concerned with respect to the privacy of the College employees, you enclosed facsimiles of the screens as they appear on the system and asked for advice concerning "the confidentiality criteria of each field." You also asked "[w]ho should be allowed access to this information" and what liability your office might incur, presumably in the event of an inappropriate 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, 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, October 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.

In my opinion, the only relevant basis for denial regarding the information in question would be §87(2)(b), which authorizes an agency to withhold records or portions thereof to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first of which states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

In my view, although various aspects of records concerning the public employees or their backgrounds may be withheld, I believe that other portions of those documents must be disclosed.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard 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 a their 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); 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); 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].

With respect to the first screen (items 1 to 28) the initial items involve employees' names, which in my view would be public. Assuming that items 7 through 13 pertain to an employee's home address and home phone number, those items could in my opinion be withheld, for they are irrelevant to the performance of one's official duties. The same would be true with respect to items 14 through 26, all of which involve personal information unrelated to

a position. Item 28 involving "funding source" would appear to be public.

The same standards would apply to the other screens. In the next (items 1-30), the name would be available, but home addresses or addresses where checks are mailed could be withheld, as could items 18 to 21. An employee's work location and building would be public, as would items regarding employees' start and end dates. As I understand page 3, it involves salary and leave information. Salary information is clearly public, for §87(3)(b) of the Freedom of Information Law requires that "[E]ach agency maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency." Further, in a decision dealing with leave and attendance records that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights 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)].

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates 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 §87(2)(b) could be asserted to withhold that kind of information.

In affirming the Appellate Division decision in Capital Newspapers, 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 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" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, it is clear in my view that attendance records must be disclosed under the Freedom of Information Law.

On the last page, family and health insurance benefit information could in my view be withheld (items 1 and 2). Item 3 indicating educational background and a degree may be available. If, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications as a condition precedent to serving in a particular position, records of or containing that kind of information 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 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.

With respect who should be allowed access to this information, those aspects of the data that are accessible under the Freedom of Information Law would be available to any person. Other aspects of the data that could be withheld from the public as an unwarranted invasion of personal privacy presumably could be shared with College officials when those items are necessary to the performance of their duties.

Lastly, while I cannot appropriately respond with regard to liability, I point out that the Freedom of Information Law is permissive. Although an agency may have the authority to withhold records or portions thereof, there is no requirement that it must do so. 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, with or without identifying details, if it so chooses" [Capital Newspaper v. Burns, 67 NY 2d 562, 567 (1986)].

If I have misinterpreted the information you forwarded or if you have questions pertaining to particular items, please feel free to contact me.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7394

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 29, 1992

Mr. Harold G. Trabold
Dranitzke, Lechtrecker & Trabold
73 North Ocean Avenue
P.O. Box 510
Patchogue, NY 11772

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

Dear Mr. Trabold:

I have received your letter of October 9 in which you sought advice concerning the Freedom of Information Law.

As the attorney for the North Patchogue Fire District, you have sought clarification concerning the disclosure of incident reports prepared by the Department, particularly in situations in which medical assistance is provided or when there is a medical emergency.

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, the introductory language of §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 may contain both accessible and deniable information. Moreover, that phrase in my opinion imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Second, of relevance is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

> "if disclosed would constitute an unwarranted invasion of personal privacy under the

> provisions of subdivision two of section eighty-nine of this article...."

In addition, §89(2)(b) lists a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to:

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

From my perspective, a record of a medical emergency call consists in great measure of what might be characterized as a medical record or history relating to the person needing care or service (see Hanig v. NYS Department of Motor Vehicles, 79 NY 2d 106 (1992)].

In my opinion, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, for disclosure of a name coupled with those details in my view represents a personal and somewhat intimate event in the individual's life. However, I believe that other aspects of the records, such as the locations of calls or addresses, should be disclosed. In my view, an emergency call, particularly when sirens or flashing lights are used, is an event of a public nature. When a fire truck or ambulance travels to its destination, that destination is or can be known to those in the vicinity of the event. In essence, I believe that event is of a public nature and that disclosure of an address or a brief description of an event would not likely constitute an unwarranted invasion of personal privacy. Nevertheless, the personally identifiable details described earlier could in my view be withheld.

Lastly, I do not believe that the information could be characterized as privileged and confidential; rather I view the items that could be withheld as deniable. It is noted that the Freedom of Information Law is permissive; although an agency may withhold records falling within the exceptions to rights of access, there is no requirement that records must be withheld. As indicated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so

chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

I hope that I 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-7395

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 29, 1992

Mr. Derry Ruffin
76-A-4430
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. Ruffin:

I have received your letter of October 7 in which you sought assistance concerning requests for records directed to the Kings County Office of the District Attorney and the Supreme Court in Kings County.

According to your letter, the records requested from the Office of the District Attorney could not be located. The requested directed to the court were not answered. In this regard, I offer the following comments.

First, if records cannot be located, one possible avenue would involve providing additional detail concerning the records sought in order to improve the ability of agency staff to locate the records. Further, if you believe that it would be useful to do so, you may seek a certification in which the records access officer for the District Attorney must assert in writing that the records could not be located. Section 89(3) of the Freedom of Information Law states in part that when a record cannot be found, 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."

Second, the Freedom of Information Law applies to agency records and §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 of other governmental entity performing a governmental or proprietary function for the

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

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

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

As such, the courts and court records fall beyond the requirements of the Freedom of Information Law.

The foregoing is not intended to suggest that court records may not be disclosed, for other statutes often provide access to those records (see e.g., Judiciary Law, §255). If you have not already done so, it is suggested that a request be made to the clerk of the court that maintains the records. Such a request should include sufficient detail to enable court officials to locate the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7396

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 29, 1992

Mr. Michael Webb
#90-A-4906
Attica Correctional Facility
Attica, N.Y. 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. Webb:

I have received your letter of October 9 in which you seek assistance concerning court records pertaining to you.

Specifically, you indicated that you are attempting to locate various records, particularly those involving a preliminary hearing conducted in Mt. Vernon. Other aspects of the proceeding occurred in Supreme Court in White Plains.

In this regard, the Freedom of Information Law applies to agency records and §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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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

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

As such, the courts and court records fall beyond the requirements of the Freedom of Information Law.

The foregoing is not intended to suggest that court records may not be disclosed, for other statutes often provide access to those records (see e.g., Judiciary Law, §255). If you have not already done so, it is suggested that a request be made to the clerk of the courts that maintain the records in which you are interested. Such requests should include sufficient detail to enable court officials to locate the records. Mount Vernon City Court is likely located in City Hall, Mount Vernon, N.Y. 10550.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7397

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 29, 1992

Ms. Joan Rowlands
[redacted]

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

Dear Ms. Rowlands:

I have received your letter of October 10. You have asked whether the Port Jervis Development Corporation is subject to the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law applies to agency records, and the scope of that statute is determined in part by §86(3), which defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental 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, I believe that the entity in question is a "local development corporation". If that is so, I point out that specific reference is found in §1411 of the Not-for-Profit Corporation Law to such corporations. The cited provision describes the purpose of local development corporations and states in part that:

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

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

In an effort to learn more about local development corporations generally, it has been found that their relationships with government are inconsistent. Some are apparently analogous to chambers of commerce and, in great measure, carry out their duties independent of government. Others appear to be partners with or extensions of government that carry out their duties in conjunction with government.

Third, there are two judicial decisions of which I am aware that have dealt with the status of local development corporations, both of which concluded that those corporations are "agencies" subject to the Freedom of Information Law. In the first, Legal Aid Society of Northern New York, Inc. v. Albany Local Development Corporation (Supreme Court, Albany County, January 27, 1989), the Court found that "[t]o suggest that ALDC is not an agency of the City of Albany is not realistic and the court does not adopt such reasoning." Concurrently, the Court "adopt[ed] the reasoning" offered in two opinions prepared by this office in which it was advised that certain local development corporations were subject to the Freedom of Information Law. Further, in a recent decision rendered by the Appellate Division, Fourth Department, Matter of Buffalo News, Inc. v. Buffalo Enterprise Development Corporation [578 NYS 2d 945, 173 AD 2d 43 (1991)], the Court found that the Corporation was subject to the Freedom of Information Law, stating that the Corporation:

> "was specifically organized by the City of Buffalo pursuant to the Not-for-Profit Corporation Law [sections] 102(a)(5), 201(b), 402 and 1411, 'to advance the objectives of [the City's] Department of Community Development *** [and] *** to facilitate partnership with the private sector in strengthening Buffalo's downtown, its neighborhoods, and its business and industries'. Occupying rent-free offices in City Hall, it 'acts as the City's agent to invest public funds in economic development activities' and 'to lessen the burdens of government and to act in the public interest'. It is required to disclose its annual budget publicly, subject that budget to a public hearing and file its audited financial report with the City annually because, as a City development agency, it 'acts for or on behalf of the City in expending money granted to the City of [itself] for development purposes."

In its conclusion, the Court found that "because the BEDC acts as a governmental agency, it is subject to the disclosure requirements of FOIL."

Based upon the foregoing, it appears that the Port Jervis Development Corporation is an "agency" subject to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7398

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 29, 1992

Mr. Pat Castaldo
[redacted]

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

Dear Mr. Castaldo:

I have received your letter of October 13. As in the case of previous correspondence, the matter involves a request made under Freedom of Information Law to the New York City Police Department. In brief, the Department has apparently failed to respond to requests.

You asked what procedure may be followed to seek enforcement of the Freedom of Information Law and whether there is any state or federal agency that enforces that statute. In this regard, I offer the following comments.

In this regard, although this office is authorized to advise with respect to the Freedom of Information Law, there is no agency empowered to compel an agency to comply with that statute or to enforce its provisions. However, I reiterate a portion of the advisory opinion rendered at request in July. Specifically, if an agency fails to respond to a request within the requisite time limits, the applicant may consider the request to have been constructively denied. In such a circumstance, the denial may be appealed pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

denial, or provide access to the record sought."

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

If an appeal is denied, an applicant may initiate a proceeding under Article 78 of the Civil Practice Law and Rules to seek review of the agency's determination. I point out that §89(4)(b) of the Freedom of Information specifies that the agency has the burden of proof in such a proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Sgt. Louis J. Capasso, Record Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7398A
OML-AO-2157

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 6, 1992

Robert A. Barlette, President
Dunkirk School Board
9 Lafayette Avenue
Dunkirk, NY 14048

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

Dear Mr. Barlette:

As you are aware, I have received your letter of October 16 in which you requested an advisory opinion.

In your capacity as a member of the City of Dunkirk Board of Education, you wrote that one member of the Board contended that the release of teachers' salaries by another member of the Board constituted a "serious breach of conduct". You have asked whether a Board member may "pass out information such as a list of teachers' salaries given to him or her, and whether so doing is a "violation of Education Laws or Freedom of Information Laws?"

In this regard, I offer the following comments.

First, it is noted that 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 §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 §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 the 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 NYS 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. While information might have been obtained during an executive session properly held or from records that might have been characterized as confidential, I believe that a claim of confidentiality can only 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 may be aware, the Family Educational Rights and Privacy Act (20 USC §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, §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 §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 matter 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).

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 ware 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 need 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.

In the situation that you described, however, it is clear in my opinion that the information disclosed would be accessible to any person.

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.

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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying

employees and their salaries 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 [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.

Based upon the foregoing, since records reflective of teachers' salaries would be available to any member of the public, I cannot envision how disclosure of teachers' salaries by a Board member could constitute a "breach of ethics."

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 7399

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 16, 1992

Mr. Kevin Smith
#87-A-9373
Sing Sing Corr. Fac.
354 Hunter Street
Ossining, N.Y. 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. Smith:

I have received your letter of October 5 and November 3.

According to your letter, having requested records from the Office of the Kings County District Attorney, certain names were deleted, including the name of a witness who testified in open court that he viewed a line up, as well as "the names of the witnesses who went to the police station stating that someone at the scene of the homicide gave them [your] name..." It is your contention that the names should be disclosed. You have asked that this office "direct" the Office of the District Attorney to disclose or that I "forward" the documents to you without redactions.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to compel an agency to disclose records to or obtain records on behalf of an applicant.

Second, if your statement is accurate, it would appear that the identity of the witness who testified should be disclosed. As stated in Moore v. Santucci, "statements of...witnesses obtained by 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...[1151 AD 2d 677, 679 (1989)].

With respect to the names of other witnesses, it is possible that they may be withheld under §87(2)(b) or (e)(iii). The former permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". The latter states that records compiled for law enforcement purposes may be withheld when release would "identify a confidential source or disclose confidential information relating to a criminal investigation".

Lastly, you wrote that a request to the Kings County Hospital Mortuary has not been answered. You questioned where you may appeal. The Kings County Hospital Center is part of the New York City Health and Hospitals Corporation. I believe that the person designated by that agency to determine appeals is Ms. Edna Wells Handy. The address of the Corporation is 125 Worth Street, New York, N.Y. 10013.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7400

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 18, 1992

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 October 12 in which you asked that I inform Mr. Edwin Ayala, record access officer for the New York City Fire Department, that the Department must respond to your appeals made under the Freedom of Information Law.

In this regard, when records are withheld or when an agency constructively denies access to records by failing to respond to a request within the appropriate time, I would agree that an applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

However, having reviewed the correspondence attached to your letter, although your request was not fulfilled, it appears that there was no denial of access to records. One aspect of your request appears to have involved audits concerning a particular plan, and Mr. Ayala wrote that the plan had never been audited. The other aspect of your request related to a fund that was neither created nor administered by the Fire Department. In both instances, no records existed that fell within the scope of your request. In my opinion, an appeal may be taken when an agency has

the ability to withhold existing records and has done so. In this circumstance, no records exist that could have been withheld. Consequently, I do not believe that there was any denial of access to records to be appealed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Edwin Ayala
David Clinton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-
FOIL-AO-7401

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 23, 1992

Robert M. Shaw, Director
Higher Education Committee
New York State Senate
Room 806
Legislative Office Building
Albany, NY

Dear Mr. Shaw:

As you are aware, I have received your letter of November 5. You asked whether an entity designated by the Board of Regents, the "Commission on Higher Education", is subject to the Freedom of Information Law and the Open Meetings Law.

By way of background, according to a news release attached to your letter, the Board of Regents several months ago appointed "18 distinguished business, education and civic leaders" to serve on the Commission. The Commission will "make recommendations to the Regents next spring on organizing and funding New York State's unified system of public and private higher education to serve more effectively the educational needs of all" and will focus on students' needs in the 21st century, the "kind of structure...our education system [should] have, and how it should be funded." The release also states the Commission's chair is the president and chief executive officer of a financial services company and that "[f]inancial support for Commission is being sought from private foundations."

In this regard, I offer the following comments.

First, it is noted that recent decisions indicate generally that ad hoc 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)].

Therefore, an advisory body such as a citizens' advisory committee would not in my opinion be subject to the Open Meetings Law. Since the Commission is apparently not subject to the Open Meetings Law, it could choose to conduct open meetings, but it would not be obliged to do so.

Second, the Freedom of Information Law applies to agency records, and §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 of other governmental 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 definition refers to state and municipal departments and the like, "or [any] other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities". In my opinion, in view of the decisions rendered under the Open Meetings Law cited earlier, the Commission is not a governmental entity for it does not perform a governmental function.

Third, also relevant is the definition of "record" appearing in §86(4) of the Freedom of Information Law. That term is defined to include:

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

In my opinion, any documentation generated by the Commission would constitute a "record", for such documentation would consist of information produced for an agency, the Board of Regents. As such, the work product of the Commission would in my opinion fall within the scope of rights conferred by the Freedom of Information Law.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is unlikely in my view that any of the grounds for denial could be asserted to withhold records generated by the Commission for the Board of Regents.

I point out that one of the grounds for denial, §87(2)(g), pertains to inter-agency and intra-agency materials, and that it has been held by the Court of Appeals that records prepared "by outside consultants retained by agencies" may be characterized as intra-agency materials [see Xerox Corporation v. Town of Webster, 65 NY 2d 131, 133 (1985)]. When records consist of intra-agency materials, those portions consisting of advice, opinions or recommendations, for example, may be withheld; other portions of such records, i.e., statistical or factual information, must be disclosed [see §87(2)(g)(i)]. Nevertheless, in my opinion, the Commission could not be characterized as a consultant. As the term "consultant" is ordinarily used and according to an ordinary dictionary definition of that term, a consultant is an expert or a person or firm providing professional advice or services. As I understand the composition of the Commission, while it consists of well-respected individuals who may enjoy expertise in a variety of areas, many of its members do not, for their business or livelihood, engage in the kind of work or inquiry in which the Commission is engaged. Further, in the context of the Xerox decision, I believe that a consultant would be a person or firm "retained" for compensation by an agency to provide a service. It is my understanding that the Commission serves voluntarily and without compensation.

In sum, although the Commission does not appear to be subject to the Freedom of Information Law or the Open Meetings Law, the documentation that it produces would fall within the scope of the Freedom of Information Law and, for reasons discussed above, would in my opinion be accessible under 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 Regents

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO. 7401-A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 23, 1992

Mr. Rafael Pones
87-A-2463
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Pones:

I have received your letter of November 17 in which you sought the name and address of the records access officer at the Brookdale Hospital. You added that you "intend to obtain medical records" under the Freedom of Information Law or §18 of the Public Health Law relating to a prosecution witness in your case.

In this regard, I am unaware of whether the Brookdale Hospital is a government or private institution. It is not run by the New York City Health and Hospitals Corporation, and if it is not a governmental entity, the Freedom of Information Law would not be applicable. Under the circumstances, I am unable to provide a name or address of a records access officer, if there is such person.

Even if the Freedom of Information Law is applicable to the Brookdale Hospital, I point out that agencies may withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2)(b)(ii) of that statute states that an unwarranted invasion of personal privacy includes "disclosure of items involving the medical or personal records of a client or patient in a medical facility."

Further, §18 of the Public Health Law pertains generally to the rights of a patient to obtain medical records about himself or herself from a physician or hospital, for example. It does not provide rights of access to medical records to a third party, unless the subject of the records consents to disclosure.

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 7402

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 25, 1992

Mr. Salvatore Rizzo
#92-A-0650
354 Hunter Street
Ossining, N.Y. 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. Rizzo:

I have received your letter of October 10. You have sought an advisory opinion concerning records used by the Department of Correctional Service in a "determination of a Central Monitoring Case".

In this regard, I am unfamiliar with the records that might have been prepared or generated in relation to such a case. Since I am unaware of the contents of the records in which you are interested or the effects of their disclosure, I cannot offer specific guidance. However, based on your remarks, the following paragraphs will review the provisions that may be significant in determining rights of access to 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". That provision 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 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 and communicated within the department or to another agency 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 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 o 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7403

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 25, 1992

Mr. Robert W. Arnold III,
Bureau Chief
Local Government Records Services
Cultural Education Center
Albany, N.Y. 12230

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

Dear Mr. Arnold:

I have received your letter of October 20 in which you sought an opinion concerning whether teachers' lesson plans are "public records" or whether they are "private working papers belonging to the teachers who generate them".

As you indicated in your letter, both the Local Government Records Law and the Freedom of Information Law define the term "record" broadly. In my view, since lesson plans are prepared by teachers in the performance of their duties as public employees, those documents constitute "records" under either of the two provisions.

Under the Local Government Records Law, "record" is defined to mean:

> "any book, paper, map, photograph or other information recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business" [Arts and Cultural Affairs Law, §57.17(4)].

Similarly, §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" 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).

Additionally, in another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

"...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Based upon the decisions cited above, all of which were rendered by the State's highest court, lesson plans in my view constitute "records" subject to rights conferred by the Freedom of Information Law, for they are produced by public employees in their capacities as public employees and are integral to the performance of their duties for agencies.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-134
OML-AO-2160
FOIL-AO-74/04

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 25, 1992

Professor Fukashi Utsunomiya, Ph.D.
Tokai University
School of Political Science
1117 Kitakaname, Hiratsuka-Shi Kanagawa-Ken
Japan, 259-12

Dear Professor Utsunomiya:

I have received your letter of November 16, and it was a pleasure to hear from you. Your kind words are much appreciated, and I found the Forum to be most interesting and informative.

As you requested, enclosed are a variety of materials, including the Freedom of Information Law, procedural regulations promulgated pursuant to that statute, the Personal Privacy Protection Law and model regulations prepared to assist agencies in implementing the law, and the Open Meetings Law. Because the Open Meetings Law is procedural in nature, no regulations are required under that statute. In addition, enclosed are copies of the Committee's latest annual report and brochures describing the three statutes. Those materials describe the work of the Committee on Open Government. I also wrote an article sometime ago dealing with access to police records under the Freedom of Information Law, and a copy is enclosed.

You also asked how we deal with "police agency and police information" in the three statutes.

First, the Freedom of Information Law is applicable to entities of state and local government in New York, including the State Police, and municipal police departments.

As a general matter, the Freedom of Information Law, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.
Since the ability to withhold is dependent upon the specific contents of records an the effects of their disclosure, the extent to which records must be disclosed or may be withheld will vary from one request to the next. However, several of the grounds for denial may be relevant.

Of potential significance is section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or a victim of a crime, 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.

Records prepared by employees of a police department and communicated within the department or to another agency 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, too, 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 o 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 Personal Privacy Protection Law applies only to state agencies; it does not apply to municipal agencies. 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, §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 (5) of §95 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."

Further, subdivision (7) of §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."

As such, in terms of disclosure, the Personal Privacy Protection Law generally excludes law enforcement records from rights of access to individuals.

Lastly, the Open Meetings Law pertains of meetings of public bodies, such as city councils, boards of education, legislative bodies, etc. From my perspective, it is rare that issues involving the disclosure of police or law enforcement issues arise under the Open Meetings Law. However, like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted in public unless there is a basis for a closed or "executive session". Section 105(1) of the Open Meetings Law specifies the grounds for entry into executive session, and the first three pertain to :

> "a. matters which will imperil the public safety if disclosed;
>
> b. any matter which may disclose the identity of a law enforcement agent or informer;

c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed."

If you have additional questions, please feel free to contact me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 7405

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 25, 1992

Ms. Carolyn Schurr
Staff Counsel
Times Mirror
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, unless otherwise indicated.

Dear Ms. Schurr:

As you are aware, I have received your letter of October 15 and various related materials.

You have sought an advisory opinion concerning responses to requests for records of the Suffolk County Office of the District Attorney made by three Newsday reporters. Most of the requests involve records pertaining to the activities of that office in relation to the implementation of state and federal forfeiture laws.

According to a letter of November 13 addressed to you by the Suffolk County Freedom of Information Appeals Officer, some of the records sought have been or will be disclosed. Others, however, have been determined to be deniable, perhaps in part.

Under the forfeiture laws, a local agency, such as the Office of the District Attorney, can "acquire" federal funds. As I understand the procedures, the Office of the District Attorney can participate in a "joint task force" and acquire a pro rata share of the proceeds of a forfeiture; in addition, the Office can ask a federal agency to "adopt" a case to gain an "adoptive forfeiture", under which it can obtain eighty percent of the proceeds of goods or monies acquired.

One category of the records sought involves records in which the District Attorney petitioned the federal government for an equitable share of cash or valuables seized by the federal government, as well as the responses to those requests by the federal government. The petitions and the responses were "withheld

as inter agency communications that are not final agency policy or determinations pursuant to Public Officers Law §87(2)(g)." It was stated that the "usual lag time for finalization of these applications is two years or more and the petitions/applications presented since January 1, 1990, which you seek are still pending." It was also stated that "the information identifying the criminal activity involved in the forfeiture which is indicated in the petition/application pertains to pending criminal cases in most instances, which if divulged, could interfere with on-going law enforcement investigation or pending judicial investigation, identify confidential source or disclose confidential information relating to a criminal investigation, or reveal criminal investigative techniques or procedures and may be withheld pursuant to Public Officers Law §87(2)(e)."

Two other categories of records at issue involve requisitions and similar forms generated to authorize disbursements from federal and state forfeiture funds, and records "detailing non-cash items received." With respect to the former, it was contended that certain information could be withheld for "security reasons", and that the "identities of recipients, as well as location, may be redacted for security (criminal investigation reasons)." With respect to the latter, general descriptions of items (i.e., a motor vehicle), as well as sale price or value would be disclosed; however, it was found by the Appeals Officer that the "location where assets are stored is not available for security reasons, and identities of source or recipient (if sold) need not be made public; the source should be withheld as indicative of criminal investigations, and the identity of a purchaser, if any, may be withheld unless it is already public knowledge, such as purchasers at an auction."

Having discussed the matter with one of the reporters who requested the records, it was suggested that the petitions or applications are similar to affidavits, that the forms used are not extensive, and that the forms often do not include the name of either a defendant or a potential defendant. He also indicated that the individuals may not contest forfeitures and that in those instances, the forfeiture may represent the termination of an investigation.

Based on the foregoing, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record might include both accessible and deniable information. That phrase in my view also imposes an obligation on an agency to review records sought in

their entirety to determine which portions, if any, may justifiably be withheld and to ascertain which portions must be disclosed.

Second, although §87(2)(g) of the Freedom of Information Law permits the withholding of inter-agency or intra-agency materials, depending upon the contents of those materials, it does not appear that §87(2)(g) could be cited to withhold communications between a County agency and a federal agency. 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."

The language quoted above indicated that an "agency" is an entity of state or local government in New York. While there is no case law of which I am aware that deals with the issue, since the definition of "agency" does not include a federal agency, it does not appear that §87(2)(g) could be cited as a means of withholding records communicated between the County and a federal agency governmental entity, for such an entity would not be an agency for the purpose of the Freedom of Information Law.

Third, the other primary basis for denial, according to the response, is §87(2)(e), which permits an agency to withhold records that:

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

The extent to which §87(2)(e) may properly be asserted is questionable. While some of the records might be characterized as having been compiled for law enforcement purposes, others might have been prepared for accounting purposes or perhaps in the ordinary course of business. Insofar as the records could not be

considered to have been compiled for law enforcement purposes, §87(2)(e) would be inapplicable as a basis for denial. To the extent that §87(2)(e) is applicable, the capacity to withhold would be dependent upon the specific contents of records and the effects of disclosure. Only to the extent that harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) would arise could that provision serve as a basis for denial.

If indeed disclosure would interfere with an ongoing criminal investigation, I would agree that records or portions thereof could be withheld under §87(2)(e)(i). However, if an investigation has ended, any such interference with the investigation might also have ended. Further, if, for example, an individual's vehicle or other item is acquired under forfeiture provisions, presumably that person is aware that his or her property has been taken. If that is so, it is difficult to envision how disclosure of records indicating the acquisition of those items would jeopardize or interfere with an investigation, for the individual is effectively informed that he or she is or has been the subject of an investigation.

It is also noted that not all records reflective of criminal investigative techniques and procedures may be withheld; only those that are not "routine" would fall within the scope of the exception [§87(2)(e)(iv)].

The remaining ground for denial of likely significance, which was not specifically cited in the determination of your appeal, is §87(2)(f). That provision permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person." If items acquired are used in undercover operations, or if, for example, the disclosure of names or locations would endanger the life or safety of law enforcement officials or others, §87(2)(f) would serve as a basis for denial.

Once again, the ability to assert the grounds for denial would be dependent upon the contents of records and the effects of disclosure, and I believe that records must be reviewed individually, if necessary, to determine rights of access. While some records might relate to ongoing investigations, others would not; while the sources or recipients of some items might endanger peoples' lives or safety in some instances, that would not be so in every case. One of the enclosures with your letter is a news article that refers to the use of an automobile by the District Attorney that was acquired via the forfeiture procedure. Obviously, in that and perhaps in other situations, disclosure would not result in any of the harmful effects envisioned by the grounds for denial.

Lastly, it is emphasized that the 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 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 courts 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 rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was 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 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" (id., 565-566).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, and to obviate the necessity of engaging in litigation, copies of this opinion will be forwarded to the Appeals Officer and the Office of the District Attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joyce D. Long, Assistant County Attorney
Steven A. Hovani, Chief, Appeals Bureau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7406

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 1, 1992

Mr. Orville Salmon
92-R-0584
Orleans Correctional Facility
35-31 Gaines Basin Road
Albion, NY 14411

Dear Mr. Salmon:

I have received your letter of November 20, which reached this office on November 30. You have requested copies of certain records from this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain records generally, and this office does not possess the records you seek.

It is noted that a request made under the Freedom of Information Law should generally be made to the records access officer at the agency that maintains the records sought. Further, since you requested a waiver of fees, I point out that the Freedom of Information Law contains no provisions pertaining to fee waivers, and that it has been held that there is no requirement that fees be waived, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Lastly, it appears that the records sought are maintained by a court. If that is so, please be advised that the Freedom of Information Law does not apply to the courts or court records. That statute pertains to agency records, and §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, §86(1) defines "judiciary" to mean:

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

While court records are not subject to the Freedom of Information Law, those records are often available under other statutes (see e.g., Judiciary Law, §255). A request for court records should be made to the clerk of the court that maintains the records.

I hope that the foregoing enhances your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7407

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 1, 1992

Mr. Albert Tulloch
88-T-2143
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, NY 12733

Dear Mr. Tulloch:

I have received your letter of November 22 in which you sought "case law" concerning access to the criminal history records of a person who testified against you.

On this regard, the general repository of criminal records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. 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]. It is also noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to those events are generally sealed pursuant to §160.50 of the Criminal Procedure 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

OMLAO 2160A
FOIL-AO 7408

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 1, 1992

Mr. Felix F. Welka
[redacted]

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

Dear Mr. Welka:

I have received your letters of October 16 and November 27. Please accept my apologies for the delay in response.

A news article attached to your initial letter includes an allegation that the release of salary information by a member of the Dunkirk Board of Education constituted a "serious breach of conduct". You have questioned the accuracy of that statement.

In this regard, I offer the following comments.

First, it is noted that 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 §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 §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 the 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 NYS 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. While information might have been obtained during an executive session properly held or from records that might have been characterized as confidential, I believe that a claim of confidentiality can only be based upon a statute that specifically confers or requires confidentiality.

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).

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 ware 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 need 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.

In the situation to which you referred, however, it is clear in my opinion that the information disclosed would be accessible to any person.

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.

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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries 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 [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.

Based upon the foregoing, since records reflective of teachers' salaries would be available to any member of the public, I cannot envision how disclosure of teachers' salaries by a Board member could constitute a "breach of ethics."

Lastly, you referred to decision in which it was held that a discussion between a public body and its attorney was subject to the attorney client privilege and exempt from the Open Meetings Law. You asked whether that continues to be valid.

The Open Meetings Law includes two vehicles under which the public may be excluded from meetings. An executive session, a portion of an open meeting, serves as one kind of vehicle for discussing public business in private. Another vehicle that authorizes private discussion arises under §108 of the Open Meetings Law. Section 108 contains three "exemptions", and if a matter is "exempted" from the Open Meetings Law, that statute is not applicable.

Of relevance to your question is §108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law."

When an attorney-client relationship has been invoked, the communications made pursuant to that relationship are considered confidential under §4503 of the Civil Practice Law and Rules. Consequently, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1989); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my

opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

In a judicial determination that described the parameters of the attorney-client relationship and the conditions precedent to its initiation, it was 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 proceedings, 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 upon the foregoing, to the extent that a public body seeks legal advice from its attorney, I believe that the communications between the body and the attorney would fall within the scope of the attorney client privilege and would, therefore, be exempt from the coverage 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:pb
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7409

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 1, 1992

Ms. Valerie Caproni
New York State
Urban Development Corporation
1515 Broadway
New York, N.Y. 10036-8960

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

Dear Ms. Caproni:

I have received your letter of October 16 and the correspondence attached to it. You have sought an "advisory guideline" based upon a review of the materials.

By way of background, two requests were made in July for records concerning the "HELP-East 13th Street Project". In some instances, records sought did not exist; in others, records were disclosed; the remaining records were withheld on the basis of §87(2)(a),(c) and (g) of the Freedom of Information Law. Further, in an appeal, the applicant asked that you provide "(a) detailed description of the documents, by affidavit, such that the claimed basis for the exemption will be demonstrated; and (b) a specification as to each document individually, of the ground for exemption claimed with respect to that document." Also, since certain records sought did not exist, and since "this is an ongoing matter", the applicant appears to have requested records "as they become available".

Based on the foregoing and a review of the correspondence, I believe that there are several issues. In this regard, I offer the following comments.

First, one of the issues appears to concern the breadth of the portion of the request involving "correspondence and memoranda pertaining to the project". As you are aware, §89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 [Baxelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC §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 an agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of the request in question, I am unfamiliar with your agency's record-keeping systems; whether or the extent to which you have the ability to locate and identify all of the records sought in the manner in which you requested them is unknown to me. Insofar as the records sought could have been located and identified, I believe that the request would have met the standard of reasonably describing the records.

Second, insofar as correspondence and memoranda pertaining to the project were or could have been located, it would appear that a blanket denial of those items may have been overbroad. The grounds for denial that ware cited to withhold might have been validly asserted in part, but there is no indication in the correspondence of a rationale for their assertion.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute". Upon which statute or statutes is that aspect of denial based? Without

additional information, it is difficult to advise whether a denial citing that provision was properly asserted.

Section 87(2)(c) enables an agency to withhold records insofar a disclosure would "impair present or imminent contract awards or collective bargaining negotiations. As that provision relates to the impairment of "contract awards" it is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids has received a number of bids, but the deadline for their submission has not been reached, premature disclosure of the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals has been reached, often the passage of that event results in the elimination of harm. Further, it has been held that bids are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2D 951, 430 NYS 2D 196, 198 (1980)]. The cited decision involved bids and related documents. I believe, however, that it is implicit that the agreement itself had been made public or would be an accessible record.

The other situation where §87(2)(c) has successfully been asserted to withhold records pertains to real estate transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Again, premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving an optimal price [see Murray v. Troy Urban Renewal Agency, Sup. Ct., Rensselaer County, April 24, 1980, rev'd 84 2D 612, NY 2D 888 (1982)].

The third basis for denial, §87(2)(g) enables an agency to withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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.

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 subject 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) 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 lve 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)].

Similarly, the Court of Appeals has 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).

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.

Further, there is no indication of the parties to correspondence or memoranda. If those documents were communicated within an agency or between agencies, §87(2)(g) would apply. However, insofar as they involve communications with persons or entities outside of government, §87(2)(g) would be inapplicable.

Third, I am unaware of any provision of the Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or a description of the reason for withholding each document be given. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. 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. Again, 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 a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could

> endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

Fourth, as you aware, the Freedom of Information Law pertains to existing records. Consequently, in my opinion, that statute imposes no ongoing duty to disclose records that do not yet exist or as they are prepared. Stated differently, if a record sought does not yet exist, unless an agency agrees to do so, it has no obligation to disclose a record when it comes into existence.

Lastly, both the initial denial and the denial of the appeal cited certain grounds for denial without any denial. In this regard, I point out that §89(4)(a) of the Freedom of Information Law, which deals with the right to appeal, states in part that a determination to uphold a denial must "fully explain in writing to the person requesting the record the reasons for further denial". In my view, the denial of the appeal did not "fully explain" the reasons for the denial.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7410

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1992

Mr. Alan Newton
85-A-3855
Box 500
Elmira, New York 14902-500

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

Dear Mr. Newton:

I have received your letters of October 16 and November 13. You wrote that you have twice requested a copy of the "Master Index" from the Office of the Bronx County District Attorney, but that you have received no response.

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.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 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 §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 agency in question, it is suggested that you request the subject matter list maintained pursuant to §87(3)(c) of 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
cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7411

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1992

Mr. Charles D. Johnson
[redacted]

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

Dear Mr. Johnson:

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

According to the materials, you submitted requests to the Town of Wheatfield for any permits that were issued in relation to a particular garage. Although you were informed that permits were issued in 1976 and 1985 by the Town's building inspector, only a copy of the latter permit was made available. As I understand the situation, the original permit is on longer kept at the Town Hall. Because it was issued so long ago, it appears that it is in storage elsewhere. However, the Town Building Inspector inferred that the permit might have been destroyed, for such record may be "expunged in accordance with Article 57 of the Cultural Affairs Law". It is your belief that, as a taxpayer, you have the right to a copy of the permit.

In this regard, I offer the following comments.

First, the reference to Article 57 involves sections of the Arts and Cultural Affairs Law pertaining to the retention and disposal of local government records. In brief, those provisions require local governments to retain records in accordance with schedules issued by the State Archives and Records Administration indicating minimum periods of retention. Only after the retention period has elapsed can records be destroyed. I have contacted the State Archives and Records Administration on your behalf to learn whether the permit in question could have been destroyed and was in informed that building permits must be retained for six years after a building has been destroyed. Therefore,. if the building in

question still exists, I believe that the Town is obligated to maintain possession of the permit.

Second, §89(3) of the Freedom of Information Law requires that a request must "reasonably describe" the record sought. Further, it has been that a request reasonably describes the record when an agency can locate and identify the record. Therefore, if Town officials can locate the permit, I believe that they would be obliged to so do.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In my view, a building permit would clearly be available, for none of the grounds for denial would apply.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of

Information Law, the appellant has exhausted his or her 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:pb
cc: Nancy Jo Conrad, Town Clerk
Donald Knab, Building Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 741?

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1992

Ms. Lynn Olivieri
[redacted]

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

Dear Ms. Olivieri:

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

According to the materials, you sent a request to the Nassau County Comptroller for records indicating monies paid from the Office of the District Attorney's Prosecution Fund to outside contractors for stenographic services from January, 1992 to the date of the request. You were informed by the Office of the Comptroller that the District Attorney's Office has "custody of the Prosecution Fund's original source data", and that your request had been forwarded to Laurence Leff, Chief Assistant District Attorney. Soon thereafter, you were informed by the Office of the District Attorney that your request had been received and was being reviewed by its record access officer. A second request was sent to the Office of the District Attorney on October 15 for a "printout of all checks paid to outside contractors in payment for vouchers submitted by them for stenographic services", or, alternatively, for copies of checks paid to those contractors.

You added that none of the responses that you had received included any indication of whether your request would be granted or denied, when you could expect to obtain the records, or to whom you could appeal a denial.

You have asked that I prepare an advisory opinion on the matter and forward it to officials in the Office of the District Attorney. In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the

agency can locate 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 requests, I must admit to being unfamiliar with the record-keeping systems of the District Attorney's office. However, assuming that the records in question may be located and identified, I believe that you would have met the standard of reasonably describing the records sought.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, with respect to rights to access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, in general, books of account, vouchers, bills, checks and similar records reflective of the expenditure of public monies are accessible, for none of the grounds for denial would ordinarily apply. I point out that one of the first decisions rendered under the Freedom of Information Law following its initial enactment in 1974 dealt with a request by Denis Dillon for records of travel and other reimbursable expenses maintained by a former district attorney, and that the court found that the records were available to the public [Dillon v. Cahn, 359 NYS 2D 981 (1974)].

However, since I am unaware of the specific contents of the records in question, I cannot advise with certainty that the records sought must be disclosed in their entirety. While I believe that those portions of the records reflective of payments to contractors for payment of stenographic services would be accessible, it is possible that the records might identify witnesses, victims, or informants, for example. In that event, two of the grounds for denial might serve to permit deletions of those

portions of the records. Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy"; §87(2)(f) authorizes an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person". Insofar as the records sought might include those kinds of items, deletions might properly be made. Nevertheless, it is reiterated that the remaining portions of the records indicating payments to contractors would, in my opinion, clearly be available.

As you 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
Executive Director

RJF:pb

cc: Denis Dillon, District Attorney
Laurence Leff, Chief Assistant District Attorney
Patrick McCloskey, Executive Assistant District Attorney
Peter Weinstein, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-743

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1992

Ms. Mary Kern
[redacted]

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

Dear Ms. Kern:

I have received your letter of October 14 in which you sought advice concerning the Freedom of Information Law. Please accept my apologies for the delay in response.

According to your letter, you sought a tape recording of an open meeting held by Community School Board #24 in Queens. In response to the request, you were informed that the audio tape "was not part of the public record and therefore your request is denied."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" to include:

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

Since tape recordings of an open meeting would be produced for and maintained by the District, I believe that they constitute "records" subject to rights of access. I point out by means of analogy that, in a case involving notes taken by the Secretary to

the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

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

In sum, based upon the language of the Freedom of Information Law and its judicial interpretation, it is clear in my view that a tape recording of an open meeting must be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the District.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph F. Quinn, Community Superintendent
George J. Colwell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7414

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1992

Mr. Arthur Cook
81-A-3943
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. Cook:

I have received your letter of October 15.

You asked that I obtain information concerning the New York City Police Department and its "policy of soliciting additional information before they can fill a request." Attached to your letter is a copy of a request made on September 29. In order to expedite the process of locating the records, you provided the precinct number, the complaint number, your date of birth, your indictment number and the county of the indictment, your NYSID number, and the name and badge number of the arresting officer. Nevertheless, you received an acknowledgement of the receipt of your request on October 6 stating that the Department would "be unable to estimate the date by which we anticipate a determination can be made until we receive the following additional information", which included your date of birth, social security number and place of arrest. It is your view that the use of such a "form letter" is inconsistent with both §89(3) of the Freedom of Information Law and the decision rendered in Mitchell v. Slade [173 AD 2d 226 (1991)].

In this regard, as you are likely aware, §89(3) requires that an applicant "reasonably describe" the records sought. It appears that the Department solicits additional information from applicants in order to meet that standard and thereby enable staff to locate records. I point out that 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, since it included two of three "additional" items requested by the Department, as well as other details, it is questionable in my view whether the Department's request for additional information, and, therefore, its delay in responding to your request, was warranted. The only such item that you did not provide in your request was your social security number. That being so, unless that item is necessary to locate the records, I believe that the request would have reasonably described the records and that the Department should have responded accordingly.

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
Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7414-A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1992

Mr. Ernest W. Vann
91-B-2531
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. Vann:

I have received your letter of October 15 in which you sought assistance in obtaining records. As I understand the situation, you requested various records from the clerk of the clerk of the "Dryden Town Court", but you have received no response.

In this regard, the Freedom of Information Law does not apply to the courts or court records. That statute pertains to agency records, and §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, §86(1) defines "judiciary" to mean:

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

While court records are not subject to the Freedom of Information Law, those records are often available under other statutes. For example, in this instance, the court is a town justice court, and §2019-a of the Uniform Justice Court Act, entitled "Justices' criminal records and docket", states in relevant part that "[t]he records and dockets of the court except as otherwise provided by

law shall be at reasonable times open for inspection to the public..."

It is suggested that you resubmit your request to the clerk of the Town of Dryden Justice Court, citing the statute referenced above as the basis of your request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7415

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1992

Mr. Joseph Cooke
#89-A-2830
Green Haven Correctional Facility
Drawer B
Stormville, N.Y. 12582

Dear Mr. Cooke:

I have received your letter of November 28 in which you referred to correspondence sent previously to this office. You wrote that, in that earlier correspondence, you sought assistance in obtaining your "co-defendant's rap sheet" from the Division of Criminal Justice Services. You asked whether I received your earlier letter.

In this regard, having reviewed our files, your letter of October 3 was received by this office on October 8. No response to that letter was given because it was a copy of an appeal, and because there was no covering letter or other request for assistance.

With respect to the issue of access to rap sheets, as you may be aware, the general repository of criminal history records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. 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]. It is also noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to those events are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7416

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 3, 1992

Mr. Roberto A. Kintz
89-A-6532
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. Kintz:

I have received your letter of October 20 in which you asked that I provide "a specific definition for the term 'statistical and factual tabulations or data'".

In this regard, the phrase "statistical or factual tabulations or data", which appears in §87(2)(g)(i) of the Freedom of Information Law, is not defined in any statutory provision. However, the courts have rendered decisions relating to that phrase, which in my view encompasses statistical or factual information, irrespective of how it might appear on a record. Statistical or factual information need not appear in tabular or numerical form; rather, factual information night involve a narrative presentation of facts.

In an early decision on the subject concerning so-called "budget worksheets", it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2D 496, aff'd 54 Ad 2D 446, aff'd 43 NY 2D 754

(1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, §88(1)(d)]. Currently, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

> "[I]t is readily apparent that the language 'statistical or factual' tabulation was meant to be something other than an expression of opinion or naked 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 §85 the work sheets have not been shown by the appellants as being not a record made available in §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 documents 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 requirement that such data be limited to objective information and there is no apparent necessity for such a limitation" (id. at 449).

Similarly, in another decision, 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 subject 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) 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 lve 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, would be available, unless a ground for denial could properly 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

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-747

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 3, 1992

Mr. Otis Tate
92-A-0607
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. Tate:

I have received your letter of October 19 and the materials attached to it.

You wrote that your ability to obtain certain records from the Department of Correctional Services "is being impeded", and you asked for assistance in the matter. Three requests were made on October 19. One involved a request for the Department's "master index" from the Deputy Commissioner for Administrative Services; the second pertained to medical records that was sent to the Assistant Commissioner and Director of Health Services; the third involved the "personal history" portion of your file. You also sent a request to the Division of Criminal Justice Services for a copy of your rap sheet.

In this regard, it appears that each of the requests involves records that should be made available to you. However, it is noted that a subject matter list or master index is maintained at each facility by the superintendent pursuant to §5.13 of the Department's regulations. Similarly, a rap sheet or "DCJS report" is available through the Department of Correctional Services at your facility under §5.22 of the Department's regulations.

Further, although there is nothing in your correspondence suggesting that your efforts have been "impeded", if a request is or has been denied, the denial may be appealed in accordance with §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 thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

The person designated to determine appeals at both the Department of Correctional Services and the Division of Criminal Justice Services is the Counsel to those agencies.

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 7418

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 3, 1992

Mr. Edgar English
89-T-1809
Franklin Correctional Facility
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. English:

I have received your letter of October 22, as well as the correspondence attached to it. You have sought assistance in obtaining records of the New York City Police Department, the Office of the District Attorney of New York County, the Supreme Court in New York County and the Mental Health Unit at the New York City House of Detention for Men.

Having reviewed the materials, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §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, §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 Freedom of Information Law is applicable to the Police Department, the District Attorney's Office and the Department of Correction, for those entities are agencies, it does not apply to the courts or court records. However, court records are often available under other provisions of law (see e.g., Judiciary Law, §255), and it is suggested that any request for court records be made to the clerk of the appropriate court, citing an applicable provision of law.

Second, a request made under the Freedom of Information Law should be directed to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests. Further, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 records sought from the Police Department or the Office of the District Attorney, I cannot offer specific guidance. However, the following paragraphs will review the provisions that may be significant in determining rights of access to 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". That provision 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 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 and communicated within the department or to another agency 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, too, 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 o 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.

Fourth, mental health records pertaining to a client or patient are generally available to that person or his or her representative from the provider of services under §33.16 of the Mental Hygiene Law.

Lastly, since you referred to your indigency and a desire to obtain records at no cost, it is noted that the Freedom of Information Law generally permits an agency to charge a fee of up to twenty-five cents per photocopy. Further, it has been held that nothing in the Freedom of Information Law requires that fees be waived, even if the person seeking copies is an indigent inmate [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO:
FOIL-AO-7419

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 3, 1992

Mr. Lawrence Hull, 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. Hill:

I have received your letter of October 20 and the news articles attached to it.

You described several issues and events relating to the Deposit Central School District Board of Education and, in particular, its implementation of the Open Meetings Law. Based on a review of your remarks and the articles, I offer the following comments.

First, since there appears to have been some question concerning whether a joint session of the Board and the Booster Club fell within the scope of the Open Meetings Law, it is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

The court also dealt with the characterization of meetings as "informal," stating that:

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

Based upon the direction given by the courts, if a majority of the Board gathers to discuss District business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Second, since you wrote that the Board conducts "a one hour executive session before each regular meeting", I point out that the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the

> subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As indicated in the language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

In addition, it has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

Third, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice. For instance, in my opinion, the discussion involving whether a proposition should be considered by District residents could not have validly been discussed in private, for none of the grounds for entry into executive session would have applied.

Reference was made to discussions of "legal issues" and "possible litigation" in executive session, and one of the grounds for entry into executive session is §105(1)(d), which permits a public body to conduct 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 is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meeting' (Matter of Concerned Citizens 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)].

Therefore, unless the Board was discussing litigation strategy, it does not appear that §105(1)(d) could justifiably have been cited to conduct an executive session. Further, as indicated in the passage quoted above, the possibility that litigation might ensue would not constitute a valid basis for entry into executive session.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981), emphasis added by court].

Fourth, because you questioned the completeness and accuracy of information provided by the District, it is suggested that, in

addition to the Open Meetings Law, the Freedom of Information Law represents an alternative vehicle for seeking information. That statute pertains to all existing 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. For instance, one of the issues raised involved the salaries of certain employees. In this regard, §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." Gaining access to records under the Freedom of Information Law might enable you and others to obtain accurate data regarding School District operations.

Lastly, you wrote that a "growing number" of residents "would like to remove the members of the board and the superintendent", and you asked how that can be accomplished. Other than selecting Board members at the polls, I am unfamiliar with the methods of replacing board members, for that is an issue beyond the scope of the expertise of this office. It is suggested that the issue might be raised with an attorney at the State Education Department.

Enclosed for your review are copies of the Freedom of Information Law and the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7420

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 3, 1992

Mr. Erwin M. Blant
Attorney & Counsellor At Law
225 Westchester Avenue
Port Chester, N.Y. 10573

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

Dear Mr. Blant:

I have received your letter of October 21. You referred to previous discussions concerning access to records of a public housing authority, and you have sought an opinion "as to what information a Public Housing Authority is obliged to give, under the Freedom of Information Act of the State of New York".

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 §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 of other governmental 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. Since the definition of "agency" includes public corporations, I believe that a public 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 [Westchester Rockland Newspapers, Inc. v. Fischer, 101 AD 2d 840 (1985)].

Second, due to the structure of the Freedom of Information Law, I do not believe that your specific question can be answered. As you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. As such, it is impossible to advise as to which records will always be available or deniable, for the contents of records and the effects of their disclosure are often the factors inherent in determining the extent to which records must be disclosed.

An example of when the effects of disclosure may determine rights of access involves §87(2)(c), which states that an agency may withhold records when disclosure "would impair present or imminent contract awards or collective bargaining negotiations." From my perspective, the key word in the quoted provision is "impair", and the question involves how disclosure would impair the process of awarding contracts or collective bargaining negotiations. When an agency solicits bids, for instance, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, when the deadline for submission of bids has been reached, all of the submitters are on an equal footing and an agency is generally obliged to accept the lowest appropriate bid. In that situation, the bids would, in my opinion, be available, for the impairment that might have previously arisen would have essentially disappeared.

An example of when the contents of records may determine rights of access involves §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 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.

In short, I cannot list or identify records that will always be accessible or exempt from disclosure. If you have a question regarding access to a particular record, please feel free to contact me.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7421

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 3, 1992

Mr. Charles R. Millson
81-D-0019
135 State Street
Auburn, NY 13021

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

Dear Mr. Millson:

I have received your letter of October 20 in which you raised a question concerning the applicability of the Freedom of Information Law.

Specifically, you asked whether the Freedom of Information Law applies to records of a county public defender or a court appointed attorney "when a former client is requesting records from the attorney's file."

In this regard, the Freedom of Information Law is applicable to agency records, and §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, in general, the Freedom of Information Law applies to records of state or local governmental entities.

With respect to the office of a county public defender, §716 of the County Law states in part that the "board of supervisors of any county may create an office of public defender, or may authorize a contract between its county and one or more other such counties to create an office of public defender to serve such counties." Therefore, a county office of public defender in my

opinion is an agency subject to the Freedom of Information Law that is required to disclose records to the extent required by that statute.

In a case in which an attorney is appointed, while I believe that the records of the governmental entity required to adopt a plan under Article 18-B of the County Law are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, for reasons offered earlier, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to 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 7422

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 3, 1992

Ms. June Maxam
The North Country Gazette
Box 408
Chestertown, N.Y. 12817

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

Dear Ms. Maxam:

I have received your letter in which you sought assistance concerning issues relating to two requests made to Warren County government.

The first involves a request directed to the Sheriff's Office. In brief, you were informed that a request had to be made on the County's form. It is noted that I have received a copy of a response to that request, and it appears that the response was given without use of the form. The second involves a request made to the County Personnel Officer which was neither answered nor acknowledged within the "requisite time".

In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law provides direction concerning the time in which an agency must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, I do not believe that an agency can require that a request be made on a prescribed form. To reiterate, the Freedom of Information Law, section 89(3), as well as 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, require 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 possesses 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 an 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 is unnecessarily serves to delay a response to or deny a request for records.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the County.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Major Larry J. Cleveland
Richard Kelly, Personnel Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7423

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 4, 1992

Mr. Jackson Leeds
[redacted]

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

Dear Mr. Leeds:

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

You asked initially whether "a person representing himself [is] an attorney within the meaning of N.Y. Pub. Off. Law §89(4)(c)". As you are aware, the cited provision authorizes a court to award reasonable attorney's fees and other litigation costs under certain circumstances when a person has substantially prevailed in a judicial proceeding brought under the Freedom of Information Law. There is one decision of which I an aware that relates to the issue. In Leeds v. Burns (Supreme Court, Queens County, NYLJ, July 27, 1992), the petitioner was a law student who brought a proceeding against the Dean of the City University of New York Law School at Queens College pro se under the Freedom of Information Law. He prevailed and requested attorney's fees. The court found that he met all of the conditions prescribed in §89(4)(c), except one. In short, the court found that he was an "aspiring attorney" but not yet a licensed attorney, and that, therefore, attorney's fees would not be awarded. On the basis of that decision, I believe that one must be or represented by a licensed attorney in order to be eligible for an award of attorney's fees under §89(4)(c).

Your second question is whether §105(c) of the CPLR provides "the definition of the term attorney for the laws of the State of New York except as the term may be otherwise defined". In this regard, this office is authorized to advise with respect to the Freedom of Information Law. I have neither the jurisdiction nor the expertise to offer an appropriate response.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7434

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 4, 1992

Mr. Guarionex Suarez
86-A-3059
Shawangunk Correctional Facility
Wallkill, N.Y. 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. Suarez:

I have received your letter of October 22 in which you sought advice concerning a denial of access to records by the New York City Police Department. The records in question relate to your arrest.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office cannot compel an agency to disclose records or enforce the law. Nevertheless, I offer the following comments.

With respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records sought or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the provisions that may be significant in determining rights of access to 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". That provision 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 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 and communicated within the department or to another agency 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, too, 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 o 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, although the response to your request includes a copy of a decision which upheld the denial of a "DD-5", the same court in different case, based upon a review of the same kind of record, found that it was available with certain redactions [Mitchell v. Slade, 173 AD 2D 226 (1991)]. As such, DD-5's in my opinion would be accessible or deniable, in whole or in part, based upon their contents.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Louis J Capasso
Susan R. Rosenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7425

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 7, 1992

Mr. S. Paul Battaglia
Bond, Schoeneck & King
One Lincoln Center
Syracuse, NY 13202-1355

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

Dear Mr. Battaglia:

I have received your letter of October 27, 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 Department of Transportation.

By way of background, you referred to an opinion rendered three years ago (Advisory Opinion 5832) that dealt with a similar issue. In brief, in that instance, it was advised that records indicating amounts of monies paid by the state to persons whose property was needed for highway construction, thereby completing those transactions, must be disclosed, even though negotiations concerning the sale of other properties had not yet been completed. In your situation, the Department has executed "Agreements of Adjustment" with certain landowners whose properties have been taken, and it is your understanding that those agreements preclude the landowners from claiming any additional compensation. The Department agreed to disclose records indicating payment for those properties. The focus of your inquiry, however, pertains to "certain other property owners whose lands have been taken [who] have rejected the State's evaluation of their lands, and insisted that their properties are worth more than the State has offered." It is your belief that "the State has made 'advance payments' to those landowners based upon the State's own assessment of the land," and that the "landowners have an additional time within which to submit claims for further compensation."

Your client's reporter was denied access to those records, initially because "there are pending claims", some of which "may not be finalized before the three-year statutory period ends." Following an appeal, the denial was affirmed, citing the decision rendered in Murray v. Troy Urban Renewal Agency [80 AD 2d 612,

aff'd 56 NY 2d 888 (1982)], and stating that "[d]isclosure of the information...could possibly impair future contracts between the property owners and the Department where a full agreement has not yet been reached." It is your view "that the value of a particular landowner's property is not affected by any knowledge he may gain as to the amount which the state has paid to a neighboring landowner", and that the "value which land has is determined by factors associated with its location, marketability, developability, etc."

In this regard, I offer the following comments.

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

Second, from my perspective, only one of the grounds for denial is relevant to the matter. Specifically, §87(2)(c) permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in the provision is "impair", and the question involves the extent, if any, to which disclosure would jeopardize or impair the State's ability to reach an optimal agreement. Further, I believe that the answer to that question would be dependent upon attendant facts.

One factor involves your belief that the "advance payments" have been made on the basis of the State's assessment of the properties. If, for example, the State has made partial payments, records indicating those payments would not specify the State's offer or its full assessment of the properties. In that event, I cannot envision how disclosure of those records of payment would impair the process or the State's position.

If the payments made reflect the total of assessments at which the Department has arrived, I believe that the factors to which you referred would be relevant. The request indicates that there are two series of parcels, one which involves condemned properties; the other pertains to property owners "losing frontage." Among them are apparently properties used for a variety of purposes and of varying sizes. They include a church, what appears to be a doctor's office, a motel, a McDonald's restaurant, a parking lot, a realtor and a public television station. Due to disparate uses, locations and sizes, it is questionable how disclosure to the public, including property owners, could "impair future contracts." To make the point more concretely, the assessed value of a fast food restaurant located at or near a busy intersection may have little relevance to the value of church property of a different size located a distance from the restaurant.

Further, I believe that the holding in Murray, supra, is inapposite, because the factual circumstances were different. In

that case, the applicant sought appraisals of urban renewal properties that were owned by an agency, and disclosure of the appraisals would have enabled the public to know the amounts that the agency sought to receive for the sale of the properties. As such, disclosure would likely have given potential buyers an unfair advantage in any negotiation process. In this circumstance, an agency is taking property, it has made offers to property owners, and, it is your belief that it has made payments to those persons or entities based upon its assessment or appraisal of those properties. As such, various disclosures have been made to the property owners. Moreover, according to the determination of the appeal, the Department agreed to disclose "payment documents for property owners who have entered into full Agreements of Adjustment with the Department." If records of those payments, which involve the same project, have been disclosed based upon an analysis and finding that disclosure would not impair the Department's ability to reach agreements regarding the remaining properties, it would be difficult in my view to justify a basis for withholding records of payments concerning those remaining properties.

Lastly, it is emphasized that the 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 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 courts 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 rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific

> justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Further, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was 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 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" (id., 565-566).

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

cc: Gloria Shepherd

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7426

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 7, 1992

Mr. Anthony Barrett
3622 Wende Road
P.O. Box 1187
Alden, N.Y. 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. Barrett:

I have received your letter of October 26 in which you sought advice concerning the Freedom of Information Law.

You asked whether you can request and obtain records relating to law enforcement investigations, including "DD-5" forms, "victim complaint reports", and "on the scene activity reports".

In this regard, I offer the following comments.

First, a request should be made to the "records access officer" at the agency in possession of the records. The records access officer has the duty of coordinating an agency's response to requests. Further, §89(3) of the Freedom of Information Law requires records that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate and identify the records.

Second, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unaware of 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 provisions that may be significant in determining rights of access to 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". That provision 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 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 and communicated within the department or to another agency 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, too, 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 o 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 7427

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 7, 1992

Mr. Dayle Wheelock
89-C-1224 B-1-43
Collins Correctional Facility
Helmuth, N.Y. 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 of October 19, which reached this office on November 2. Your inquiry involves justice court records.

In this regard, the Freedom of Information Law does not apply to the courts of court records. That statute pertains to agency records, and §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, §86(1) defines "judiciary" to mean:

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

While court records are not subject to the Freedom of Information Law, those records are often available under other statutes. For example, in this instance, the court is a town justice court, and, §2019-a of the Uniform Justice Court Act, entitled "Justices' criminal records and docket", states in relevant part that "[t]he records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..."

It is suggested that you resubmit your request to the Town Justice Court, citing the statute referenced above as the basis of your request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2162
FOIL-AO 7457A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 7, 1992

Mr. James N. Seefried
[redacted]

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

Dear Mr. Seefried:

I have received your letter of October 28, as well as various materials attached to it.

In your capacity as chairman of the Town of Clarendon Zoning Board of Appeals, you wrote that it is often difficult to obtain records in order to carry out your duties, and that, in certain instances, records have been withheld.

One of the issues involves the propriety of the zoning enforcement officer keeping records in his home. You asked that the records be kept in the office of the town clerk in order that you and citizens generally may review or seek copies in a convenient and efficient manner.

In this regard, in a decision that may have some bearing on the situation, although it was held that there was no requirement that a town bookkeeper keep records at town offices, it was also found that provisions be made to ensure that the records are accessible to the public [Town of Northumberland v. Eastman , 493 NYS 2D 93, 95 (1985)]. Further, while the zoning enforcement officer may have possession of certain records, I believe that the town clerk has legal custody of all town records under §30 of the Town Law, irrespective of where they are kept or who may have physical custody of the records. Subdivision (1) of §30 states in relevant part that the town clerk "[s]hall have the custody of all the records, books and papers of the town". In my opinion, in view of §30 of the Town Law, while it may be reasonable for the zoning enforcement officer to temporarily maintain records that he currently needs to perform his duties, all other records should be kept in town offices in order that they may be reviewed or copied

by the public generally at the location where town records are routinely maintained.

Another issue involves the contents of minutes of meetings and the time within which they must be made available. The Open Meetings Law offers direction on the subject and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute 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, although it is clear that minutes must be prepared and made available within two weeks, it is also clear that minutes need not consist of a verbatim account of every comment that was made.

Further, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that 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.

Finally, your requests for tape recordings of Town Board meetings were denied. The basis for the denial, according to the

Town Clerk, is that a tape recording "is considered a working tool, not a public record". I disagree, for the Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" to include:

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

Since tape recordings of open meetings would be produced for and maintained by the Town, I believe that they constitute "records" subject to rights of access. I point out by means of analogy that, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

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

In sum, based upon the language of the Freedom of Information Law and its judicial interpretation, it is clear in my view that a tape recording of an open meeting must be disclosed.

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:pb
cc: Town Board
Susan C. Klatt, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7428

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 8, 1992

Mr. Thomas J. Hillgardner, Associate
New York Environmental Law Project
73 West Shore Road
Huntington, N.Y. 11743

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

Dear Mr. Hillgardner:

I have received your letter of October 16, which, for reasons unknown, did not reach this office until November 3.

You have requested an advisory opinion concerning "the use of the Freedom of Information Law as a shield". Specifically, when you sought to examine various records from the Town of Brookhaven, you were told by the Town Clerk "that it would be improper for him to provide [you] any access to these files without a Freedom of Information Law request". You asked whether that is so.

In this regard, while I do not believe that a request for records must cite the FOIL as its basis, an agency may, in my view, require that a request be made in writing. As stated in §89(3) of the Law:

> "Each entity subject to the provisions of this article, within five business days 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..." (emphasis added).

While the regulations promulgated by the Committee on Open Government authorize agencies to accept oral requests [21 NYCRR §1401.5(a)], it is clear in my view that an agency may require that requests be made in writing.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Stanley Allan, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7439

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 8, 1992

[redacted]
Auburn State Prison
135 State Street
Auburn, N.Y. 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 [redacted]:

I have received your letter of October 30, which relates to our earlier correspondence.

In brief, you are attempting to obtain information concerning inquiries made about you by law enforcement officials at a treatment facility while you were a patient. It is your contention that the section of the hospital providing treatment "falls under the umbrella of the Mental Hygiene Law", that an administrative determination would have been required to permit law enforcement officials to make such inquiries and that records of any such determination should be available to you.

In this regard, as you may be aware, §33.16 of the Mental Hygiene generally authorizes a patient or client of a mental hygiene facility to obtain clinical records from such a facility about himself or herself. For purposes of that statute, the phrase "clinical record" is defined to mean:

> "any information concerning or relating to the examination or treatment of an identifiable patient or client maintained or possessed by a facility which has treated or is treating such patient or client, except data disclosed to a practitioner in confidence by other persons on the basis of an express condition that such data would never be disclosed to the patient or client or other persons, provided that such data has never been disclosed by the practitioner or a facility to any other

> person. If at any time such data is disclosed, it shall be considered clinical records for the purposes of this section. For purposes of this subdivision, 'disclosure to any other person' shall not include disclosures made pursuant to §33.13 of this article, to practitioners as part of a consultation or referral during the treatment of the patient or client, to the statewide planning and research cooperative system or to the committee or a court pursuant to the provisions of this section or to an insurance carrier insuring, or an attorney consulted by, a facility".

Based upon the foregoing, it appears that clinical records include those that relate "to the examination or treatment of an identifiable patient or client". As such, it is questionable in my view whether the records at issue would fall within the scope of §33.16 of the Mental Hygiene Law.

It is suggested that you discuss the matter with your attorney.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 7430

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 8, 1992

Mr. Steve Norris
[redacted]

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

Dear Mr. Norris:

As you are aware, I have received your letter of November 3 and related correspondence.

You wrote that you have requested "copies of the Municipal Reports for the Town of Northampton issued by the State Controller's Office", but that the town attorney "has instructed the town clerk not to hand over" those records. In addition, you later indicated that the Town authorized you inspect the records, but that you could not have copies.

In conjunction with the foregoing, you sought a "ruling" on the matter and asked whether "disciplinary action can be taken against" the town attorney.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect the Freedom of Information Law. The Committee is not empowered to issue a "ruling" that is binding. Further, questions involving the discipline of attorneys are beyond the scope of the jurisdiction or expertise of the office.

Although the correspondence appears to indicate that the records sought have been or will be made available and that copies will be made, I offer the following comments.

First, §34 of the General Municipal Law provides that the State Comptroller "shall have power to examine into the financial affairs of every...municipal corporation". In addition, §35(1) of the General Municipal Law states in part that:

> "A report of such examination shall be made and shall be filed in the office of the state comptroller and in the office of the clerk of the municipal corporation...When so filed, each such report and a copy thereof shall be a public record open to inspection by any interested person."

Further, §87(2)(g)(iv) of the Freedom of Information Law requires that agencies disclose "external audits, including but not limited to audits performed by the comptroller and the federal government".

Second, §87(2) of the Freedom of Information Law states that accessible records must be made available for inspection and copying, and §89(3) provides that agencies must make copies of such records upon payment of the requisite fees.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her

administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

As you requested, a copy of the Freedom of Information Law 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:pb
cc: Ronald Schur, Jr., Town Attorney
Ms. Grega, Town Clerk
Supervisor Loveless

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7431

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1992

Ms. Carol Rinere
Board of Cooperative
Education Services
Lackawanna Avenue
Mt. Morris, N.Y. 14510

The staff of the Committee 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. Rinere:

I have received your memorandum of November 4 and the materials attached to it.

The correspondence relates to requests made by Mr. Jim Kramer of Aquatic Collaboration involving records relating to the use of chemicals in swimming pools. Citing §879 of the Labor Law, he has requested "employee exposure" records. Section 879 is part of the so-called "Right to Know Law", which pertains to employees' rights to be aware of toxic substances used in the workplace. In brief, employees may request and obtain information about those substances, except to the extent that such information would constitute a trade secret as described in §877 of the Labor Law.

Section 879 of the Labor Law states that:

> "Employers shall keep a record of the name, address and social security number of every employee who handles or uses substances included in section nineteen hundred ten of the federal occupational safety and health regulations, subparagraph z. Such record shall be made available to each affected employee, former employee, designated physician or representative and the commissioner of health, upon request, for examination and copying. Such record shall be kept for forty years. Such records shall be sent to the department of health if the

employer's establishment ceases to operate within the state of New York".

In my opinion, all records kept or prepared by an agency, which would include a school district or a BOCES, are subject to rights conferred by the Freedom of Information Law [see definition of "record", FOIL, S86(4)]. Further, 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.

Relevant under the circumstances is §87(2)(b), which authorizes an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal property". In my opinion, insofar as records maintained pursuant to §879 identify particular individuals, those portions could be withheld as an unwarranted invasion of personal privacy.

Further, having spoken with Mr. Kramer, I do not believe he is interested in obtaining names, addresses or social security numbers of employees who handle or use toxic substances. Rather, it appears that his interest involves records indicating the nature of those substances. If that is so, when such records are maintained by agencies subject to the Freedom of Information Law, I believe that they would be available, except to the extent that they contain trade secrets as described in §877 of the Labor Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Jim Kramer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7432

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1992

Ms. Allison Colp
86-C-0370
35-31 Gains Basin Road
Albion, N.Y. 14411-0436

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

Dear Ms. Colp:

I have received your letter of November 1 in which you sought assistance in obtaining your "Final Parole hearing transcripts" and a court appointed attorney.

In this regard, a transcript of a hearing, if prepared, would in my view be available to you. As a general matter, a request for a record should be directed to an agency's "records access officer". The records access officer has the duty of coordinating a agency's response to requests. The records access officer for the Division of Parole is William Attschuller. Further, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the record sought. Therefore, a request should contain sufficient detail to enable agency officials to locate the record.

Since this office does not have the jurisdiction or resources to help you obtain legal representation, it is suggested that you confer with a representative of Prisoners' Legal Services or a counselor at your facility.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1433

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1992

Mr. Charles Hurd
86-A-6878
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. Hurd:

I have received your letter of November 3 in which you sought an advisory opinion concerning a requst for records of the New York City Police Department.

The request involves records pertaining to a particular arrest, as well as those relating to any other "active or inactive investigation bearing [your] name" or other identifier. In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. I point out that 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. While the request appears to have reasonably described the records concerning a particular arrest, it might not have met that standard concerning records that may relate to other "active or inactive" investigations.

Second, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unaware of 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 provisions that may be significant in determining rights of access to 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". That provision 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 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 and communicated within the department or to another agency 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, too, 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 o 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-1434

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1992

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 November 1 in which you requested an advisory concerning the Freedom of Information Law.

Your inquiry concerns rights of access to "a correctional facility Hospital Infirmary Log Book" that includes inmates' names, numbers, cell locations, and the times and dates of their arrivals at and departures from the infirmary.

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

Relevant in my view is §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 eighty-nine of this article." Section 89(2)(b) provides examples of unwarranted invasions of personal privacy, one of which pertains to "disclosure of items involving the medical or personal records of a client or patient in a medical facility."

While the log book might not describe the nature of inmates' illnesses or treatment, by its nature the log book would identify a class of persons having medical problems. For that reason and based on the provisions cited above, it appears that the log book

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.

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-7435

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 10, 1992

Mr. Ricardo A. DiRose
85-C-773
Box 500
Elmira, N.Y. 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. DiRose:

I have received your letter of October 26, which reached this office on November 6.

You have questioned the propriety of a denial of access by the Office of the State Comptroller to copies of payroll checks issued in January to Governor Cuomo, Lieutenant Governor Lundine and Thomas Coughlin, Commissioner of the Department of Correctional Services. Since the figure appearing on a paycheck indicates net rather than gross pay, information reflective of the annual salaries of those officials was provided. That being so, and particularly because the salaries of those officials are set by statute, I believe that the matter is academic. Nevertheless, I offer the following comments.

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.

Although tangential to your request, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries 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 [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 operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment 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.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, it has been advised that portions of W-2 forms may 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. Moreover, in a recent decision, the same conclusion was reached, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

As indicated earlier, a paycheck indicates the net or take home pay of an officer or employee. The net pay may represent a figure reached due to a variety of deductions, such as exemptions for family members, contributions to charity, deductions for insurance payments, garnishments and the like. Further, in some instances, employees' checks may be deposited directly into bank accounts, for example. In short, disclosure of a record indicating the net pay of an officer or employee would likely constitute an unwarranted invasion of person 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:pb
cc: James L. Kalteux

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7436

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 10, 1992

Mr. Padraic D. Riley
Local Editor/North
Gannett Suburban Newspapers
1825 Commerce Street
Yorktown Heights, N.Y. 10598

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

Dear Mr. Riley:

I have received your letter of November 5 in which you sought an advisory opinion concerning access to records relating to youthful offenders. Your inquiry was precipitated by an initial denial of access by the Bedford Police Department to the name of a seventeen year old charged with felony.

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 §87(2)(a) through (i) of the Law.

Second, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." While records concerning youthful offenders might at some point fall within a statutory exemption from disclosure, that point is reached, in my view, only when or after a court adjudicates that a person is a youthful offender.

Most relevant to the issue in my view is §720.15 of the Criminal Procedure Law which, as amended by Chapter 411 of the Laws of 1979, provides that:

> "1. When an accusatory instrument against an apparently eligible youth is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public.

> 2. When a youth is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and which the defendant's consent, be conducted in private.
>
> 3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law."

Based upon the foregoing, it is clear in my opinion that only a court has the authority to seal an accusatory instrument that identifies "an apparently eligible youth". Further, subdivision (3) of §720.15 narrows the applicability of subdivisions (1) and (2) and the capacity to seal records or conduct private proceedings by distinguishing between apparently eligible youths charged with felonies from others. As such, I do not believe that records pertaining to eligible youths become "exempted from disclosure" by statute unless or until a court adjudicates them as youthful offenders. Further, under §720.15(3), the provisions regarding the sealing of an accusatory instrument are not applicable, at least for a time, if a youth has been charged with a felony.

It is possible that records pertaining to an apparently eligible youth charged with a felony may at some point be adjudicated a youthful offender, in which case the records pertaining to that person may be sealed under §720.35 of the Criminal Procedural Law. However, until that occurs, I believe that the records and proceedings concerning such an individual would be open to the public to the same extent as similar records or proceedings concerning adults.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: David Marden, Chief of Police
Lawrence K. Beaupre, Gannett Suburban Newspapers
Lawrence E. Dwyer, Town Supervisor
George E. Sirignano, Town Justice

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2166
FOIL-AO-7437

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 10, 1992

Mr. Art Simmons
[redacted]

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

Dear Mr. Simmons:

I have received your letter of November 2. In your capacity as a member of the Board of Trustees of the Village of Northville, you raised a variety of questions relating to open government laws. An attempt will be made to deal with them, though not necessarily in the order in which you raised them.

First, in conjunction with your questions concerning the services rendered by this office, there is no objection to receiving telephone or written inquiries from members of village boards of trustees, and, in fact, during the past year, this office received nearly 2,500 telephone inquiries from local government officials and prepared more than 100 written advisory opinions in response to their written requests for opinions. As a general matter, the Committee on Open Government provides advice, orally and in writing, to any person, including members of the public and the news media, as well as government representatives.

Second, there is no distinction in the Open Meetings Law and its requirements among regular meetings, special meetings and "work sessions". It is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

The court also dealt with the characterization of meetings as "informal," stating that:

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Further, the provisions of the Law concerning notice, executive sessions, and the preparation of minutes, for example, would apply to all meetings, irrespective of their characterization.

In order to constitute a valid meeting and the presence of a quorum, I believe that all of the members of a public body must be

given reasonable notice of a meeting. Relevant in my view is §41 of the General Construction Law, which provides guidance concerning quorum and voting requirements. The cited provision states that:

> "Whenever three of 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."

Based upon the language quoted above, a public body, such as a village board of trustees, cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. Further, if a public body consists of five members, three would constitute a quorum. However, in order to carry a motion or otherwise take action, again, there must be an affirmative vote of a majority of the total membership. For instance, if a public body consists of five members, three of whom are present, a vote of two to one would not carry a motion, for three affirmative votes would be needed to do so.

Third, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must 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 of the time and place 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.

In the context of your inquiry, if a series of meetings have been scheduled in advance to be held at particular times, the posting of a notice of a schedule of those meetings and transmittal of that notice to the news media would in my view satisfy §104 of the Open Meetings Law regarding those meetings. The only instances in which additional notice would be required would involve unscheduled meetings that are not referenced in the notice. It is emphasized that although notice must be given to the news media, there is no requirement that the news media must publish notice. As such, there may be instances in which notice is given to a newspaper as required by the Open Meetings Law, and the newspaper chooses not to print it. In that instance, so long as notice is posted and given to the news media as required by law, a public body would be in compliance with law.

Fourth, with regard to minutes, the Open Meetings Law offers direction on the subject and provides what might be viewed as minimum requirements concerning the contents of minutes. Section 106 of that statute 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."

Although minutes may include reference to comments made at meetings or even consist of a verbatim account of what is said at a meeting, there is no requirement that minutes be so expansive. It is also noted that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his or her 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. Compt. File #82-181).

In a related vein, you suggested that minutes should not include "political" comments and asked what a "political" comment might be. I cannot answer that question, and I doubt that it is answerable. Many comments might be viewed as political or politically motivated; some would likely contend that every comment is political.

Next, you raised questions concerning the tape recording of open meetings and executive sessions, and rights of access to tape recordings. Neither the Open Meetings Law or any other statute deals directly with the use of tape recorders at meetings. However, several judicial decisions have been rendered concerning the use of tape recorders at meetings.

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

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

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

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good

> cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgment annulling the resolution of the respondent board of education" (id. at 925).

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

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In sum, I believe that any person may use a tape recorder in a non-disruptive manner at an open meeting of a public body, irrespective of whose comments might be recorded.

Unlike an open meeting, when comments are conveyed with the public present, an executive session is generally held in order that the public cannot be aware of the details of the deliberative process. For example, one of the grounds for entry into executive session, §105(1)(d), pertains to litigation, and it has been held that the purpose of that exception is to enable a public body to discuss its litigation strategy in private, so as not to divulge its strategy to its adversary, who may be in attendance at the meeting [see e.g., Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)]. When representatives of public bodies have asked whether they should tape record executive sessions, I have suggested that doing so may result in unforeseen and potentially damaging consequences. A tape recording is a "record" as that term is defined in §86(4) of the Freedom of Information Law and, therefore, would be subject to rights conferred by that statute. Further, a tape recording of an executive session may be subject to subpoena or discovery in the context of litigation. Disclosure in that kind of situation may place a public body at a disadvantage should litigation arise relative to a topic that has been appropriately discussed behind closed doors. In short, I am suggesting that tape recording executive sessions could potentially

defeat the purpose of holding executive sessions. More appropriate in my view would be the preparation of minutes to the extent required by §106(2) of the Open Meetings Law. Again, that provision requires the preparation of minutes of an executive session only when action is taken during an executive session.

With regard to access to tape recordings of open meetings, I point out that the Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" to include:

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

Since tape recordings of open meetings would be produced for and maintained by the Town, I believe that they constitute "records" subject to rights of access. I point out by means of analogy that, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

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

In sum, based upon the language of the Freedom of Information Law and its judicial interpretation, it is clear in my view that a tape recording of an open meeting must be disclosed.

Under the Local Government Records Law (see Arts and Cultural Affairs Law, Article 57-A), records cannot be destroyed or discarded except in conjunction with retention and disposal schedules promulgated by the State Education Department and its

State Archives and Records Administration. I believe that those schedules require that tape recordings be kept for a minimum of four months. After that time, they may be destroyed or reused.

Lastly, you sought my views concerning the following statement: "if people don't come to meetings, they have no right to complain or ask questions later." In short, I disagree. In my opinion, absence from a meeting cannot be equated with a lack of interest. People may have a variety of commitments involving work, child related activities or other issues that preclude them from attending. In some cases, weather conditions or health problems might prevent people from attending meetings. There may be a variety of reasons for not attending meetings, none of which involve the level of a person's interest. Further, often the news media serves as the eyes and ears of the public, and their presence may enable people unable to attend to know what transpired.

I hope that I 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-7438

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 11, 1992

Mr. Arthur Springer
[redacted]

Dear Mr. Springer:

I have received your letters addressed to my self and William Bookman, Chair of the Committee. Please be advised that Mr. Bookman is a member of the public rather than a government employee and that the Committee has authorized staff to respond to inquiries on behalf of its members.

Having reviewed your correspondence, it may be worthwhile to discuss the Freedom of Information Law in terms of its scope and the functions of this and other offices.

First, as you may be aware, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee has no power to enforce the Law or to compel an agency to grant or deny access to records, nor is it authorized to request records on behalf of members of the public.

Second, the title of the Freedom of Information Law may be somewhat misleading, for it is not an access to information law per se; rather, it is a vehicle that enables the public to seek and generally obtain records from agencies. Similarly, 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. As such, although agency officials may provide information following inquiries or by responding to questions, for example, they are not obliged to do so by the Freedom of Information Law.

In terms of procedure, a request for records 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. Further, §89(3) requires that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate and identify the records.

I point out, too, that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, since one aspect of your correspondence related to an attempt to obtain records pertaining to what appears to be a charitable organization, I contacted Douglas Williams, Director of the Office of Charities Registration, to ascertain the status of your request addressed to him. Mr. Williams informed me that he sent a copy of a complete report pertaining to that corporation.

Lastly, it is reiterated that the jurisdiction of this office is limited. While your concerns and grievances may be valid, they are in great measure beyond the scope of the authority or expertise of this office.

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-7439

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 11, 1992

Mr. Nicholas J. Selvaggio
[redacted]

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

Dear Mr. Selvaggio:

I have received your letter of November 9 and the correspondence attached to it. You have sought assistance concerning a denial of a request for an "expenditure summary report" by the Commack Union Free School District.

According to a response to your request, a copy of which is attached to your letter, "this report has not, as yet been submitted to the Board of Education for approval, and, therefore, is not available to you." You were informed that the report would be available upon its approval by the Board.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and §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, the documentation in question constitutes a "record" subject to rights conferred by the Freedom of Information Law, irrespective of whether it has been approved by the Board.

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

Third, although one of the grounds for denial may be relevant to a determination of rights of access, that provision, due to its structure, often requires disclosure. Specifically, §87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

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

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

Although the documentation in question could be characterized as "intra-agency material", as I understand its contents, it would consist in great measure if not wholly of "statistical or factual tabulations or data." If that is so, I believe that it would be accessible under the Law.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to District officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Joseph DelRosso
Tess Falcetta

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7440

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 11, 1992

Mr. M. Gene Samuel
[redacted]

The staff of the Committee 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. Samuel:

I have received your letter of November 13, as well as the correspondence attached to it. The materials pertain to your unsuccessful attempts to obtain a current inventory of musical instruments from the Penfield Central School District. It is noted that I also recently received a copy of a response to your appeal and related materials that have been forwarded by Dr. Richard E. Mace, Superintendent of Schools.

In brief, based upon a review of the materials, it appears that the record that you requested has not yet been prepared, but that it will be prepared and disclosed to you in February. I point out in this regard that the Freedom of Information Law pertains to existing records. Further, §89(3) of the Law states in part that an agency need not create a record in response to a request. Under the circumstances, if the inventory that you requested does not yet exist, the District would not in my view be obliged to prepare such a record on your behalf.

In his determination of your appeal, Dr. Mace wrote that "although such a record is available from last school year, no such record is in existence for this school year." It is suggested that you seek to inspect or copy last year's inventory, which could be compared with the current school year's inventory when it is prepared and disclosed to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7441

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 14, 1992

Ms. Irene A. Duszkiewicz
Hempstead Public Library
115 Nichols Court
at Washington Street
Hempstead, L.I. N.Y. 11550

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

Dear Ms. Duszkiewicz:

I have received your letter of November 16 in which you sought a clarification concerning the applicability of the Freedom of Information Law.

You wrote that the Hempstead Public Library, which you serve as Director, is a public library and "a member of a county-wide cooperative library system - the Nassau Library System". You added that the Nassau Library System "receives its funding primarily from New York State funds with some funding received from the County". You asked whether you may "request and receive payroll records, signed and Board approved labor contracts, [and] contracts for services that [your] library participates in".

In this regard, the Freedom of Information Law is applicable to agency records, and the question, therefore, is whether the Nassau Library System is an agency. The term agency is defined in §86(3) of the Freedom of Information Law to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental 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 pertains to records maintained by entities of state and local

government. Public and school district libraries, for example, constitute agencies subject to the Law.

It is my understanding that a library system may be not-for-corporation which may have a relationship with government, but which is not itself a governmental entity. In that situation, I do not believe that it would be an "agency" subject to the Freedom of Information Law. In other instances, a library system might apparently have been created wholly by governmental entities, in which case, I believe that it would be an agency. Section 90.3 of the regulations promulgated by the Commissioner of Education states in part that a "public library system" includes:

> "a library established by one or more counties, a group of libraries serving an area including one or more counties in whole or in part, a library of a city containing one or more counties, or a cooperative library system established pursuant to the provision of §255 of the Education Law."

If, for example, the Nassau Library System was established by Nassau county, it would appear to be a governmental entity and, therefore, an agency subject to the Freedom of Information Law.

When the Freedom of Information Law is applicable, agency records are presumptively available. Stated differently, all records of an agency are available, except to the extent 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 Law, contracts between agencies or others or maintained by agencies must be disclosed, for none of the grounds for denial would apply. Further, §87(3)(b) of the Freedom of Information Law states that "Each agency shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency...".

Lastly, even if the Nassau Library System is not subject to the Freedom of Information Law, I would conjecture that Nassau County or member libraries would have copies of much of the information in which you are interested. Insofar as those records are maintained by those agencies, I believe that they would be available from them under the Freedom of Information Law.

Enclosed for your review is §90.3 of the Commissioner's regulations pertaining to public library systems. It is noted that several aspects of the regulations require that library systems submit records to the State Education Department. Any such records would also be subject to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1442

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 14, 1992

Ms. June Maxam
Editor/Publisher
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 November 18 in which you sought an advisory opinion concerning the Freedom of Information Law.

Specifically, you wrote that you have unsuccessfully attempted to obtain mileage records pertaining to individual deputies from the Warren County Sheriff's Office. Although you were initially informed that no such records exist, you indicated that you "know for a fact that each deputy is required to maintain a Daily Activity Report (DAR) on which all activity for the day is logged, including the starting odometer reading of the patrol car used, the number of gallons of fuel consumed and the ending odometer reading at the end of the shift", and that "[o]ther officers who have the exclusive use of a vehicle ar asked on the air for their monthly odometer readings..." Your request for records indicating mileage was denied on the ground that disclosure should constitute "an unwarranted invasion 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 records of an agency are available, except to the extent 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 suggested by the Sheriff, §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". While the standard concerning privacy is

flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard 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 a their 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); 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); 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 my opinion, odometer readings or records reflective of mileage or fuel used by an officer clearly relate to the performance of that person's duties. Consequently, I do not believe records or portions of records indicating individual officers' mileage, odometer readings or fuel consumption while on duty could be withheld based upon considerations of privacy.

Lastly, although one of the grounds for denial may be relevant to a determination of rights of access, that provision, due to its structure, often requires disclosure. Specifically, §87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could 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. While the information sought would be or could be found within intra-agency materials, numbers, such as those involving mileage odometer readings or fuel consumption, would consist of "factual" data accessible under §87(2)(g)(i).

For the foregoing reasons, records or portions of the records, insofar as they contain the information sought, must in my view 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: Sheriff Frederick Lamy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7443

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 14, 1992

Mr. Dwayne Gosso
349-92-17490
Rikers Island Wic
1500 Hazen Street
East Elmhurst, N.Y. 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. Gosso:

I have received your letter of November 2 in which you sought assistance in obtaining your birth certificate.

In this regard, access to birth records is not governed by the Freedom of Information Law but rather by provisions of the Public Health Law. Under §4173 of the Public Health Law, a person may obtain a birth record pertaining to himself. Based upon the information that you provided, it appears that you believe that your birth certificate is maintained by the New York City Bureau of Vital Records. However, the information indicates that you were born in Westchester County. If that is so, I believe that the records would be maintained by the Bureau of Vital Records at the State Health Department, which is located at the Empire State Plaza, Corning Tower, Albany, N.Y. 12237. It is also noted that the fee for the search and disclosure of a birth record is fifteen dollars. I am unaware of whether there are circumstances in which the fee may be waived.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7444

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 15, 1992

Mr. Johnny West
[redacted]

Dear Mr. West:

I have received your recent letter in which you asked that this office send you your Parole Board decision.

In this regard, 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 does not possess Parole Board decisions. Nevertheless, I offer the following comments.

First, a request for a record should be sent to the "records access officer" at the agency that maintains the record. The records access officer has the duty of coordinating an agency's response to requests.

Second, §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 a requested record.

For your information, the records access officer at the Division of Parole is William Altschuller. His address is NYS Division of Parole, 97 Central Avenue, Albany, NY 12206.

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-1445

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 15, 1992

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 November 12 in which you sought an advisory opinion concerning the Freedom of Information Law.

You requested from the Fulton County Industrial Development Agency ("FCIDA") records reflective of fees paid by developers to the IDA's attorney. In response to an appeal, the Chairman of the IDA wrote that:

> "The IDA has adopted a fee schedule for attorney's fees paid by developers using Industrial Revenue Bonds. This schedule has been previously provided to you. This is the only involvement and record the IDA has of these fees.
>
> "The IDA isn't involved in the billing or payment of these fees. None of these bills nor payments pass through any of the IDA members, files or officers. We therefore can't provide you something we never have had or are even involved with."

You have questioned whether records of payments to the attorney should be made available. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §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."

Section 856 of the General Municipal Law deals generally with industrial development agencies, and subdivision (2) states in part that "[a]n agency shall be a corporate governmental agency, constituting a public benefit corporation". Section 66(1) of the General Construction Law states that a "public benefit corporation" is a "public corporation". Further, §895-c of the General Municipal Law specifically established the "Fulton County Industrial Development Agency" as "a body corporate and politic" subject to the requirements of Article 18-A of the General Municipal Law. Based on the foregoing, I believe that the FCIDA is an "agency" required to comply with the Freedom of Information Law.

Second, on previous occasions, 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, the "bond documents" would be maintained by the FCIDA, and it appears that such records have been disclosed. It is likely that you could determine the method and amount of payment by reviewing these documents.

Third, with respect to the actual records of payment, in my opinion, the physical possession by FCIDA of the records sought, or the absence thereof, is not necessarily determinative of rights of access. If the attorney for FCIDA maintains the records sought, it appears that those documents would be subject to rights conferred by the Freedom of Information Law.

As indicated previously, the Freedom of Information Law pertains to agency records, and section 86(4) of that statute defines the term "record" expansively to include:

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

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

From my perspective, based upon its specific language, the definition of "record" includes not only documents that are physically maintained by an agency; it refers to documents are that are "kept, held, filed, produced or reproduced by, with or for an agency." If the attorney maintains records for, on behalf of, or in

his capacity as attorney for FCIDA, it appears that they would fall within the coverage of the Freedom of Information Law.

Although different from the instant situation, an analogy might be made between this situation 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 AD2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed in the same manner as a record prepared by the staff of an agency. I would contend that a consultant's report, information "produced for" an agency, would fall within the scope of the Freedom of Information Law even if it is in the physical possession of a consultant rather than the agency. Any other conclusion would, in my opinion, serve to negate the effect of the decision rendered by the Court of Appeals.

Moreover, in a decision cited earlier, the Court of Appeals discussed the scope and intent of the Freedom of Information Law and found that:

> "Key is the Legislature's own unmistakably broad declaration that, '[as] state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and

> expenditures, it is incumbent upon the state and its localities to extend public accountability *wherever and whenever* feasible' (emphasis added; Public Officers Law, section 84).
>
> "...For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester-Rockland Newspapers, supra, at 579].

To be consistent with the intent of the Freedom of Information Law and its broad interpretation by the state's highest court, I believe that the FCIDA must give effect to the Law so as to "extend public accountability wherever and whenever feasible."

If the attorney in question maintains records for or on behalf of FCIDA, that agency should in my opinion direct him to release records to the extent required by the Freedom of Information Law, or, alternatively, the agency could obtain the records sought or copies thereof from the attorney for the purpose of reviewing them and determining the extent to which the Freedom of Information Law requires disclosure.

Lastly, with regard 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 opinion, bills, vouchers, contracts, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable. With specific respect to payments to attorneys, I point out that, while the communications between an attorney and client are often 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 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 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". 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. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms

> of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys 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:pb
cc: Alfred E. Stahl, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7/46

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 15, 1992

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 November 18 concerning §110.5 of the regulations promulgated by the State Comptroller and your ability to use your own photocopier to produce photocopies of records maintained by the Office the State Comptroller.

Section 110.5(a) of the regulations cited above states that:

> "Records inspected by members of the public may be copied by those persons, or may be copied for those persons, in the following manners:
>
> (1) the records may be copied by the person inspecting the records by his or hand copying;
>
> (2) the records may be copied by the person inspecting the records by copying the same by his or her typewriter; or
>
> (3) the records may be copied for the person inspecting the records by department personnel using department mechanical reproduction equipment."

As such, the use of your photocopying equipment has been precluded. You wrote that you have a Xerox 5220 personal copier which is not larger than an electric typewriter, and that your copier uses

electricity at a rate of "about .16 per hr.", and that you would be willing to pay a fee at that rate.

In this regard, I offer the following comments.

First, §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 those records or portions thereof that fall within one or more of the grounds for denial that follow. Further, §89(3) of the Law requires that agencies provide copies of records upon payment of the appropriate fee.

Second, the Freedom of Information Law is silent with respect to a person's right to use his or her own photocopying equipment. However, since the statute requires that an agency permit an applicant to "copy" accessible records, and since the Law does not state that an applicant cannot copy records by means of his or her photocopier, I believe that an applicant has the right to use his or her own photocopy equipment, so long as the use of such equipment is not disruptive, and the applicant is willing to pay incidental costs based upon an agency's actual cost, such as the cost of electricity.

Third, since the Comptroller's regulations indicate that records may be copied only "by department personnel using department mechanical equipment", the issue involves the validity of that provision. Again, nothing in the Freedom of Information Law deals directly with the use of one's own photocopier. However, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations pertaining to its procedural implementation. In turn, §87(1) requires agencies to promulgate procedural rules and regulations consistent with the Freedom of Information Law and the regulations adopted by the Committee. The Committee's regulations state in 21 NYCRR §1401.1(d) that "Any conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of records." Further, at the beginning of the Freedom of Information Law, §84, its legislative declaration states in part that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible."

I am unfamiliar with the specific records you seek or the manner in which they are maintained. If they exist in a manner that requires that they be handled by agency staff, and the use of one's photocopier would be disruptive or diminish the integrity of the records, it would appear that the Office of State Comptroller could preclude the use of a personal photocopier. On the other hand, if the records are maintained in a manner in which a personal photocopier could be used in a non-disruptive manner and without

damage to the integrity of the records, it is likely in my view that the portion of the Comptroller's regulations restricting the use of such a photocopier would be inconsistent with the Freedom of Information Law and the Committee's regulations. In such circumstances, it is likely in my view that the portion of the regulations in question would be invalid.

I hope that I have 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, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1447

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 16, 1992

Mr. Isaiah Brown
92-R-5542
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990-0900

The staff of the Committee on Open 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 17 in which you sought assistance concerning access to records.

According to your letter, you requested information under the Freedom of Information Law pertaining to particular attorneys from the Disciplinary Committee of the Appellate Division, First Department. You wrote that you were informed "that said committee could not be bothered, and that...they were not staffed to handle requests under the Freedom of Information Law." You also indicated that requests to other government offices have not been answered.

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, 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, §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, §90(10) 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 §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable. If indeed your request involved records available under §90(10) of the Judiciary Law, it is suggested that you renew the request, citing and highlighting appropriate aspects of that statute.

Lastly, as it pertains to agencies, the Freedom of Information Law provides direction concerning the time and manner in which those entities must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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-7448

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 16, 1992

Mr. Jitendra Lakram
92-A-2581
Elmira Correctional Facility
Box 500
Elmira, NY 14902

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

Dear Mr. Lakram:

I have received your letter of November 14 in which you raised questions concerning the fees that can be charged for copies of audiotapes. You also asked how you can determine whether you have been overcharged.

In this regard, §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 authorizes other fees, 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 duplicated by means of photocopies, such as tape recordings. Therefore, if, for example, an agency uses a new cassette tape to reproduce information stored on its tape recording, it could charge on the basis of the cost of the new cassette and, if it is possible to compute such a figure, the actual cost of electricity used in producing a new recording.

To determine an agency's cost in this instance, it is likely that there are records, such as purchase orders, indicating payment for cassette tapes. A purchase order or equivalent record would in my view be accessible under the Freedom of Information Law, for none of the grounds for denial appearing in §87(2) of the Law would be applicable. Presumably a record indicating the agency's purchase of cassette tapes could be reviewed to ascertain the agency's actual cost.

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-1448-A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 15, 1992

Mr. Nat L. 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 Mr. Jones:

I have received your letter of November 16 in which you sought clarification concerning the Freedom of Information Law.

Your first question is whether an agency in receipt of an appeal made under the Freedom of Information Law must forward a copy of the appeal to this office. In this regard, §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 thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Therefore, appeals made to agencies and their determinations of those appeals must be forwarded to the Committee on Open Government.

Second, you asked whether a copy of a felony complaint is available. Assuming that such a record has not been sealed (i.e., pursuant to Criminal Procedure Law, §160.50), the Freedom of

Information Law would in my view govern public rights of access. 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. Since I am unaware of the contents of felony complaints in every instance or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the provisions that may be significant in determining rights of access to 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". That provision 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 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.

Lastly, 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 o 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPR - AL 28
FOIL-AO-7449

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 17, 1992

Mr. Alan Berg
General Counsel
NYS Employment Relations Board
400 Broome Street
Fourth Floor
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. Berg:

I have received your letter of November 19 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, one of the functions of the Employment Relations Board pertains to "the administration of a panel of private arbitrators to hear and decide grievances involving labor unions and management of private sector companies". You added that the Board's "role is to facilitate the selection of a mutually acceptable arbitrator from [y]our roster." The arbitrators are paid by the parties and are not state employees.

You wrote that an arbitrator recently objected to your release of her name and business telephone number to a grievant in a case in which she was the arbitrator. Further, she "demanded" that the Board withhold her "name, address or phone number from any employee." Your inquiry involves your legal ability to withhold those items under any of the exceptions appearing in §87(2) of the Freedom of Information Law, particularly paragraphs (c) and (f). You also asked that I consider the situation in which an arbitrator's business address is also that person's home address.

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 regard to the grounds for denial to which you specifically referred, §87(2)(c) permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards of collective bargaining negotiations." From my perspective, that provision is cited most frequently and was likely intended to pertain to situations in which a government agency is or would be a party with respect to contract awards or collective bargaining negotiations. I do not believe that it was envisioned that §87(2)(c) would be relevant or applicable in situations in which non-governmental entities are involved in contracting or collective bargaining. Nevertheless, it is difficult to see how disclosure of the items in question would, if disclosed, impair collective bargaining negotiations. It is assumed that the names of arbitrators are readily disclosed, and their addresses and phone numbers are, in my view, largely irrelevant to the substance of the matters that come before them.

Section 87(2)(f) permits an agency to withhold records insofar as disclosure would "endanger the life or safety of any person". It is noted in this regard that the burden of defending a denial of access to records is imposed upon agencies [FOIL, §89(4)(b)] and that the Court of Appeals has that an agency is "required to articulate particularized and specific justification...to exempt its records from disclosure [see e.g., Fink v. Lefkowitz, 47 NY 2D 567, 571 (1979)]. The only decision of which I am aware that dealt with the possibility of endangerment in a situation in any way analogous to that presented involved access to names, addresses and similar information relating to principals of check cashing firms licensed by the State Banking Department. While the names of the principals and the locations of those firms were found to be available, home addresses of those persons were found to be deniable, for "disclosure of their home address or residence address could, in the nature of the business they conduct expose applicants and their families to danger to life or safety..." [American Broadcasting Companies, Inc. v. Siebert, 442 NYS 2D 855, 859 (1981)]. In my opinion, significant in that decision was "the nature of business", which involved transporting large amounts of cash and, therefore, exposing individuals to crime and danger. That kind of factor does not appear to be present or relevant in this instance. Additional commentary will be offered later in this opinion concerning the disclosure of home addresses.

Third, most significant in my view are provisions concerning the protection of personal privacy. Among the grounds for denial appearing in the Freedom of Information Law is §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, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

Related is Personal Privacy Protection Law, which 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, §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" [§92(7)]. For purpose of Personal Privacy Protection Law, the term "record" is defined to mean "any time, 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" [§92(9)].

With respect to disclosure, §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 §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 §96 of the Personal 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 the items in question would result in an unwarranted invasion of personal privacy.

There are several judicial decisions, both New York State and federal, which in my opinion are relevant, for they pertain to records about individuals in their business or professional capacities, rather than their personal capacities.

For instance, one 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 provisions 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 Law 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)."

In another more recent decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

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 Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 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 regarding '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 4. 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 established 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 professional 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 'professional qualifications'. 'Professional' 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 an unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

The standard in the New York Freedom of Information Law, as in the case of the federal Act, is subject to conflicting points of view, and reasonable people often differ with respect to issues concerning personal privacy. In this instance, the information in question, although identifiable to particular individuals, pertains solely to their duties as arbitrators who presumably have voluntarily made their names known to the Board. 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 professional arbitrators. 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 in my view, disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

In sum, it is my opinion that the names, business addresses and business telephone numbers of arbitrators must be disclosed. If an arbitrator's business address is the same as his or her home address, the issue may be more difficult. In analogous situations involving persons licensed by state agencies, for example, if two addresses, home and business, are maintained by the agency, it has been advised that the business address is available, but that the home address may be withheld as an unwarranted invasion of personal privacy. In cases in which the home and business address are the same, it has been advised that the address should be disclosed, for that is the site where the licensed activity is being carried out. However, the arbitrators are not licensees, and the state would not appear to have the same kind of interest in them as in the case of licensees. While I believe that the business address is public, even if it is the same as an arbitrator's home address, issues could arise involving unwanted or unexpected intrusions. If it is feasible or appropriate to do so, it may be worthwhile to consider informing arbitrators that their names, business addresses and business phone numbers are disclosable under the Freedom of Information Law. If the home and business addresses are the same, an arbitrator might use an alternative, such as a post office box.

I hope that I 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 4450

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 18, 1992

Mr. Donald Lee Singer
Attorney and Counselor at Law
Northern Westchester Office
74 Cordwood Road
Cortlandt Manor, N.Y. 10566-5122

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

Dear Mr. Singer:

I have received your letter of November 20 in which you requested an advisory opinion concerning the Freedom of Information Law. Your inquiry pertains to the validity of a "search and service" fee of ten dollars that must be paid to the New York City Police Department for a copy of an accident report.

In this regard, in my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy up to nine by fourteen inches, nor can it charge a fee for "search and service".

By way of background, §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 of 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 is conferred by a statute. In Sheehan v. City of Syracuse [521 NYS 2d 207 (1987)]. a fee in excess of twenty-five cents per photocopy for certain records was established by an ordinance, and the court found the ordinance to be invalid.

Further, 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 states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:

> (a) There shall be no fee charged for the following:
>
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (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. Therefore, absent statutory authority to do so, I do not believe that the Department could validly charge a fee other than a maximum fee of twenty-five cents per photocopy.

Moreover, 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, confusion has arisen on occasion concerning fees for accident reports due perhaps to the provisions of §202 of the Vehicle and Traffic Law, which was recently amended. Section 202(3) authorizes a copying fee of $8.00 for accident reports obtained from the Department of Motor Vehicles and one dollar per page for copies of other records. Section 202 also authorizes the Department to collect certain fees for searching for records. However, since the provisions of the Vehicle and Traffic Law pertain to particular records in possession of the Department of Motor Vehicles only, in my opinion, other agencies, such as municipal police or sheriff's departments, cannot unilaterally adopt policy or regulations authorizing fees in excess of twenty-five cents per photocopy or other fees without specific statutory authority 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:pb
cc: Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7451

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 18, 1992

Mr. Jitendra Lakram
92-A-2581
Elmira Correctional Facility
Box 500
Elmira, N.Y. 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. Lakram:

I have received your letter of November 18. You asked that this office investigate with respect to your allegation that the freedom of information officer at your facility is "intentionally stalling" responding to your requests.

In this regard, the Committee has neither the staff nor the resources to conduct an investigation concerning your allegation. However, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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:pb
cc: Joan McKibbin, Freedom of Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7452

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 18, 1992

William Graham
84-A-6009
Auburn State Prison
135 State Street
Auburn, N.Y. 10321

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

Dear Mr. Graham:

I have received your letter of November 19 and the materials attached to it.

Your correspondence relates to a request for certain fiscal records directed to Albany County. In response to the request you were informed that "[t]o the best of our knowledge, these fiscal records have been disposed of in accordance with the disposition schedule, which requires that the records be kept for a maximum of six years". Since you are dissatisfied with the response, you asked that I contact the County Clerk on your behalf.

In this regard, I offer the following comments.

First, under the Local Government Records Law (see Arts and Cultural Affairs Law, Article 57-A), records cannot be destroyed or discarded except in conjunction with retention and disposal schedules promulgated by the State Education Department and its State Archives and Records Administration. Many agencies, in an effort to be as efficient as possible, routinely dispose of records pursuant to the appropriate schedules. If indeed the records in question have been destroyed, the Freedom of Information would no longer be applicable.

Second, in a situation in which an agency asserts that it does not maintain records, an applicant may seek a certification that so states. Section 89(3) of the Freedom of Information Law provides in part that on request, when an agency indicates that it does not maintain a record, it "shall certify that it does not have

possession of such record or that such record cannot be found after diligent search".

Rather than contacting the County Clerk as you suggested, a copy of this response will be sent to him.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Thomas G. Clingan, County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7453

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 18, 1992

Mr. Michael O'Connor
[redacted]

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

Dear Mr. O'Connor:

I have received your letter of November 20 in which you requested an advisory opinion concerning the Freedom of Information Law. Your inquiry concerns rights of access to records maintained by a justice court.

In this regard, the Freedom of Information Law does not apply to the courts of court records. That statute pertains to agency records, and §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, §86(1) defines "judiciary" to mean:

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

While court records are not subject to the Freedom of Information Law, those records are often available under other statutes. For example, in this instance, the court is a town justice court, and, §2019-a of the Uniform Justice Court Act, entitled "Justices' criminal records and docket", states in relevant part that "[t]he records and dockets of the court except as otherwise provided by

law shall be at reasonable times open for inspection to the public..."

It is suggested that you resubmit your request to the Town Justice Court, citing the statute referenced above as the basis of your request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Clerk, Justice Court

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7454

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 18, 1992

Ms. Barbara J. Gazzigli
[redacted]

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

Dear Ms. Gazzigli:

I have received your letter of November 19, as well as your original letter of October 20, which never reached this office, and related materials.

Your correspondence relates to your efforts to obtain information from the City of Peekskill concerning records pertaining to a business that operates near your residence. Copies of two requests were enclosed, both of which pertain to the "A-Plus Mini Market". In the first, you asked "Why residents living behind, along side were never notify or given the opportunity of opinion, for conversion from a garage to market. City Variance Policy for such...Why weren't we sent certified letters from city, as we did for the canopy". In the other, you requested a "copy of special permit that was given to the A-Plus Mini Market...for operation of a 24 hrs. business. Specifications of operations and its renewal date".

In this regard, I offer the following comments.

First, for purposes of clarification, I point out that the title of the Freedom of Information Law may be somewhat misleading. That statute pertains to public rights of access to existing records maintained by government agencies. Further, §89(3) of the Freedom of Information Law states in part that an agency need not create a record in response to an request. As such, the Freedom of Information Law is not a vehicle that requires government officials to provide information by answering questions. Although they may choose to so, their obligation under the Freedom of Information Law involves providing access to existing records to the extent required by law.

Second, insofar as requested 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. To the extent that the City maintains records involving the information sought, such as permit applications, permits and their terms, minutes of meetings pertaining to the application, grant, revocation or amendment of permits, and laws or policies pertaining to the issuance of variances, I believe that such records would be available. In short, none of the grounds for withholding those kinds of records could in my view properly be asserted.

Lastly, for future reference, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Pamela Beach, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1455

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 21, 1992

Mr. Christopher McNamara
[redacted]

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

Dear Mr. McNamara:

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

According to your letter, officials of the Village of Ossining have indicated that illegal dumping has occurred at a Village park and that summonses have on occasion been issued. You have unsuccessfully attempted to obtain information on the subject from the Village. In your first request, you asked how many summonses were issued during the past three years for dumping in the park, copies of summonses and their disposition. The second request involved summonses that may have been issued in relation to particular incidents. It appears that none of the information has been disclosed, and you wrote that you were informed that the Village does not maintain a log concerning the summonses.

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 required to create a record in response to a request. Therefore, if, for example, there are no statistics indicating the number of summonses issued, Village officials would not be obliged in my opinion to review records for the purposes of compiling statistics on your behalf or to respond to your questions.

Second, §89(3) also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 Village's record-keeping systems; whether it has the ability to locate and identify the records sought in the manner in which you requested them is unknown to me. It is suggested that you confer with the records access officer in an attempt to learn of the means by which the records are kept.

Third, to the extent that existing records that you requested can be located and identified, it appears that they would be accessible. As a general matter, the Freedom of Information is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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, summonses or statistics relating to summonses would be available, for none of the grounds for denial would apply.

Fourth, you wrote that it often takes months to receive information. Assuming that you are referring to requests for existing records and that those records can be found, I point out

that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, you referred to fees for copies and asked whether there is "anything our local government gives residents at no charge". In this regard, the Freedom of Information Law authorizes agencies to charge up to twenty-five cents per photocopy when photocopies are requested. However, when records are available under the law, the public may inspect them at no charge.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7456

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 21, 1992

Mr. Keith Linnen
90-A-3744
P.O. Box 125
Altona, N.Y. 12910

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

Dear Mr. Linnen:

I have received your letter of November 22 in which you sought assistance concerning the use of the Freedom of Information Law to obtain birth and death certificates concerning your father.

In this regard, I offer the following comments.

First, assuming that your father was born and died in New York, the records in question would be located in one of two locations. Records of births and deaths occurring in New York City are maintained by the Bureau of Vital Records, New York City Department of Health, 125 Worth Street, New York, N.Y. 10013. Records of births and deaths occurring outside of New York City are maintained by the Bureau of Vital Records, New York State Health Department, Corning Tower, Empire State Plaza, Albany, N.y. 12237.

Second, rights of access to birth and death records are not governed by the Freedom of Information Law, but rather by provisions of the Public Health Law. Death records are available only under the condition specified in §4174(1)(a) of the Public Health Law. One of those conditions authorizes disclosure "upon specific request of the spouse, children, or parents of the deceased..." As such, I believe that you should be able to obtain your father's death certificate. Under both §§4173 and 4174 of the Public Health Law, birth records are available pursuant to court order, to the subjects of those records if they are eighteen years of age or older, or to the "lawful representative" of the person to which the record or birth relates.

When requesting birth or death records, it is suggested that you include sufficient detail to enable agency staff to locate the records. It is noted, too, that fees may be charged for searches and reproduction of birth and death 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7457

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 21, 1992

Mr. Daniel Lynch
82-A-6183
Great Meadow Correctional
Facility
Box 51
Comstock, N.Y. 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. Lynch:

I have received your letter of November 22 and the materials attached to it.

You have questioned the propriety of a response to a request in which the Division of State Police indicated that the fee for a copy of an investigative report would be $15.00. The fee is apparently based on Chapter 50 of the Laws of 1992.

In this regard, §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 authorizes other fees, 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 duplicated by means of photocopying.

In this instance, a statute other than the Freedom of Information Law, Chapter 50 of the Laws of 1992, appears to be applicable. Chapter 50 is an appropriations bill that was enacted by the State Legislature and signed by the Governor. I have not seen the bill, and it is likely hundreds of pages in length. However, if indeed it authorizes the Division of State Police to charge $15.00 for a copy of an investigative report, such a fee would be prescribed by "statute" and would supersede the fee provisions in the Freedom of Information Law that would ordinarily apply.

I point out, too, that in a case in which an indigent inmate sought a waiver of fees that could be charged under the Freedom of Information Law, it was held that nothing in that statute required an agency to waive the fees [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Raymond G. Dutcher, Lieutenant Colonel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO 140
FOIL-AO 1457A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 21, 1992

Mr. Richard H. Jacobs
[redacted]

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

Dear Mr. Jacobs:

I have received your letter of November 23 and the materials attached to it.

By way of background, you apparently applied for a certain position at the Department of Social Services, but a different person was appointed. Having sought the interview notes taken with respect to that person, your request was denied on the basis of §87(2)(g) of the Freedom of Information Law. It is your contention, however, that if the notes in question are similar to those made available to you relative to your interview, they "will be filled with factual data rather than merely subjective impressions and opinions".

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

First, as you may be aware, the Committee on Open Government is authorized to provide advice concerning access to agency records. This office is not authorized to review records in camera or to compel an agency to grant or deny access to records.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unfamiliar with the contents of the notes, specific guidance cannot be offered. However, two of the grounds for denial are relevant.

The provision cited by Department of officials as the basis for denial, §87(2)(g), enables an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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 such, 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 subject 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) 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 lve 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)].

Similarly, the Court of Appeals has 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).

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, would be available, unless a different ground for denial could properly be asserted.

The remaining ground for denial of potential significance is §87(2)(b), which enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". It is possible that certain aspects of the notes might involve sensitive or intimate personal information. In that kind of situation, even though the information might be "factual", it might nonetheless be properly withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Related to the foregoing is the Personal Privacy Protection Law, which 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, §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" [§92(7)]. For purpose of Personal Privacy Protection Law, the term "record" is defined to mean "any time, 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" [§92(9)].

With respect to disclosure, §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 §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 §96 of the Personal Protection Law, it is precluded from disclosing 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:pb
cc: Linda Hunt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7458

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 22, 1992

Mr. William A. Caldwell
[redacted]

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

Dear Mr. Caldwell:

I have received your note in which you sought assistance in obtaining a variety of information from Westchester County. The information sought involves the "number of applicants" and their "race and ethnicity" concerning a series of issues raised relative to a civil service eligible list. You were informed that the information in question is not maintained by the County.

In this regard, as indicated in an opinion addressed to you on March 27, the Freedom of Information Law pertains to existing records, and §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, no figures or statistics have been prepared that contain the information in which you are interested, the Freedom of Information Law would not require agency officials to prepare figures or statistics on your behalf. Stated differently, I do not believe that agency staff would be required by the Freedom of Information Law to review existing records in an effort to create new records reflective of the number of applicants in conjunction with the information sought in your request.

Insofar as statistics or figures have been prepared containing the information sought, I believe that they would be available, so long as they do not include personally identifiable details.

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-7459

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 22, 1992

Mr. William Lent
87-T-1369
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. Lent:

I have received your letter of November 22 in which you referred to an unanswered request for records directed to the City of Albany. You questioned where you can appeal.

In this regard, as indicated in my letter to you of October 22, if an agency denies access to records in writing or by means of a constructive denial of access to records, an applicant may appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

For your information, I believe that the person designated to determine appeals for the City of Albany is Mr. Harold Greenstein. An appeal can be addressed to him at City Hall.

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-7460

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 22, 1992

Mr. Marlon Rodriguez
91-A-1771
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Rodriguez:

I have received your letter of November 22 in which you sought guidance concerning your ability to obtain immigration records and court papers under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is a New York State statute that pertains to records maintained by various governmental entities in the state. Records pertaining to immigration would be maintained by the Immigration and Naturalization Service, which is a federal agency that is part of the United States Justice Department. As such, those records would be subject to the federal Freedom of Information Act. While I am not an expert with respect to the federal Freedom of Information Act, a request may be made to the freedom of information officer at that agency. Further, like the New York Freedom of Information Law, the federal Act requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records.

Second, with regard to court records, it is noted 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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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

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

As such, the courts and court records are not subject to the Freedom of Information Law. However, court records are often accessible under other statutes [see e.g., Judiciary Law, §255]. Therefore, it is suggested that requests for court records be made to the clerks of the appropriate courts, citing applicable provisions of 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-7461

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 22, 1992

Ms. Barbara Appel
[redacted]

Dear Ms. Appel:

I have received your recent note and copies of various releases authorizing this office to review and copy records.

In this regard, to clarify the function of the Committee on Open Government, I point out that this office is authorized to provide advice concerning the Freedom of Information Law. The Committee does not obtain records on behalf of individuals and neither myself nor the Committee acts as the attorney of an individual.

Further, this office has no greater rights of access to records than you do. You could only authorize to disclosure of records to another person or entity to the extent that you have rights of access. In short, it is suggested that you seek the records that are the subjects of the releases.

Since many of the releases related to court records, it is noted 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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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

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

As such, the courts and court records are not subject to the Freedom of Information Law. However, court records are often accessible under other statutes [see e.g., Judiciary Law, §255]. Therefore, it is suggested that requests for court records be made to the clerks of the appropriate courts, citing applicable provisions of law.

I hope that the foregoing serves to clarify the role of this office, and I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7462

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 22, 1992

Mr. Ricardo DiRose
85-C-773
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. DiRose:

I have received your letter of November 16, which reached this office on November 25.

You asked that I comment with respect to the following issues; first, being questioned as to the reason for requesting records under the Freedom of Information Law; second, concern that "legal mail", including requests for records, "are being tampered with or opened;" and third, concern that agencies and/or your facility use your "status as an 'Inmate' to inflict reprisals upon [your] making FOIL requests."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. While the latter two items of your concern relate to your assertion of rights under the Freedom of Information Law, they are tangential to issues arising under that statute. It is suggested that you discuss those concerns with your attorney or perhaps a representative of Prisoners' Legal Services.

With respect to the initial issue, I point out that when records are available under the Freedom of Information Law, it has been held that they must be made equally available to any person, without regard to one's status or interest [see M. Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976)]. The Law does not generally distinguish among applicants, and the intended use of records is largely irrelevant to rights of access.

As you requested, I am returning your letter and forwarding a copy of this response to Deputy Superintendent Fennel.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: R. Fennel, Deputy Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7463

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 22, 1992

Mr. Michael Webb
90-A-4906
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. Webb:

I have received your letter of November 24. You asked how you may seek to obtain records from the Mount Vernon Police Department relating to its procedures concerning the investigation of sex offenses and its treatment of evidence.

In this regard, I offer the following comments.

First, a request should be made to an agency's "records access officer". The records acoess officer has the duty of coordinating an agency's response to requests for records.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all 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. I am unfamiliar with the contents of the records in which you are interested. However, 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.

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 scrupulous 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.

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 7469

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1992

Mr. Ricardo A. DiRose
85-C-0773
P.O. 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. DiRose:

I have received your letter of November 30 concerning your requests for "a sample or photostat" of identification cards used by state agencies. The correspondence indicates that agencies have denied your requests for a variety of reasons, and you have sought an opinion on the matter.

In this regard, first, it is assumed that your requests involve blanks or facsimiles of identification cards rather than duplicates of cards identifiable to particular individuals or which might include photographs.

Second, assuming that blank or sample identification cards are maintained by agencies, it would appear that they constitute records subject to rights conferred by the Freedom of Information Law. As you may be aware, §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."

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that

records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

In conjunction with the assumptions described above, it appears that but one of the grounds for denial would be relevant. Section 87(2)(f) enables agencies to withhold records when disclosure "would endanger the life or safety of any person." Identification cards may be used to gain entry into certain facilities, for example, and the unauthorized use of identification cards could result in a variety of unauthorized or perhaps illegal acts. In such circumstances, §87(2)(f) might serve as an appropriate basis for denial.

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-
FOIL-AO-7465

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1992

Mr. William P. Stris
[redacted]

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

Dear Mr. Stris:

I have received your letter of December 1 in which you seek an advisory opinion in your capacity as a member of the Board of Education of the Valley Stream Union Free School District Thirteen concerning several issues.

The first involves a complaint by teachers that their salaries have been disclosed, an action which is characterized as a "senseless invasion of privacy", and their request to meet with the Board in executive session "to argue their case for not having their salaries listed in the board agenda or minutes."

In this regard, I point out initially that records reflective of the salaries of public employees are clearly available to the public under the Freedom of Information Law and that consent by teachers to disclose salary records is unnecessary prior to release of that information.

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

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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed for the following reasons.

One of the grounds for denial, §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)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, 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.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted in public, except to the extent that a topic may properly be considered during an executive session. Further, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Perhaps the most frequently cited ground for entry into executive session is the basis that is the focus of your inquiry, the so-called "personnel" exception. That provision relates to each of your questions involving executive sessions, i.e., consideration of disclosure of teachers' salaries, a discussion of a selection of a new president of the Board, and the ability to discuss various subjects under heading of "personnel".

I point out that although it is used often, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision

was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

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

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "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" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to budgetary matters or matters of policy could appropriately be discussed during an executive session.

In addition, due to the presence of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a

discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

With respect to your specific questions, consideration of teachers' salaries would not in my opinion qualify for discussion during an executive session. That issue appears to involve a matter of policy pertinent to teachers and employees generally, and it would not fall within the specific language of §105(1)(f).

It is unlikely in my view that a discussion of choosing a new Board president could be conducted in executive session. The president of the Board would neither be appointed nor employed but rather elected by its members. Similarly, a review of a member's experience on the Board would not involve one's "employment" history, for a member would not be an employee of the District.

On the other hand, two of the issues that you described, alleged sexual harassment of a teacher by a student and consideration of a failure to receive tenure or appointment would focus on "particular" individuals. Those issues would involve the employment history of a particular person or perhaps a matter leading to the discipline of a particular person. As such, I believe that they would fall within §105(1)(f).

Lastly, you asked whether receipt of a letter from a teacher or a resident addressed to the Board must be "acknowledged under correspondence in the minutes". In this regard, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. 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."

Although a public body may choose to prepare expansive minutes, I do not believe that minutes must include reference to the acknowledgement of the receipt of 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: Jerome Ehrlich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-746

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1992

Mr. Richard Osinoiki
89-A-3589
Wallkill Correctional Facility
Box G
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. Osinoiki:

I have received your letter of November 30 addressed to Secretary of State Shaffer. As indicated above, the staff of the Committee on Open Government is authorized to respond on behalf of its members.

You have complained that the New York City Police Department and the Office of the Kings County District Attorney have failed to respond to your requests for records in a timely manner. As such, you asked that this office "compel" those agencies to provide the requested records, conduct an investigation and forward "all pertinent papers concerning [your] request."

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, obtain records on behalf of an applicant, or conduct investigations.

Second, with respect to delays in responses to requests, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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-7467

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1992

Hon. Patrick Kingston
Town Supervisor
Town of Brandon
No. Bangor, NY 12966

The staff of the Committee on 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 Kingston:

I have received your letter, which reached this office on November 30.

You wrote that members of the Town Board have stated that "they never gave out copies of the Town budget and that [you] had no right to do so." You have asked for advice on the matter.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, a budget adopted by a Town Board would be available to the public, for none of the grounds for denial could be justified to withhold such a records.

Second, §87(2) of the Freedom of Information Law states that accessible records must be made available for inspection and copying. Further, §89(3) of the Law specifies that an agency must make available copies of accessible records upon payment of the appropriate fee.

In short, I believe that a town budget is a public record that must be made available to any person.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7468

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1992

Mr. Tom Rossi
[redacted]

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

Dear Mr. Rossi:

I have received your letter concerning the Freedom of Information Law, which reached this office on November 20.

According to your letter, "civil servants are too rude when [you] show up to see public documents after their records access officer has approved access to [you] in writing." In conjunction with the foregoing, you raised the following question: "If [you] say that [you] wish to examine records for [your] 'personal interest' is this a reasonable legal verbal response."

Although your question is not entirely clear, I offer the following comments.

First, while the Freedom of Information Law does not address the issue of rudeness, I believe that civil servants and all others should act in a courteous manner.

Second, an applicant's interest in records, "personal" or otherwise, generally has no bearing on rights of access. I point out that when records are available under the Freedom of Information Law, it has been held that they must be made equally available to any person, without regard to one's status or interest [see M. Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976)]. The Law does not generally distinguish among applicants, and the intended use of records is largely irrelevant to rights of access.

Third, although an agency may accept oral requests, §89(3) of the Freedom of Information Law indicates that an agency may require that requests be made in writing. Once a request has been granted,

I believe that the records should be made available for inspection and copying.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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-7469

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1992

Mr. Raymond Campanale
88-A-6177
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. Campanale:

I have received your letter of November 18, which reached this office on November 27. You raised issues concerning the operation of this office and delays in responses to requests by the New York City Police Department.

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. The Committee is not empowered to compel an agency to comply with law or to grant or deny access to records.

Second, the Committee consists of eleven members. Four are ex officio, including the Secretary of State, the Lieutenant Governor, the Director of the Budget and the Commissioner of General Services. In addition, the Governor appoints one elected local government official to the Committee. The remaining six members are members of the public designated by the Governor and the leaders of the State Legislature. The staff of the Committee consists of myself and two secretaries, and as indicated above, the Committee has authorized the staff to prepare advisory opinions on its behalf.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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- 7470

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1992

Mr. Mel Draizen
[redacted]

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

Dear Mr. Draizen:

I have received your letter of December 3 in which you raised a variety of issues relating to public assessment records.

The first involves "what constitutes a denied request" and the procedure for appealing a denial. In my view, a denial may occur when an agency determines in writing to withhold a record or when the agency fails to respond within the appropriate time. In this regard, it is noted that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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 pertains to information maintained electronically. Here 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. It is emphasized, however, that §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 more than ten years 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)].

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. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. 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 or disk. 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 information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

In a recent decision, Brownstone Publishers Inc. v. New York City Department of Buildings, the question involved 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 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.
>
> "Public Officers Law [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" [166 Ad 2d, 294, 295 (1990)].

Further, in a more recent decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format

information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

In short, assuming that the conversion of format can be accomplished, that the data sought is available under the Freedom of Information Law, and that the data can be transferred from the format in which it is maintained to a format in which you request it, I believe that an agency would be obliged to do so. Under those conditions, it does not appear that production would involve creating a new record or reprogramming, but rather merely a transfer of information into a format usable to you.

A third issue involves the fees that may be charged for the reproduction of records. By way of background, §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 reproduction 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 of 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."

Therefore, 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 is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Further, 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 oertification pursuant to this Part" (21 NYCRR 1401.8)."

Based upon the foregoing, it is likely that a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape) to which data is transferred.

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, 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)].

Fourth, you were informed that a request would not be accepted unless it was made on an agency's "official form". In my opinion, an agency cannot require that a request be made on a prescribed form. 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 requests" [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 possesses 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 is unnecessarily serves to delay a response to or deny a request for records.

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

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 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; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Insofar as the records in which you are interested are essentially the equivalent of those described above, I believe that they must be disclosed.

Further, it is noted that assessment rolls and related documents have been found judicially to be available to the public, whether they are maintained in paper or computer tape format, and irrespective of the purpose for which a request is made. One of the grounds for denial in the Freedom of Information Law, §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. Nevertheless, in a decision rendered more than 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 or equivalent records 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)(1)). 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 an assessment roll or its equivalent should be disclosed. I point out 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 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- 7471

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1992

Mr. Warren R. Overbaugh
81-A-2926
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. Overbaugh:

I have received your letter of December 2 in which you sought assistance in relation to requests made under the Freedom of Information Law.

According to your letter, you have made two requests for records of the Village of Saugerties Police Department, but you have received no response. You raised a question as to whom you may appeal.

In this regard, I offer the following comments.

First, a request for records should generally be made to an agency's "records access officer". The records access officer has the duty of coordinating an agency's responses to requests for records. I point out, too, that §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 records.

Second, it is noted that both the Village and Town of Saugerties have police departments. I was informed that requests for records of those agencies should be made to the town clerk or the village clerk as the case may be.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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)].

An appeal would be made to the governing body of a town or village (i.e., a town board or a village board of trustees) or to a person designated by such body.

I hope that I 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 1472

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 24, 1992

Mr. Greg Evans
91-R-7620
Watertown Correctional Facility
Dry Hill
Watertown, NY 13601

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

Dear Mr. Evans:

I have received your letter in which you wrote that you would like to "obtain a copy of [your] test scores of legal law clerk exam [you] took in July or August."

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 does not maintain records generally. Further, the Committee is not empowered to compel an agency to grant or deny access to records.

Second, a request made under the Freedom of Information Law should be directed to the "records access officer" at the agency that maintains the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests. Additionally, I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate and identify the records.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 an existing record indicates the score on an examination of an individual who requests that information, I believe that it

must be disclosed. In such a circumstance, none of the grounds for denial could in my opinion appropriately be asserted.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7473

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 28, 1992

Mr. Hector France
[redacted]

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

Dear Mr. France:

I have received your letter of December 4 in which you sought assistance.

Attached to your letter is a request directed to the records access officer at the Ossining Correctional Facility in which you sought records indicating calls made to a particular phone number from a certain telephone "or any other phone" in February of 1988. You also requested records of calls made to a particular number from "any telephone" during May of 1988.

In this regard, I offer the following comments.

First, I point out that by Freedom of Information Law pertains to agency records and that §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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law is generally applicable to records maintained by entities of state and local government. It does not apply to records maintained by a telephone company, for example.

Second, on the basis of the information that you provided, it is unclear which agency, if any, would maintain the records in question. Since Ossining is the (914) area code, and since phones to which you referred involve the (718) area code, it would appear that your correctional facility would not maintain records of the calls.

Third, assuming that the information in which you are interested is ordinarily maintained by an agency subject to the Freedom of Information Law, it is noted that Freedom of Information Law pertains to existing records. If phone bills or similar records involving calls made in 1988 have been destroyed or discarded, the Freedom of Information Law would not apply.

Lastly, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records. In my view, it may be all but impossible to locate records indicating calls made to a certain number from "any" telephone.

If you can to provide additional information pertinent an interest in agency records, perhaps I could provide more substantial guidance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1474

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 28, 1992

Ms. Sharon M. Billings, District Clerk
Board of Education Administrative Offices
21 Page Avenue
Cohoes, N.Y. 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. Billings:

I have received your letter of December 9. You have sought an advisory opinion concerning the distinction "between bids and RFP's relative to Freedom of Information".

Your inquiry was precipitated by a situation involving the release of proposals for legal services submitted to the District. In short, the attorney for the District wrote that a determination concerning access to should be made by the Board of Education.

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, as indicated by the attorney in a memorandum to you, the most relevant provision in determining rights of access is §87(2)(c), which states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." From my perspective, the key word in the quoted provision is "impair", and the question involves how disclosure would impair the process of awarding contracts.

Section 87(2)(c) often applies in situations in which agencies seek bids or requests for proposals ("RFP's"). While I am not an expert on the subject, I believe that bids and the processes relating to bids and RFP's are different. As I understand the

matter, prior to the purchase of goods or services, an agency might solicit bids. So long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency seeks proposals by means of RFP's, there is no obligation to accept the proposal reflective of the lowest cost; rather, the agency may engage in negotiations with the submitters regarding cost as well as the nature or design of goods or services, or the nature of the project in accordance with the goal sought to be accomplished. As such, the process of evaluating RFP's is generally more flexible and discretionary than the process of awarding a contract following the submission of bids.

When an agency solicits number of bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, when the deadline for submission of bids has been reached, all of the submitters are on an equal footing and, as suggested earlier, an agency is generally obliged to accept the lowest appropriate bid. In that situation, the bids would, in my opinion, be available.

In the case of RFP's, even though the deadline for submission of proposals might have passed, an agency may engage in negotiations or evaluations with the submitters resulting in alterations in proposals or costs. Whether disclosure at that juncture would "impair" the process of awarding a contract is, in my view, a question of fact. In some instances, disclosure might impair the process; in others, disclosure may have no harmful effect or might encourage firms to be more competitive, thereby resulting in benefit to the agency and the public generally.

I hope that the foregoing enhances your understanding of the issue. Should any further questions arise, please feel fee to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7475

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 28, 1992

Mr. Aldo T. DeBenedictis, President
Ardea Construction Incorporated
395 Gramatan Avenue
Mount Vernon, N.Y. 10552

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

Dear Mr. DeBenedictis:

I have received your letter of December 5 in which you sought my views concerning a request made under the Freedom of Information Law to the Mount Vernon Housing Authority.

In your request, a copy of which is attached to your letter, you sought "totals" of various expenses incurred by the Authority in relation to certain litigation, including "legal expenses". In addition, you questioned the basis for hiring law firms and requested "[a]ny other information that directly or indirectly involves or may involve presently and or in the future the City of Mt. Vernon taxpayer money".

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records. Further, §89(3) of the Freedom of Information Law states in part that an agency need not create records in response to requests. Therefore, if the Authority has not prepared a record indicating "total legal expenses" in relation to a certain matter, I do not believe that it would be obliged to review its records and prepare a total on your behalf. Similarly, although an agency may do so, it is not required by the Freedom of Information Law to respond to questions in an effort to provide information.

Second, however, if records exist indicating legal expenses, I believe that they would generally be available. On the basis of such records, you could prepare totals independently.

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

In my opinion, bills, vouchers, contracts, receipts and similar records reflective of payments made or expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable. With specific respect to payments to attorneys, I point out that, while the communications between an attorney and client are often 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 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 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". 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. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys or "legal expenses" should be disclosed.

Lastly, with respect to the final aspect of your request, that pertaining to any information that directly or indirectly involves

the City of Mount Vernon, I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate and identify the records. From my perspective, the final aspect of your request may be so indefinite that it may not meet the requirement that records be reasonably described.

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:pb
cc: Doryne Isley, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7476

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 28, 1992

Mr. Dennis J. Nolan
[redacted]

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

Dear Mr. Nolan:

I have received your letter of December 5 in which you sought an advisory opinion concerning whether the Office for the Aging "is in compliance" with the Freedom of Information Law. In brief, you wrote that you have experienced a series of delays relative to requests, that information provided was not the information requested, and that you have not received records in which you are interested.

In this regard, I offer the following comments.

First, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading. That statute is not a vehicle requiring the disclosure of information per se; rather, it pertains to existing agency records. Further, §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, an agency would not be obliged to prepare a new record in response to a request for information.

Second, insofar as your requests involve existing records, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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:pb
cc: Fong Chan, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 7477

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 28, 1992

Mr. Gregory Opal
89-T-3817
Marcy Correctional Facility
P.O. Box 3600
Marcy, N.Y. 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. Opal:

I have received your letter of November 30 in which you sought an advisory opinion concerning a denial of a request by the Albany County Probation Department.

Although the denial states that "New York State Law prohibits the release of confidential case file information to anyone, including the defendant". In your correspondence, however, you wrote that the denial does not refer to any provision of law as a basis for withholding.

In the regard, I am unaware of any statutory provision that pertains to access to or the confidentiality of probation records, except §390.50 of the Criminal Procedure Law, which deals with pre-sentence reports and related records. There are, however, certain provisions of the regulations promulgated by the State Division of Probation pertaining to probation records generally. Section 348.1(b) states that:

> "(b) Cumulative case record is a single case file containing all information with respect to a case from its inception through its conclusion. All records developed and/or received by the probation department and which are related to the carrying out of authorized probation functions and services are considered probation records for the purpose of retention and destruction. Reports and other records material developed by the probation department and transmitted to the

> courts of other agencies become the responsiblity of the court or other agencies as records."

Further, §348.4(k) of the regulations provides that: "Case records shall be accessible, in whole or in part, only to those authorized by law or court order." It appears that the quoted provision to represents the basis upon which the County relied withholding the records.

Nevertheless, it is questionable in my view whether regulations can serve as an appropriate basis for withholding records, for it has been held that regulations do not exempt records from disclosure. Section 87(2)(a) of the Freedom of Information Law permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". It has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of an administrative code or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Marting, 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 of congress. Therefore, I do not believe that regulations can be considered as a statute that would exempt records from disclosure or that an agency can rely upon regulations as a basis for withholding a record.

If indeed the regulations cited earlier represent the sole basis for denial and have been invalidly asserted, it would appear that rights of access would be governed by the Freedom of Information Law. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Without knowledge of the contents of the records sought, I could not conjecture as to rights of access. However, since the records appear to relate in part to a person other than yourself, it is possible that §87(2)(b) may be relevant. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Charlotte O. Gray, Director of Probation
Jamie J. Kallner, Assisant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7478

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 28, 1992

Mr. James Lane
[redacted]

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

Dear Mr. Lane:

I have received your letter of December 17, which reached this office today.

You wrote that you believe that you can obtain records under the Freedom of Information Law relevant to your case, but that you "do not know how it works". As such, you requested information concerning the procedural use of the law.

In this regard, I offer the following comments.

First, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate rules and regulations (21 NYCRR Part 1401) concerning the procedural aspects of the Law. In turn, §87(1) of the Law requires each agency to adopt its own rules and regulations consistent with the Law and the Committee's regulations.

Second, as indicated in the regulations, each agency must designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests, and a request should be directed to the records access officer at agency that you believe maintains the records in which you are interested.

Third, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records.

Lastly, I point out that the Freedom of Information Law does not apply to the courts or court records. Nevertheless, other

provisions of law often require the disclosure of court records (see e.g., Judiciary Law, §255).

Enclosed for your review are copies of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7479

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 29, 1992

[redacted]
Albion Correctional Facility
3595 State School Road
Albion, N.Y. 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 [redacted]:

I have received your letter of December 8 in which you sought information concerning your ability to obtain mental health records maintained at your correctional facility.

In this regard, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, a different statute, §33.16 of the Mental Hygiene Law, pertains specifically to access to mental health records by the subjects of the records. Under that statute, a client or patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. It is my understanding that mental health units that operate within state correctional institutions, so-called "satellite units", are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to Mr. Charles Giglio, Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, New York 12229. I point out that under §33.16, there are certain limitations on rights of access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7412

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1992

Ms. Lynn Olivieri
[redacted]

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

Dear Ms. Olivieri:

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

According to the materials, you sent a request to the Nassau County Comptroller for records indicating monies paid from the Office of the District Attorney's Prosecution Fund to outside contractors for stenographic services from January, 1992 to the date of the request. You were informed by the Office of the Comptroller that the District Attorney's Office has "custody of the Prosecution Fund's original source data", and that your request had been forwarded to Laurence Leff, Chief Assistant District Attorney. Soon thereafter, you were informed by the Office of the District Attorney that your request had been received and was being reviewed by its record access officer. A second request was sent to the Office of the District Attorney on October 15 for a "printout of all checks paid to outside contractors in payment for vouchers submitted by them for stenographic services", or, alternatively, for copies of checks paid to those contractors.

You added that none of the responses that you had received included any indication of whether your request would be granted or denied, when you could expect to obtain the records, or to whom you could appeal a denial.

You have asked that I prepare an advisory opinion on the matter and forward it to officials in the Office of the District Attorney. In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the

agency can locate 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 requests, I must admit to being unfamiliar with the record-keeping systems of the District Attorney's office. However, assuming that the records in question may be located and identified, I believe that you would have met the standard of reasonably describing the records sought.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, with respect to rights to access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, in general, books of account, vouchers, bills, checks and similar records reflective of the expenditure of public monies are accessible, for none of the grounds for denial would ordinarily apply. I point out that one of the first decisions rendered under the Freedom of Information Law following its initial enactment in 1974 dealt with a request by Denis Dillon for records of travel and other reimbursable expenses maintained by a former district attorney, and that the court found that the records were available to the public [Dillon v. Cahn, 359 NYS 2D 981 (1974)].

However, since I am unaware of the specific contents of the records in question, I cannot advise with certainty that the records sought must be disclosed in their entirety. While I believe that those portions of the records reflective of payments to contractors for payment of stenographic services would be accessible, it is possible that the records might identify witnesses, victims, or informants, for example. In that event, two of the grounds for denial might serve to permit deletions of those

portions of the records. Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy"; §87(2)(f) authorizes an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person". Insofar as the records sought might include those kinds of items, deletions might properly be made. Nevertheless, it is reiterated that the remaining portions of the records indicating payments to contractors would, in my opinion, clearly be available.

As you 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
Executive Director

RJF:pb

cc: Denis Dillon, District Attorney
Laurence Leff, Chief Assistant District Attorney
Patrick McCloskey, Executive Assistant District Attorney
Peter Weinstein, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7481

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 29, 1992

Mr. William Adams, Chairman
NYC Friends of Ferrets
P.O. Box 268, Gracie Station
New York, N.Y. 10028

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

Dear Mr. Adams:

I have received your letter of November 28, which reached this office on December 10.

You have complained with respect to the treatment of your request for records by the New York City Department of Health and that agency's action in precluding you from speaking with various officials of that agency.

In this regard, 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 Freedom of Information Law or compel an agency to grant or deny access to records. Further, since the issue of speaking with officials or employees does not involve access to records, it is beyond the jurisdiction of this office. However, as your correspondence relates to the Freedom of Information Law, I offer the following comments.

First, since you complained regarding delays in responding to your requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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, you alleged that Counsel to the Department acting as appeals officer represents "an obvious conflict of interest". I disagree, for §89(4)(a) of the Freedom of Information Law, which pertains to the right to appeal a denial, states in relevant part that:

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

As such, a person denied access to records may appeal to the head of an agency or a person designated by the head of an agency to determine appeals.

Third, it appears that "orders of the Commissioner" were disclosed after names were deleted. It also appears that the names

involve those found to have illegally possessed a domestic pet. If indeed the records in question are reflective of orders or determinations to the effect that individuals have violated certain provisions of law, I believe that they should have been disclosed with the names of those found to be in violation. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, a record indicating a violation would be available, 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
Executive Director

RJF:pb
cc: Wilfredo Lopez, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7482

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 29, 1992

Mr. Steven N. Levine
Press & Sun-Bulletin
Vestal Pkwy. East
P.O. Box 1270
Binghamton, N.Y. 13902

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

Dear Mr. Levine:

I have received your letter of December 8 in which you sought my views concerning a denial of access to records sought under the Freedom of Information Law.

The request involves "a denial of access to records of past commendations or reprimands" concerning a Johnson City police officer, and you specified that the request was not made "in the context of civil or criminal action", but rather as "an extension of [y]our newsgathering role in the community". The denial was based on §50-a of the Civil Rights Law.

In this regard, I offer the following comments.

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

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the state's highest court, in reviewing the legislative history leading to its enactment, has held that §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 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 §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 decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for 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 your request was not made in the context of current or future litigation, in my opinion, §50-a of the Civil Rights Law would not apply to the request insofar as you are seeking records indicating commendations or findings of misconduct on the part of police officer.

Also relevant is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, 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); 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); 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].

The third ground for denial of significance, §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 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. The records sought in my opinion consist of intra-agency materials. However, insofar as your request involves final agency determinations, I believe that those determinations

must be disclosed, again, unless a different ground for denial could be asserted.

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which allegations or charges 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 those 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 §50-a of the Civil Rights Law.

It is also noted, however, that in Scaccia, it was found that although a final determination reflective of a finding of misconduct is public, the records leading to the determination could be withheld. Further, 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, to the extent that charges are dismissed or allegations are found to be without merit, I believe that the records related to and including such charges or allegations may be withheld.

Lastly, the 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 a decision that was cited earlier, 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 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" (Capital Newspapers v. Burns, supra, 565-566).

For the reasons described above, I believe that records reflective of commendations or findings of misconduct or disciplinary action taken would be available under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Rodney J. Jewett, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7483

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 29, 1992

Mr. Francis A. DeFrancesco, Chief Inspector
New York State Police
State Office Building Campus
Albany, N.Y. 12226

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

Dear Chief Inspector DeFrancesco:

I have received your letter of December 7 and appreciate your forwarding a copy of your determination of an appeal concerning a request made by Mr. James K. Grass.

Mr. Grass appealed an initial denial of records indicating "the physical agility test requirements for candidates to the position of New York State Trooper". You affirmed the original denial, stating that the information sought "is intra-agency material and, therefore, is exempt from disclosure".

While I agree that the information at issue would consist of intra-agency material, I do not believe that its characterization as such is necessarily definitive of rights of access or the ability to withhold records.

As you are aware, §87(2)(g) of the Freedom of Information Law 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 Court of Appeals has 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 Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

From my perspective, insofar as records indicate "physical agility test requirements", I believe that they must be disclosed, under §87(2)(g)(iii), for those requirements would be reflective of a "final agency policy" regarding a condition that must be met to qualify to be a trooper.

It is respectfully requested that you reconsider your determination, and I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: James K. Grass

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7484

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 29, 1992

Mr. Peter Odentall
92-A-5304
P.O. Box 500
Elmira, N.Y. 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. Odentall:

I have received your letter of December in which you sought assistance in obtaining your sentencing minutes.

According to your letter, you have been in "state custody" since June of 1992. Although §380.70 of the Criminal Procedure Law states that "a certified copy of the stenographic minutes of the sentencing proceeding must be delivered within thirty days from the date such sentence was imposed", your requests for the minutes have been denied by your correctional facility because it does not retain a copy of that record.

In this regard, the Freedom of Information Law pertains to existing agency records. If the record in which you are interested is not yet maintained by or in possession of your facility, the facility would be unable to provide access to the record, and the Freedom of Information Law would not yet be applicable. Only when the record is maintained by an agency would the Freedom of Information Law serve as a vehicle for seeking to review or obtain a copy.

In the alternative, although you have attempted to do so already, it is suggested that you request the record from the court that imposed the sentence. While the courts and court records are not subject to the Freedom of Information Law, court records are often available pursuant to other provisions of law (see e.g., Judiciary Law, §255). As such, it may be worthwhile to renew a request for the minutes to the clerk of the appropriate court.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: J. McKibbin, FOIL Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7485

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 29, 1992

Mr. Francis A. DeFrancesco, Chief Inspector
New York State Police
State Office Building Campus
Albany, N.Y. 12226

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

Dear Chief Inspector DeFrancesco:

I have received your letter of December 7 concerning an appeal made under the Freedom of Information Law by Ms. Ann Meneses. Her request involved the New York State Police Crime Laboratory procedures manual, and you affirmed an initial denial, stating that the record in question "is intra-agency material and, therefore, is exempt from disclosure".

In my opinion, although the record in question might properly be characterized as intra-agency material, a denial on the basis of §87(2)(g) of the Freedom of Information Law, which deals with such materials, would in my view be inappropriate. It is possible, however, that certain aspects of the manual might be withheld on other grounds. In this regard, I offer the following comments.

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

Specifically, §87(2)(g), the provision upon which you relied to deny the request, states that an agency may withhold records that:

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

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

Based on the foregoing, the contents of inter-agency or intra-agency materials determine the extent to which those materials may properly be denied. Further, it is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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.

Moreover, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was found that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

While the manual constitutes intra-agency material, by its nature, it would appear to consist of instructions to staff that affect the public available under §87(2)(g)(ii) or "final agency policy" with regard to the methods by which the Division of State Police carries out certain procedures that would be available under §87(2)(g)(iii), unless a different ground for denial applies.

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

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

> i. interfere with law enforcement investigations 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 scrupulous 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 record in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. In addition, as you are likely aware, in a 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 record might be "routine" and might not if disclosed preclude the Division from carrying out their duties effectively.

Lastly, the remaining ground for denial of possible relevance is §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 §87(2)(f) would be applicable.

It is respectfully requested that you reconsider your determination, and I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Ann Meneses

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7486

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 30, 1992

Mr. Joseph Colistra
[redacted]

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

Dear Mr. Colistra:

I have received your letter, which reached this office on December 21.

You have sought an opinion concerning "the validity of the claims", i.e., requests for information that you have made, and the duty of a police chief and/or justice court to supply the information. The information sought includes the spelling of the name of the officer who issued you a traffic ticket and can be identified by badge number, a list by serial number of radar units used by the Walden Police Department as of August 1, 1992, calibration dates for each of the above units by serial number and receipts for such calibrations, a list of speeding citations issued by the officer in question from August 1 through August 9, 1992, including the names and addresses of each "alleged speeder", the date indicating when the officer was trained in the use of a hand held radar unit, and the serial numbers of the radar units issued to the officer during the dates specified earlier.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities

> thereof, except the judiciary or the state legislature."

In turn, §86(1) of the Law defines "judiciary" to mean:

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

As such, although the Freedom of Information Law is applicable to a municipal police department, it does not apply to the courts or court records. It is noted, however, that other provisions of law may grant access to court records. One such provision is §2019-a of the Uniform Justice Court Act, which 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 pertains to existing records, and §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 police department maintains no "list, by serial number" of each of its radar units, it would not be obliged to prepare such a list on your behalf. For future reference, unless it is known that a list exists, it is suggested that a request pertain to "records". For instance, rather than requesting a list of radar units, a request might be made for records or portions thereof indicating radar units used by a municipality and their serial numbers.

Third, insofar as your request involves existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. With one exception, it would appear that any such records would be available, for none of the grounds for denial would apply. The exception pertains to situations in which persons may have been charged with a crime or a traffic infraction or violation, and where those charges have been dismissed. In such cases, the records relating to the charges ordinarily are sealed pursuant to Article 160 of the Criminal Procedure Law. Therefore, while records indicating names and addresses of those convicted of speeding would be available, where charges have been dismissed, the records would generally be confidential.

Fourth, §89(3) of the Freedom of Information Law also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate 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 Village's record-keeping systems; whether it has the ability to locate and identify the records sought in the manner in which you requested them is unknown to me.

Lastly, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) each agency must designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests. I am unaware of whether the Chief of Police is a records access officer, and it is suggested that you might contact the Village Clerk to discuss your request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Records Access Officer, Village of Walden
Justice Court, Village of Walden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7487

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 30, 1992

Mrs. 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 Mrs. Mangano:

I have received your letter of December 13 in which you asked whether, in my view, a village must make copies of local laws available free of charge.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records, including local laws.

Second, although I believe that the public may inspect accesible records accessible at no cost, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge "fees for copies which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches...except when a different fee is otherwise prescribed by statute". As such, it appears that a village may charge a fee in accordance with the foregoing when copies of local laws 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

Robert J. Freeman
Executive Director

RJF:pb
cc: Records Access Officer, Village of Ossining

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7488

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 30, 1992

Mr. Diego Vega
91-A-9165
Attica Correctional Facility
Box 149
Attica, N.Y. 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. Vega:

I have received your letter of December 9.

According to your letter, having received certain test results from a facility of the State Department of Health, you wrote to the facility to ask "if and when they recommended [you] take another test". Rather than responding to your question, you were referred to the inmate health service at your facility. You have asked whether, by law, the facility must provide a "second opinion" and answer your question.

In this regard, although you sought information from a state agency, your attempt to do so could not in my opinion be characterized as a request made under the Freedom of Information Law. It is noted that the title of the Freedom of Information Law may be somewhat misleading. That statute is a vehicle that enables members of the public to seek existing records; it does not require agencies to answer questions, provide opinions, or to create new records in response to questions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7489

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 30, 1992

Ms. Elizabeth Baxter
[redacted]

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

Dear Ms. Baxter:

I have received your letter of December 11 and the correspondence attached to it. You have sought assistance in obtaining the final agreement between the Council of Administrators and Supervisors (C.S.A.) and the Chancellor of the New York City Board of Education. Although requests for the agreement were initiated in November, you apparently have received no response.

In this regard, I offer the following comments.

First, as you may be aware, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) 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, and requests should ordinarily be directed to that person.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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. In my view, a contract or a collective bargaining or similar agreement would be accessible under the Law, for none of the grounds for denial could properly be asserted to withhold such a record.

In an effort to assist you, a copy of this response will be forwarded to the records access officer for the Board of Education.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Ruth Bernstein, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 7490

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 30, 1992

Mr. Charles Hunt
[redacted]

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

Dear Mr. Hunt:

I have received your letter of December 9, as well as the materials attached to it.

Based upon the correspondence as you have marked it, you have sought an advisory opinion concerning a request directed to the Iroquois Central School District. By way of background, attached to your letter is a record, apparently a printout, containing your salary history as an employee of the School District including various items, that was made available to another person pursuant to a request made under the Freedom of Information Law. You have requested the same information concerning several other employees in the same format as the record that was disclosed pertaining to you. You were informed, however, that the data does not exist in that format. You indicated that you would accept the information "without the dollar and percentage increases if that is a problem".

In this regard, I offer the following comments.

First, I point out that, 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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that a payroll record or other related records identifying employees and their salaries, such the information sought or the kinds of items contained in the printout, must be disclosed.

Of relevance is §87(2)(b), which 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. Similarly, insofar as records exist indicating stipends additional to salary or percentage or dollar increases, I believe that they must be disclosed for the same reasons as discussed in the preceding analysis.

Second, 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. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. 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 or disk. 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 information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

In sum, if the information sought can be printed out, for example, in the format in which you requested it, I believe that the District would be obliged to do so. Alternatively, assuming that existing paper records contain the same or equivalent information, those portions of those records must, in my view, 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:pb
cc: Lawrence F. Pereira, Superintendent
Richard A. Binner, Business Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1491

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 30, 1992

Mr. Julio Rosa
84-A-7019
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, N.Y. 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. Rosa:

I have received your letter of December 10 in which you requested my views concerning access to various records pertaining to your arrest that have been withheld by an office of a district attorney.

In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 records in which you are interested or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the provisions that may be significant in determining rights of access to 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". That provision 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 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 a district attorney's office and communicated within those agencies or to another agency 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 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 o 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7492

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 30, 1992

Mr. Peter Sluys
[redacted]

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

Dear Mr. Sluys:

I have received your letter of December 10 pertaining to the timeliness of responses to requests made under the Freedom of Information Law directed to the Clarkstown Central School District.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her 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:pb
cc: Superintendent, Clarkstown Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7493

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 30, 1992

Mr. Richard Osinoiki
89-A-3589
Wallkill Correctional Facility
Box G
Wallkill, N.Y. 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. Osinoiki:

I have received your letter of December 7 addressed to Secretary of State Schaffer. As indicated in previous correspondence, the staff of the Committee on Open Government is authorized to respond on behalf of its members.

You have asked that the Committee "compel" the New York City Police Department and the Woodhull Medical and Mental Health Center to disclose certain records to you. The records sought from the Police Department relate to a criminal harassment complaint that you made in 1987. You requested birth records involving child born to a particular individual from the medial facility.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office cannot compel an agency to grant or deny access to records.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 records of the Police Department, I am unfamiliar with the nature of the records sought, the effects of their disclosure, or the disposition of your complaint. However, the following paragraphs will review the provisions that may be significant in determining rights of access to 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". That provision 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 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.

Also potentially relevant is §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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 and communicated within the department or to another agency 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.

Further, if a person is charged with a criminal offense and the charges are later dismissed, the records relating to the charges are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

Lastly, with respect to the hospital records, the Woodhull Medical and Mental Health Center is part of the New York City Health and Hospitals Corporation. As such, its records are subject to the Freedom of Information Law. However, as indicated earlier, §87(2)(b) authorizes an agency to withhold records when disclosure would result in unwarranted invasion of personal privacy. Section 89(2)(b) of the Law provides examples of unwarranted invasions of personal privacy, one of which includes "disclosure of items involving the medical or personal records of a client or patient in a medical facility". In addition, I believe that provisions of the Public Health Law would preclude a medical facility from disclosing medical records absent the consent of the subject of those records. As such, I believe that the records that you requested from the Woodhull facility could properly be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7494

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 30, 1992

Mr. Peter W. Sluys
Community Media Inc.
25 W. Central Ave. Box 93
Pearl River, N.Y. 10965

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

Dear Mr. Sluys:

I have received your letter of December 10 in which you sought an advisory opinion concerning access to records relating to payments made to an attorney by the Village of Nyack.

Although the Village provided "a list of total sums paid" to the attorney, it is your view that detailed bills should be disclosed, perhaps after the deletion of "confidential 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, in my opinion, bills, vouchers, contracts, receipts and similar records reflective of payments made or expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable. With specific respect to payments to attorneys, I point out that, while the communications between an attorney and client are often 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 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 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". 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. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms

> of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and 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 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."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys should be disclosed.

A copy of this opinion will be forwarded to the Village Attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Linda Christopher, Village Attorney