January 4, 1993

Mr. Joseph Cooke
89-A-2830
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Cooke:

I have received your letter of December 14 in which you sought assistance.

As I understand your letter, you submitted a request to the New York City Police Department for a performance evaluation and other records involving the possibility that a named police officer might have been disciplined. You were informed that the Department was "unable to locate any records responsive to your request." It is your view that the response was erroneous, for even if no disciplinary action had been taken concerning the officer, a performance evaluation "should certainly be on file."

You asked what further steps you can take. In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law states in part that an agency need not create or prepare a record in response to a request.

Second, in a situation in which an agency asserts that it does not maintain a requested record, an applicant may seek a certification in writing to that effect. Specifically, §89(3) also 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."

Third, even if a performance evaluation exists with respect to a police officer, I believe that it could likely be withheld. 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 §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 §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. It has been held 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" [Capital Newspapers v. Burns, 67 NY 2d 562, 568 (1986)].

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)].

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 Powida 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, 406 NYS 2d 664 (Court of Claims, 1978); and Sinicropi v. County of Nassau, 76 AD 2d 838 (1980)]. Three of those decisions, Powida, 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, when a request is 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."

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. 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

January 4, 1993

Mr. Joseph Cooke
89-A-2830
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

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You asked what further steps you can take. In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law states in part that an agency need not create or prepare a record in response to a request.

Second, in a situation in which an agency asserts that it does not maintain a requested record, an applicant may seek a certification in writing to that effect. Specifically, §89(3) also 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."

Third, even if a performance evaluation exists with respect to a police officer, I believe that it could likely be withheld. 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 §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 §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. It has been held 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" [Capital Newspapers v. Burns, 67 NY 2d 562, 568 (1986)].

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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 Powida 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, 406 NYS 2d 664 (Court of Claims, 1978); and Sinicropi v. County of Nassau, 76 AD 2d 838 (1980)]. Three of those decisions, Powida, 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, when a request is 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."

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. 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

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Committee on Open Government

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January 4, 1993

FOIL-AO-7496

Mr. Charles Ransome
85-A-1643, Annex
Box 2002
Dannemora, NY 12929

Dear Mr. Ransome:

I have received your letter of December 22, which consists of an appeal following a denial of a request made to your facility.

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 render determinations following appeals. The provisions concerning the right to appeal 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 therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuring determination thereon."

I point out that the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

Second, the correspondence attached to your letter indicates that the record sought is a memo sent by the First Deputy Superintendent to the program committee for inmate placement. You wrote that the request was denied on the ground that the record did not exist.

Here I point out that the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. However, in situations in which an agency asserts that it does not maintain a record, an applicant may seek a certification to that effect. Specifically, §89(3) also 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".

Lastly, insofar as the Freedom of Information Law pertains to existing records, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Relevant to you inquiry would be §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, unless a different ground for denial applies.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

January 4, 1993

Mr. Roger Hosein
92-A-4085 D19-6
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. Hosein:

I have received your letter of December 15 in which you sought advice concerning the use of the Freedom of Information Law to obtain copies of your trial transcripts.

In this regard, it is unlikely that the Freedom of Information Law could be used to obtain those records. It is noted that the Freedom of Information Law pertains to agency records and that §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."

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

Nevertheless, other provisions of law often grant substantial rights of access to court records (see e.g., Judiciary Law, §255). It is suggested that you request the records in question from the

clerk of the court in which the proceeding was conducted, citing an appropriate provision of law as the basis for your request. It is also recommended that you confer with your attorney or perhaps 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

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January 4, 1993

FOIL-A0-7498

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 December 12, which reached this office on December 22.

You have asked that the Committee on Open Government "compel" the Office of the Kings County District Attorney, the New York City Police Department and the New York Telephone Company to disclose certain records to you.

As indicated in previous correspondence, the Committee may provide advice concerning the Freedom of Information Law; it cannot compel an agency to disclose records. Further, certain aspects of your requests to those entities were considered in earlier responses to you. As such, my comments will pertain to issues that were not addressed in those communications. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §89(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, although the Freedom of Information Law applies to records maintained by police departments and offices of district attorneys, it does not apply to private entities, such as the New York Telephone Company.

Second, the records sought relate to a criminal proceeding in which you were involved. Here I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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.

Since you referred to records of grand jury proceedings, it is noted that 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 Criminal Procedure Law, 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, "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.

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:jm

cc: Records Access Officer, Office of the Kings County District Attorney

Records Access Officer, New York City Police Department
General Offices-Management Division, New York Telephone Company

State of New York
Department of State
Committee on Open Government

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January 4, 1993

FOIL-AO-7499

Mr. Brian Cullen
HC-1
Sloatsburg, NY 10974

The staff of the Committee on Open 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 December 15 in which you sought an advisory opinion concerning a denial of access to records. Specifically, you sought "records indicating payments to lawyers representing the Tuxedo School District between the years '85 and the present."

Assuming that such records exist, I believe they must be disclosed, perhaps with certain deletions, based on the following analysis.

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 District's Business Administrator.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Zinetti, Business Administrator

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January 5, 1993

FOIL A0 7500

Mr. John J. Sheehan
Adjusters, Inc.
P.O. Box 604
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. Sheehan:

I have received your letter of December 15 in which you sought an advisory opinion concerning the Freedom of Information Law. Your inquiry concerns rights of access to records relating to a shooting that occurred in the City of Binghamton, including a police blotter entry, an incident report and perhaps related records. Although you were informed by the Mayor that the police blotter would be available, you were also informed that the incident report and other records would be withheld "based upon the law enforcement exceptions within the Freedom of Information Law.

In this regard, I believe that there is a distinction between the police blotter and the other items that you requested. As stated in the Mayor's response to you, the blotter "merely states the arrested person's name, time of arrest and a few other incidental bits of information". However, incident reports and related records may contain much more detailed information.

The "law enforcement exemption", §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."

Therefore, insofar as disclosure of an incident report or other records relating to a shooting would result in the harmful effects described in §87(2)(e), I believe that a denial of access to that extent would be consistent 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 some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Hon. Juanita M. Crabb, Mayor
Linda Kingsley
Captain Butler

State of New York
Department of State
Committee on Open Government

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January 5, 1993

FOIL AO 7501

Mr. Edwin Arthur
90-A-8635 (4F-20)
Box F
Fishkill, NY 12524

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

Dear Mr. Arthur:

I have received your letter of December 19 in which you sought assistance concerning delays in response 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)].

If you feel that your request has been constructively denied, you may appeal. Further, I believe that the person designated to determine appeals by the District Attorney is Dina Werfel, Assistant District Attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dina Werfel
Marlin L. Adams

State of New York
Department of State
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January 5, 1993

FOIL AO 7502

Mr. James Seelandt
83-A-0262
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. Seelandt:

I have received your letter of December 18 and the materials attached to it. You have asked that I prepare an "evaluation" of a request made to the Office of the Kings County District Attorney.

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of the Freedom of Information Law states in part that an agency need not create a record in response to a request. Since the records sought relate to events that occurred more than ten years ago, it is possible that some of the records in which you are interested no longer exist. If that is so, the Freedom of Information Law would not apply.

Second, one aspect of your request involves a "master index". I point out that the phrase "master index" is used in the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law. Those regulations are based upon §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", it is suggested that you request the subject matter list maintained pursuant to §87(3)(c) of the Freedom of Information Law.

Third, §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 record-keeping systems of the Office of the District Attorney; whether it has the ability to locate and identify the records sought in the manner in which you requested them is unknown to me.

Fourth, part of your request appears to involve records relating to a pre-sentence report. Assuming that is so and 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 and related records 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 those records may be made available only by a court or pursuant to an order of the court.

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

cc: Records Access Officer

State of New York
Department of State
Committee on Open Government

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
http://www.dos.ny.gov/coog/

January 5, 1993

FOIL AO 7503

Mr. Anthony Pappadakis
Box 338-86A595
Napanoch, N.Y. 12458

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

Dear Mr. Pappadakis:

I have received your letter of December 21. You have sought assistance in obtaining records from the New York City Police Department concerning your arrest. In addition, you questioned how long you must wait to file an Article 78 proceeding and whether there are time limits "on fulfilling FOIL requests".

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 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)].

Based on the foregoing, a person may initiate an Article 78 proceeding after receipt of a written denial of access rendered following an appeal, or if no written determination of an appeal is rendered following the expiration of ten business days after an agency's receipt of an appeal.

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 §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
Executive Director

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

State of New York
Department of State
Committee on Open Government

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
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January 5, 1993

FOIL A0 7504

Mr. Gennaro J. Faiella
Village Manager
Village of Ossining
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, unless otherwise indicated.

Dear Mr. Faiella:

I have received your letter of January 4 in which you referred to a request for payroll records including reference to regular and part-time employees of the Village of Ossining.

You suggested that, to comply with Law and the request, a record be disclosed that "details the name, position, title, annual salary, hourly rate and also the payroll codes for straight time, overtime, longevity payments, etc."

In my view, since the record that you described includes the items requested, as well as others, disclosure of that record would satisfy the request in a manner consistent with the Freedom of Information Law. Further, if my memory is accurate, I spoke with the applicant and suggested that disclosure of the payroll record required to be maintained by an agency pursuant to §87(3)(b) of the Freedom of Information Law, and which includes the name, public office address, title and salary, of every officer or employee of an agency, would likely suffice to accommodate her request.

In short, so long as the information sought is disclosed, perhaps as part of a more detailed record, I believe that the Village would be acting in compliance with the Freedom of Information Law.

Lastly, the applicant requested that fees for copies be waived because the information sought "is of definite public interest". While there are provisions in the federal Freedom of Information Act that authorize waivers in such circumstances, no analogous provision exists in the New York Freedom of Information Law [see Whitehead v. Morgenthau, 552 NYS 2d 518 (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:pb
cc: Linda Mangano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7505

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

January 5, 1993

Mr. Pedro Nieblas
92-A-5555
Auburn Correctional Facility
135 State Street
P.O. Box 618
Auburn, NY 13021

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

Dear Mr. Nieblas:

I have received your letter in which you sought assistance in obtaining records concerning your criminal case from the New York City Police Department and the Office of the District Attorney of Kings County.

In this regard, I offer the following comments.

First, a request should ordinarily 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.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request must 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. 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7506

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

January 5, 1993

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 December 12 in which you sought assistance concerning a request made under the Freedom of Information Law.

You inferred that officials of the New York City Police Department might have misinterpreted your request, for you requested various records relating to the destruction of certain evidence and records reflective of policies and rules concerning the destruction of evidence, rather than the records or evidence themselves.

In this regard, I am unfamiliar with the case in which you are interested or its disposition. I point out, however, that in situations in which a person is charged with a criminal offense and the charges are later dismissed, the records ordinarily become sealed and confidential pursuant to §160.50 of the Criminal Procedure Law.

Assuming that §160.50 of the Criminal Procedure Law is irrelevant it appears that the Freedom of Information Law would be applicable. It is noted, however, that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute is part that an agency need not create or prepare a record in response to a request. Therefore, insofar as the records sought do not exist, the Freedom of Information Law would not apply.

Third, to the extent that the records do exist and are maintained by the Department, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that

records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Again, I am unaware of the nature of the case in which you are interested, your relationship to it, whether the case went to trial, the nature of the evidence or whether the evidence was disclosed in a public proceeding. 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 or includes reference to medical information 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).

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
cc: Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1507

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

January 5, 1993

Ms. Cynthia Dietz, GIS Manager
Ryan Survey
Porter Building
Northern Lights Office Park
Syracuse, N.Y. 13220-3225

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

Dear Ms. Dietz:

I have received your letter of December 31 in which you alluded to legislative recommendations offered by the Committee on Open Government, as well as "holes" in the Freedom of Information Law that permit agencies to withhold information "that is not a statistic or table" under §87(2)(g).

In this regard, enclosed is a copy of the Committee's recent annual report to the Governor and the Legislature. The names of the members of the Committee appear on our letterhead and may be reached through this office.

With respect to §87(2)(g), although that provision represents a possible basis for denial, due to its structure, it often requires disclosure. Specifically, that provision authorizes an agency to withhold records that:

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

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

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

With respect to geographic information systems, in general, I believe that maps, images and the like would constitute "factual data" that must be disclosed. Further, it has been held that estimates and projections, even though they may not be reflective of "objective reality", nonetheless constitute "statistical" tabulations that must be disclosed [see e.g., Dunlea v. Goldmark, 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. As such, I believe that much , if not all of the information, contained within a GIS must be disclosed.

If you would like to discuss the matter, please feel free to contact me. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7508

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

January 6, 1993

Mr. Peter W. Sluys
Managing Editor
Community Media Inc.
25 W. Central Avenue
Box 93
Pearl River, NY 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 24 in which you sought an advisory opinion concerning rights of access to "all bills - itemized as required by law" forwarded to the Clarkstown Central School District by its law firm.

The District's interim records access officer, Lucy H. Schluter, indicated that, in addition to a voucher providing general descriptions of legal services rendered and the amounts billed for each, the firm also submits a "Confidential Monthly Summary" (CMS) of approximately thirty-five pages that falls within the coverage of the attorney-client privilege and cannot be disclosed. She indicated that the CMS includes descriptions of "strategy and status regarding litigation, collective bargaining and personnel matters", names of students and employees facing disciplinary charges, and "investigatory matters which might lead to court action." She suggested that "[t]o reveal the specifics of the legal steps and activities taken on behalf of the District, either offensive or defensive in nature, would, in [her] opinion, be detrimental to the District's ability to defend itself." Ms. Schluter also wrote that, based upon your questions, you wish to ascertain the numbers of hours of legal work each month, the level and number of attorneys doing the work, and the overall cost of same," and she suggested that it "may be possible to pull that information off the CMS and to create a separate document with such information".

In this regard, I offer the following comments.

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

records 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 in most instances. 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 withheld 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.

Based upon Ms. Schluter's description of the contents of a CMS, there may be other grounds for denial that would apply. for instance, insofar as the records identify or could identify particular students, I believe that they must be withheld. Another statute that exempts records from disclosure is the Family Education Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under the Buckley Amendment define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;
(e) A list of personal characteristics that would make the student's identity easily traceable; or
(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law. Similarly, references to employees involved in disciplinary proceedings when such proceedings have not resulted in any final determination reflective of misconduct could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Herald Company v. School District of the City of Syracuse, 430 NY 2d 460 (1980)]. In addition, §87(2)(c) enables agencies to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." That provision may also be pertinent in determining access. In short, there may be a variety of situations in which details found within a CMS may justifiably be withheld.

Further, it would appear that Ms. Schluter's suggestion at the end of her response would be generally consistent with the holding in the most recent decision on the matter. Again, she suggested that information be extracted from a CMS in an effort to ensure that the public can know the amount of time billed by attorneys and the charges incurred by the District. The decision, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), involved an applicant ("petitioner") who 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."

In my view, disclosure of information analogous to that described in Knapp would be appropriate. It is reiterated, however, that any such disclosure need not include, for example, information identifiable to students or to employees against whom disciplinary charges are pending, or which if disclosed would impair the contracting or collective bargaining process.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Dr. John Krause
Warren Berbit

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7509

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

January 6, 1993

Mr. Peter W. Sluys
Managing Editor
Community Media Inc.
25 W. Central Avenue, 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 24 which pertains to requests for records directed to the Clarkstown School District.

You wrote that you have made several requests which have been characterized by the District as "voluminous", and you asked whether the District "is justified in delaying the release of material...beyond the time set forth in the statute". You also raised a question concerning the number of hours billed to the District by its law firm.

First, it is emphasized that §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 requests, I must admit to being unfamiliar with the record-keeping systems of the District; whether it has the ability to locate and identify the records sought in the manner in which you requested them is unknown to me.

Second, although the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests, it does not include any provision that specifies a period within which records must be disclosed. As indicated in my letter to you of December 30, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibiliity that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be

granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Your final question, which involves records of billings by a law firm, was addressed in a previous response.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Dr. John Krause
Warren Berbit

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7510

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

January 6, 1993

Mr. David Davis
[redacted]

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

Dear Mr. Davis:

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

You have sought an advisory opinion concerning your right to "inspect and copy all first year student answers to the October 26, Midterm, Responsibility for Injurous Conduct" administered by the City University of New York Law School. You wrote that there is "no privacy problem", for "the students are given a four digit exam number".

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, two of the grounds for denial are relevant in ascertaining rights of access.

Significant in my view is the first 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 the Family Education Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions.

The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under the Buckley Amendment define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the definition of "personally identifiable information", the absence of a name or the use of a four digit number on test papers do not necessarily remove the records in question from the protection accorded by the Buckley Amendment, for the definition includes "[o]ther information that would make the student's identity easily traceable". If the test answers were handwritten, it is possible that a review of the test papers could enable an individual to identify students' papers by means of their handwriting, which presumably is unique in every instance. If that is so, notwithstanding the absence of students' names, it would appear that the Law School would be precluded from disclosing the records in question.

Also relevant is §87(2)(h) of the Freedom of Information Law, which enables agencies to withhold records that "are examination questions or answers which are requested prior to the final administration of such questions". Therefore, if there is an intent or possibility that the questions used in the examination that is the subject of your inquiry will be used in the future, I believe that the questions, as well as the students' answers, could be withheld. Disclosure of the questions or the answers in that circumstance would diminish or perhaps nullify the utility or efficacy of the exam.

In short, if disclosure of examination papers and the handwriting appearing on them "would make a student's identity easily traceable", or if the questions on the exam will be given in the future, I believe that the records would fall beyond the scope of rights conferred by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Dave Fields, Records Access Officer
Daphna H. Mitchell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7511

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

January 7, 1993

Ms. Jane Goldblatt
[redacted]

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

Dear Ms. Goldblatt:

I have received your letter of December 25 in which you sought assistance in obtaining information from the Northport-East Northport School District.

Specifically, you wrote that you have attempted for several months without success "to find out the cost of bussing 47 students to BOCES programs during 1991-92 school year." You were informed on one occasion that the information in question "is not readily available"; on another, you were told that the information sought is not maintained by the District.

In this regard, I offer the following comments.

First, it is emphasized at the outset that the title of the Freedom of Information Law may be somewhat misleading. It is not a vehicle that requires agencies to disclose "information" per se. Similarly, although agency officials may provide information in response to questions, they are not obliged to do so by the Freedom of Information Law, for that statute 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. While I have not seen your requests, rather than asking a question (i.e., "How much did it cost to transport 47 students to BOCES programs"), it would be more appropriate to request records. For instance, it may be worthwhile to request records or portions thereof reflective of the cost of transporting students to BOCES programs. While there may be no single record indicating a total amount spent for bussing students to BOCES programs, there may be a number of records relating to the issue from which you could prepare a total independently.

Second, I point out 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)].

Third, assuming that records exist or can be generated electronically that include the information that you are seeking, I believe that they would be accessible under the Law. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could be asserted to withhold data indicating the expenditures in which you are interested.

Lastly, at the end of your letter, you referred to a question involving the number of bus companies involved in transporting the 47 students. Again, there may be no single record identifying all of the bus companies so employed. However, individual records, such as contracts with bus companies, could be reviewed, thereby enabling you to know the number and names of the bus companies, as well as the amounts expended for their 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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7512

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

January 7, 1993

Mr. Jeffrey J. Selingo
News Editor
The Ithacan
Ithaca College
953 Danby Road
Ithaca, N.Y. 14850-7258

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

Dear Mr. Selingo:

I have received your letter of December 21 in which you sought an advisory opinion concerning the status of Ithaca College under the New York Freedom of Information Law. Your inquiry appears to have been precipitated by a request for campus safety reports that was denied on the basis of the Family Educational Rights and Privacy Act (20 USC §1232g), which is commonly known as the Buckley Amendment.

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 or other governmental 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 entities of State and local government in New York. Ithaca College is a private institution rather than a governmental entity. Therefore, in my opinion, it would not be subject to the Freedom of Information Law.

Second, although I have not seen its full text, the Buckley Amendment was recently amended by Congress. The new provisions state in part that "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement" are not considered student records subject to the confidentiality requirements otherwise imposed by the Buckley Amendment. Consequently, while I do not believe that the Freedom of Information Law would apply, the College would not be prohibited from disclosing such records by the Buckley Amendment.

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: Margaret T. Ball, Vice President and College Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7513

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

January 7, 1993

Mr. Daniel Gutman
[redacted]

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

Dear Mr. Gutman:

I have received your letter of December 28 as well as the correspondence attached to it.

You wrote that you have attempted without success to obtain "worksheets prepared in connection with an Environmental Impact Statement (EIS) issued by the New York City Department of City Planning." The worksheets were prepared by a consultant, and the request was denied because those documents are not in the possession of the Department. You have sought an advisory opinion concerning the propriety of the denial.

In this regard, in my opinion, the physical possession by the Department 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 Department may not have physical possession of the worksheets, the Department presumably retained and paid the consultant to develop the EIS and the worksheets used in its preparation. As such, in my view, the worksheets constitute "records", for they consist of information produced for an agency, the Department. Consequently, even though they are not physically maintained by the District, I believe that the worksheets are Department records subject to rights conferred by the Freedom of Information Law.

It is noted that there is case 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 persons 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 record prepared by a consultant for an agency may be withheld or must be disclosed in the same manner as those prepared by the staff of an agency. I would contend that a consultant's report and worksheets, information "produced for" an agency, would fall within the scope of the Freedom of Information Law even if they are 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 Department must give effect to the Law so as to "extend public accountability wherever and whenever feasible."

If the consultant maintains records for or on behalf of the Department, 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.

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

Since the Court of Appeals found that records prepared for agencies by consultants should be treated as if they were prepared by agency staff, those records could be characterized as "intra-agency" materials. Although those materials fall within the scope of one of the grounds for denial, that provision, due to its structure, often requires disclosure. Specifically, §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., supra, 133)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Renee A. Fox, Records Access Officer
Rosina K. Abramson, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7514

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

January 7, 1993

Mr. Gary C. Decker
78-D-0005 HU-16/20
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. Decker:

I have received your letter of December 23 in which you sought assistance in relation to a request for records directed to the senior parole officer at your facility.

Attached to your letter is a copy of the request. You sought your "entire parole folder", including, "notes, memorandums, evaluations, recommendations, letters, certificates, orders, reports, program discharges, parole summary - 1992 Parole Board (everything)". The request was apparently denied in its entirety, and you asked "which documents are specifically exempt from [your] examination, and which, if any, are open to [your] examination..."

In this regard, I cannot provide specific guidance, for I am unfamiliar with the contents of the folder. Nevertheless, I offer the following comments.

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

Second, of likely relevance 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.

As evaluation or recommendation by an agency employee could in my view be withheld. However, an order or a record indicating discharge from a program would likely constitute a final agency determination that would be available under §87(2)(g)(iii). Similarly, factual information pertaining to you would likely be available under §87(2)(g)(i).

In short, since I am unaware of the contents of the records, unequivocal guidance cannot be offered. However, it appears that a blanket denial would have been inconsistent with law.

Lastly, following a denial of access to records, you may appeal the denial 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."

I believe that 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
cc: Fred Flood

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7515

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

January 8, 1993

Ms. Sue Boice
Title Tree
P.O. Box 411
Hurley, NY 12443

The staff of the Committee 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. Boice:

I have received your letter of December 27 in which you sought an advisory opinion concerning access to records.

According to your letter, several months ago you requested town tax rolls from Ulster County that were prepared in the 19th century. The request was denied "on the grounds the records are sealed and too fragile for viewing." You were also informed that the records in question will likely be microfilmed in 1994.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, 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."

Based upon the foregoing, tax rolls maintained by an agency would in my view constitute "records" subject to the Freedom of Information Law, irrespective of their age.

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. There appears to be no question that the records in question fall within the scope of public rights of access. Further, §87(2) of the Law states that accessible records should be made available for inspection and copying.

Third, there are also provisions of law that deal with the custody, preservation, retention and disposal of records. For example, §57.25 of the Arts and Cultural Affairs Law, which is part of the "Local Government Records Law", states in part that:

> "It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; 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."

As such, local government officials have a responsibility to "protect" and ensure the "preservation of records of enduring value". Further, having spoken with a County official concerning your request, I was informed that handling of the records sought would cause their disintegration. Consequently, it is possible that a review of the records would be less than valuable to you, and that the records would be unusable in the future.

From my perspective, there is a conflict between laws in this instance. On the one hand, I believe that the records are accessible under the Freedom of Information Law; on the other hand, the County is obliged to preserve them, and acceding to your request would apparently be concomitant to their destruction. I cannot conjecture as to the response that might be rendered by a court in this unusual circumstance. However, it is possible that a review of more recent and usable records would suffice for your purposes. If that is so, it is suggested that you seek to review other records that may be equally valuable to you.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Director, Ulster County Real Property Tax Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7516

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

January 8, 1993

Mr. Ralph Pelligrini
General Delivery
[redacted]

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

Dear Mr. Pelligrini:

I have received your letter of December 23, which reached this office on January 4.

According to your letter and the materials attached to it, your pistol permit was recently suspended. Thereafter, you requested records pertaining to the suspension from Putnam County. The County Executive denied the request, citing §400.00(5) of the Penal Law, which states in part that an "application for any license, if granted, shall be public record." He indicated that a "court order is needed to open the rest of the file."

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

First, while it is clear that an approved application for a pistol license is a public record, I am unaware of any aspect of §400.00 of the Penal Law stating that other records relating to the licensing, suspension or revocation process must be kept confidential or may be obtained only by means of a court order, with the exception of fingerprint records [see §400.00(4)]. If that is so, those other records would in my view be subject to the Freedom of Information Law. That is not to suggest that all such records must be disclosed, but rather that rights of access would be governed by that statute.

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

I am unaware of the 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 in a variety of situations, i.e., where a record identifies a confidential source, a neighbor, an employer, etc.

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

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

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 an agency and communicated within that 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Robert J. Bondi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7517

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

January 8, 1993

Mr. Eugene Forman
91-A-8549 UH-12-18
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. Forman:

I have received your letter of December 25 in which you sought guidance concerning the use of the Freedom of Information Law to obtain records relating to your arrest and conviction.

In this regard, I offer the following comments.

First, a request should ordinarily be directed to the "records access officer" at the agency that maintains the records in which you are interested, such as a police department or an office of a district attorney. 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 must 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. 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.

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, although the courts and court records are not subject to the Freedom of Information Law, other provisions of law often grant rights of access to court records (see e.g., Judiciary Law, §255). If you are interested in seeking court records, it is suggested that you direct a request to the clerk of the appropriate court containing sufficient detail to permit retrieval of the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7518

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

January 11, 1993

Mr. Curtis Miller
87-A-7202
135 State Street
Auburn, NY 13021-9000

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

Dear Mr. Miller:

I have received your letter of December 24 in which you sought assistance in obtaining trial transcripts and related records.

In this regard, it is noted that the Freedom of Information Law pertains to agency records and that §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."

Based on the foregoing, although the Freedom of Information Law is applicable to records maintained by a police department or an office of a district attorney, it does not apply to the courts or court records.

Nevertheless, other provisions of law often grant substantial rights of access to court records (see e.g., Judiciary Law, §255). It is suggested that you request the records in question from the

clerk of the court in which the proceeding was conducted, citing an appropriate provision of law as the basis for your request. It is also recommended that you confer with your attorney or perhaps a representative of Prisoners' Legal Services.

It is possible, too, that some of the records in which you are interested might be available from a different source, such as the office of a district attorney. 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-7519

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

January 11, 1993

Mr. Fred Frascatore
Franklin Correctional Facility
P.O. Box 10
Bear Hill Road
Malone, N.Y. 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. Frascatore:

I have received your letter of December 30 in which you made three complaints.

The first involves a denial of access to records of the Committee on Professional Standards, which investigated following a complaint that you made concerning an attorney. The second pertains to a denial of access by an assistant district attorney to letters that he wrote to officials of another county. The third relates to unanswered requests made under the Freedom of Information Law to the Fulton County Court and the Fulton County District Attorney.

You have sought assistance and asked that this office obtain the records for you. 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. The Committee cannot compel an agency to grant or deny access to records or acquire records on behalf of an applicant.

Second, 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 or other governmental 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, although an office of a district attorney is an agency subject to the Freedom of Information Law, that statute excludes the courts and court records from its coverage. However, other provisions of law often grant access to court records (see e.g., Judiciary Law, §255), and it is suggested that your requests for court records be made to the clerks of the appropriate courts, citing an applicable provision of law.

Third, 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.

Fourth, insofar as your inquiry pertains to agency records, such as those maintained by an office of a district attorney, I point out as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

Another provision relevant 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 district attorney's office and communicated within that 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.

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-7520

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

January 11, 1993

Mr. Ricardo A. Rodrigues
[redacted]

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

Dear Mr. Rodrigues:

I have received your letter of December 31. You wrote that you are interested in obtaining a copy of an application submitted to the State Liquor Authority by a restaurant, as well as a copy of the license issued to that restaurant. You questioned the procedure for seeking those records and the fees that may be involved.

In this regard, I offer the following comments.

First, a request should be made in writing 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. With respect to the State Liquor Authority, the Records Access Officer is Richard Chernela, and the address of that agency is 250 Broadway, New York, N.Y. 10007.

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. No particular form must be used. However, a request should be made in writing, citing the Freedom of Information Law as the basis for the request.

Lastly, unless a statute other than Freedom of Information Law authorizes a different fee, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches.

I hope that 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-7521

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

January 11, 1993

Mr. Leroy Smithwick
82-A-5557 C16-38
135 State Street
Auburn, NY 13024

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

Dear Mr. Smithwick:

I have received your recent letter in which you sought assistance in obtaining the criminal history of a witness who testified at your trial.

In this regard, 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 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-AD-7522

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

January 11, 1993

Mr. James E. Cliff
92-A-2300
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. Cliff:

I have received your letter of December 27 in which you raised questions concerning the Freedom of Information Law.

You wrote that you directed a request "to the Freedom of Information officer, of the District Attorney's office in Westchester County, concerning interviews conducted by police and the D.A.'s office, with potential witnesses in [your] case." Your question is whether you "asked the right agency."

In this regard, a request should be directed to the records access officer at the agency that maintains the records in which you are interested. If the Office of the District Attorney maintains the records in question, I believe that your request was made to the appropriate agency. If, however, some of the records are not maintained by that agency, but rather by a police department, a request should be made to the police department as well.

Assuming that the request was made to the proper agency, you asked whether you would "be correct in requesting this information, or complaining that [your] request has been ignored, to the State Attorney's Office in Albany."

First, although the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law, there is no state agency that enforces the Freedom of Information Law.

Second, 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)].

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 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, 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

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-7523

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

January 14, 1993

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, unless otherwise indicated.

Dear Mr. Elentuck:

I have received your letter of January 2 and the correspondence attached to it. You have sought an advisory opinion concerning the handling of a request made under the Freedom of Information Law for records of the New York City Department of Investigation.

In this regard, in view of the scope and complexity of your request, as well as Mr. Gold's response to your appeal, it appears that the Department engaged in a substantial and good faith effort to respond.

Moreover, many of the issues raised in your letter are the same as or similar to those that you have raised in previous correspondence with this office and which I have attempted to answer by means of many advisory opinions prepared on your behalf. Consequently, I will not reiterate comments or advice on issues that have been communicated to you in the past. I will, however, comment with respect to issues that you have not previously raised or which, in my view, merit clarification or amplification.

First, much of your letter involves the standard that an applicant must "reasonably describe" the records sought in accordance with §89(3) of the Freedom of Information Law and your efforts to meet with the records access officer to discuss your request. As you are aware, the regulations promulgated by the Committee on Open Government, 21 NYCRR §1401.2(b)(2), require that an agency's records access officer assure that agency personnel "[a]ssist the requester in identifying requested records, if necessary." Based upon that provision, I believe that the records access officer or appropriate staff should have conferred with you

in person, by phone or in writing in an effort to enable you to identify the records in which you are interested.

As indicated in the opinion of June 27, 1991 addressed to you, whether a request reasonably describes the records sought may be dependent upon the nature of an agency's filing or record-keeping system. In some instances, even though a request may be specific, an agency might have no mechanism for locating the records due to its method of filing or retrieving records. If files include voluminous records kept chronologically, for example, a request based upon the name of an individual, without more, might involve a search of every record contained in the files. Based upon the holding of the Court of Appeals in Konigsberg v. Coughlin [68 NY 2d 245, 250 (1986)], I do not believe that an agency would be required to engage in such a search.

Second, part of your inquiry involves access to records relating to requests made under the Freedom of Information Law. It has generally been advised that requests for records and agencies' responses thereto must be disclosed, unless the request contains personal information which if disclosed would 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 contained in his case file, disclosure of the request would indicate that the applicant for records is such a recipient and would, therefore, result in an unwarranted invasion of personal privacy. Similarly, if a person is the subject of an unsubstantiated or unresolved complaint, and that person so indicates in a request made to the Department of Investigation, disclosure of the request insofar as it identifies the requester would in my view result in an unwarranted invasion of personal privacy.

Third, the names of certain employees of the Department were redacted from the payroll record required to be maintained by the Department pursuant to §87(3)(b) of the Freedom of Information Law. The Department based its response on claims that disclosure would constitute an unwarranted invasion of personal privacy and might if disclosed endanger the lives or safety of those employees pursuant to §87(2)(f). If your contention is accurate, that the information sought is available from other public sources, I would agree that the names of those employees should be disclosed. If it is inaccurate, I believe that names of employees could, under appropriate circumstances, be withheld under §87(2)(f).

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-7524

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

January 14, 1993

Mr. Daniel Sharp
78-T-832
Ossining Correctional Facility
354 Hunter Street
Ossining, NY 10562-0908

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

Dear Mr. Sharp:

I have received your letter, which reached this office on January 5. You have asked for assistance in obtaining the stenographic minutes and transcripts of criminal proceedings in which you were involved in 1978.

In this regard, it is noted that the Freedom of Information Law pertains to agency records and that §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."

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

Nevertheless, other provisions of law often grant substantial rights of access to court records (see e.g., Judiciary Law, §255).

It is suggested that you request the records in question from the clerk of the court in which the proceeding was conducted, citing an appropriate provision of law as the basis for your request. It is also recommended that you confer with your attorney or perhaps 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-7525

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

January 19, 1993

Mr. Steven Brockett
The Legal Aid Society of Orange County, Inc.
P.O. Box 328
Goshen, NY 10924

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

Dear Mr. Brockett:

I have received your letter of January 4 in which you seek an advisory opinion under the Freedom of Information Law.

Your inquiry involves rights of access to the "CNET (Community Narcotics Enforcement Team) Manual." Your request for the manual was initially denied and the determination of your appeal affirmed the denial. In that determination, it was stated that the records in question "were compiled for law enforcement purposes, which if disclosed, would reveal criminal investigative techniques and procedures", that they "are also intra-agency materials exempt from disclosure", and that disclosure "could endanger the life or safety of our members."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unfamiliar with the contents of the manual in which you are interested. While each of the grounds for denial cited by the Division of State Police may be relevant to your inquiry, I believe that the specific contents of the manual and the effects of disclosure would determine the extent to which the manual must be disclosed or may be withheld.

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 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.

While I agree that the manual constitutes intra-agency material, it would appear that it consists of instructions to staff that affect the public or an agency's policy. If that is so, I believe that it would be available, unless a different basis for denial could be asserted.

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

> "are compiled for law enforcement purposes and which, if disclosed, would...reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The leading decision concerning 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. 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: Francis A. DeFrancesco, Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7526

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

January 19, 1993

Mr. and Mrs. John W. Carlson
[redacted]

The staff of the Committee on Open 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 Mrs. Carlson:

I have received your letter of January 1 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, you have attempted for several months without success to obtain information from Stephen Lungen, Sullivan County District Attorney. You wrote that:

> "The particular information [you] requested from Mr. Lungen pertained to a case involving Commonwealth Enterprises in Monticello. The case concerned the alleged injuring and maiming of ducks by Commonwealth Enterprises. Mr. Lungen chose not to prosecute this company and threw out the case. [You] would like to know why Mr. Lungen chose not to prosecute. [You] feel this evidence is public information and as such should be disclosed when requested to do so" (emphasis yours).

In this regard, I offer the following comments.

First, in terms of procedure, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency must have designated 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. If you did not do so, however, I believe that the recipient of your request should have responded or that the request should have been forwarded 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, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, if there is no record indicating why the District Attorney chose not to prosecute, his office would not be required to prepare such a record or explain his reasons on your behalf.

Finally, 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 §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." I do not know whether there were criminal charges brought in the situation that you described. If there were criminal charges and those charges were dismissed in favor of the accused, the records relating to the case would likely be sealed pursuant to §160.50 of the Criminal Procedure Law. In that circumstance, records would be confidential.

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.

Another provision relevant 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).

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 district attorney's office and communicated within that 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.

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: Stephen Lungen, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1527

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

January 19, 1993

Mr. Martin Jones Sr.
89-C-0145
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. Jones:

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

You wrote that the Erie County District Attorney has "continuously" denied requests for records "without proper and/or reasonable legal ground". Your correspondence focuses on a request for a statement made by an informant, and you asked that this office conduct an investigation and "find and suppress the source of these capricious and arbitrary acts".

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. The Committee cannot compel an agency to grant or deny access to records, and it has neither the resources nor the jurisdiction to conduct an investigation.

Second, it is emphasized that the Freedom of Information Law confers rights of access to agency records to the public generally, and that other provisions of law, such as those pertaining to criminal discovery, may confer certain rights due to one's status as a litigant or defendant. The Freedom of Information Law is a disclosure vehicle separate and distinct from statutes involving discovery. As such, one's rights as a member of the public under Freedom of Information Law may differ from that persons's rights as a defendant under the Criminal Procedure 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.

With respect to statements of informants, I point out that one of the grounds for withholding records may be particularly relevant. Section 87(2)(e)(iii) states that an agency may deny access to records that "are compelled for law enforcement purposes and which, if disclosed, would...identify a confidential source or disclose confidential information relating to a criminal investigation". It is also noted, however 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Frank J. Clark, III

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7528

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

January 20, 1993

Ms. Patricia Palmazzy
[redacted]

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

Dear Ms. Palmazzy:

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

According to your letter, in 1987, a memorandum was prepared concerning the possibility that a Cortland County official might have exhibited "symptoms of drinking an intoxicating substance" while performing his or her duties. Subsequently, a recommendation was made to conduct "a professional evaluation" to determine whether a "dependency problem" existed. The recommendation also indicated that the County "would support rehabilitation, as well as confidentiality thereof". Notwithstanding the foregoing, copies of the records that you described have been distributed to various county officials. You have asked whether the records in question would be "accessible or deniable" under the Freedom of Information Law.

In this regard, I offer the following comments.

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

Section 87(2)(b) permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". Further, §89(2)(b) includes 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."

While the records in question may not be medical records, I believe that they are similar, for they pertain to what might be considered a medical condition. Further, I believe that the records are sufficiently personal and intimate that they could be withheld if requested by the public under the Freedom of Information Law on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Also relevant 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.

In sum, it appears that the records at issue could be withheld if and when they are requested under the Freedom of Information Law.

Second, I point out that the language of the Freedom of Information Law indicates that an agency may withhold records, but that it is generally not required to do so. Specifically, the introductory language of §87(2) states in relevant part that:

"Each agency shall...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof" that fall within the grounds for denial that follow (emphasis added).

Further, the Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 652, 567 (1986)].

Therefore, although an agency may in appropriate circumstances withhold records, I do not believe that it is obliged to do so.

Lastly, as you requested, enclosed is "You Should Know", which describes the Personal Privacy Protection Law. That statute would be inapplicable to the situation that you described, for it pertains only to state agencies; local governments, such as counties, are not subject to the Personal Privacy Protection Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Director of Personnel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7529

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

January 20, 1993

Ms. Carol O'Connor
Town Clerk
Town of Chili
3235 Chili Avenue
Rochester, N.Y. 14624

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

Dear Ms. O'Connor:

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

You have sought assistance in dealing with numerous requests made by members of a particular family in the Town of Chili, for you wrote that the frequency of the requests has had an adverse impact on your ability to carry out your regular duties effectively.

The materials that you forwarded consist of requests by members of the family in question. Several of the requests seek answers to questions; one involves a "list for the past 20 years" of members of certain committee; another seeks "a single page report, showing the 1992 ending balance of the Recreation Department's debits and credits".

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 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 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. The request of December 30, for example, involves an effort to seek information through responses to questions. In my view, the Freedom of Information Law would not require that you or other town officials answer those questions. While you may

choose to do so, I do not believe that you would be obliged to do so.

Second, and in a related vein, 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 Town does not maintain a list of members of a committee who have served over the course of the past 20 years, it would not be required to prepare a list on behalf of an applicant. Similarly, the Town would not be required to create new records in order to respond to questions.

Third, §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 the requests that you have received, I must admit to being unfamiliar with your record-keeping systems; whether

you have the ability to locate and identify records sought in the manner in which they have been requested is unknown to me.

Lastly, although the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests, it does not include any provision that specifies a period within which records must be disclosed. 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..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7530

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

January 21, 1993

Mr. Donovan Anderson
90-A-0550
Drawer B
Green Haven Corr. Fac.
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. Anderson:

I have received your letter of January 5 in which you sought assistance concerning your unsuccessful attempts to obtain "information kept in the business files" of the St. Mary Hospital in Brooklyn. You have questioned whether that institution is subject to the Freedom of Information Law.

In this regard, 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 or other governmental 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 entities of state and local government in New York; it does not apply to private entities, such as the hospital to which you referred.

Since the St. Mary Hospital is not subject to the Freedom of Information Law, I do not believe that it would be required to disclose the kinds of records in which you are interested, unless ordered to do so by a court.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7531

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

January 21, 1993

Mr. Marvin Saunders
89-T-4142
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. Saunders:

I have received your letter of December 21, which, for reasons unknown, did not reach this office until January 11.

The first issue that you raised pertains to "sworn testimony that '1032 burglary in progress' was put out by the 19th precinct..." In response to a request for a "1032" report, copies of a complaint sheet and arrest report were made available. In a second request, you asked for a copy of the "911 tape or radio run" relating to the burglary. As of the date of your letter to this office, you had received no response.

The second issue relates to events that occurred in 1975 involving charges of professional misconduct brought by the "B.C.I." against several officers who were later disciplined.

In this regard, it is noted that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not possess records generally, and it is not empowered to compel an agency to grant or deny access to records. Nevertheless, I offer the following comments.

First, requests for records should be directed to the "records access officer" at the agency that maintains the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests. Further, §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 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 New York City Police Department is Susan R. Rosenberg, Assistant Commissioner.

Third, with respect to a 911 tape or radio call, it is possible that such a tape may no longer exist, for it is my understanding that they are routinely erased after 90 days. If the tape does not exist, the Freedom of Information Law would not be applicable. If it does exist, I believe that it would be subject to rights of access.

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

appearing in section 87(2)(a) through (i) of the Law. Since I am unaware of the contents of the tape recording in which you are interested or the effects of its 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 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". 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.

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.

With respect to records reflective of disciplinary action imposed against police or correction officers, the initial ground for denial is relevant. That provision 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, or if the subjects of the records are

no longer employed as police or correction officers, in my opinion, §50-a of the Civil Rights Law would not apply. If §50-a is applicable, it is questionable whether the records indicating disclosure would be available.

If §50-a is not applicable, relevant is §87(2)(b) of the Freedom of Information Law which, again, 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].

Another 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 of disciplinary action 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.

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-7532

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

January 21, 1993

Mr. John J. Sheehan
Adjusters, Inc.
P.O. Box 604
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. Sheehan:

I have received your letter of January 8 in which you sought an opinion concerning access to reports prepared by fire departments and emergency squads. The correspondence attached to your letter indicates that you are not interested in obtaining medical information but rather the "names of those on the scene".

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 §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 names of volunteer firemen present at the scene, 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, 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:pb

cc: Richard W. Trebilcock

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7533

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

January 21, 1993

Mr. Richard Schrader
Deputy Commissioner
New York City Department of
Consumer Affairs
42 Broadway
New York, NY 10004

Dear Mr. Schrader:

Thank you for forwarding a copy of your determination of an appeal rendered under the Freedom of Information Law concerning a request by Mr. N. Richie Siegal.

As I understand your response to the appeal, you upheld a denial of access to a record indicating the "schedules of fines" assessed by your Adjudication division on the ground that disclosure would "interfere with both law enforcement and judicial proceedings." If I have correctly interpreted your determination, I respectfully disagree.

In this regard, I offer the following comments.

First, the language appearing in your response quoted above paraphrases a portion of §87(2)(e) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

It is questionable in my view whether a schedule of fines could be characterized as a record "compiled for law enforcement purposes". From my perspective, since such a schedule would not have been prepared with respect to any specific or individual case, but rather to cases generally that come before the Adjudication division, it likely constitutes a record prepared in the ordinary course of business rather than for a law enforcement purpose.

Second, even if the schedule could be characterized as having been compiled for law enforcement purposes, it is difficult to envision how disclosure would interfere with a law enforcement investigation. Any such investigation would have ended when a matter reaches the Adjudication division. Further, it is my understanding that the division conducts quasi-judicial proceedings, i.e., proceedings conducted by hearing officers, rather than judicial proceedings, i.e., those conducted by judges in courts.

More importantly, if your reasoning were to be extended by means of analogy to judicial proceedings, public court records reflective of penalties, fines or sentences imposed upon lawbreakers would be confidential. Similarly, sentencing guidelines would be beyond the scope of public access. Fortunately, in my view, those kinds of records must ordinarily be disclosed to the public. The only exceptions of which I am aware that might preclude public disclosure would involve records or proceedings pertaining to juveniles or persons adjudicated as youthful offenders.

In short, in my opinion, there would be no basis in the Freedom of Information Law for withholding a schedule of fines.

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

cc: N. Richie Siegal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1534

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

January 22, 1993

Ms. June Maxam
The North Country Gazette
Box 408
Chestertown, NY 12817

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

Dear Ms. Maxam:

I have received your letter of January 11 in which you complained that the Warren County Treasurer has unnecessarily delayed responding 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, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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 E. Wertime, County Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7535

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

January 22, 1993

Mr. Jerry Connor
91-A-3235
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. Connor:

I have received your letter of December 30, which reached this office on January 12.

You have sought assistance in obtaining records concerning an incident that occurred in a New York City correctional facility in October of last year. Although requests were directed to the wardens of the facilities where you have been incarcerated, you wrote that you have received no responses to those requests. Copies of your requests attached to your letter indicate that they were made under the "Freedom of Information Act, Title 5 U.S.C.A. 552, and Public Officers Law Section 84-90, N.Y." In those requests, you asked that any fees be waived.

In this regard, I offer the following comments.

First, since the records in question are maintained by an agency of the New York City government, the New York Freedom of Information Law would serve as the basis for a request. The other statute that you cited is the federal Freedom of Information Act, which applies only to federal agencies and would be inapplicable in the case of your request. Further, although the federal Act includes provisions relating to the waiver of fees, the New York Freedom of Information Law contains no similar provisions. I point out that it has been held that an agency is not required to waive fees, even if the applicant is an indigent inmate [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Second, a request made under the Freedom of Information Law 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. While I believe that the recipients of your requests should have responded or forwarded the requests to the records access officer, it is suggested that you resubmit your request to the records access officer. I believe that such a request may be made to Ruby Ryles, Records Access Officer, New York City Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

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

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-7536

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

January 22, 1993

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, unless otherwise indicated.

Dear Mr. Kane:

I have received your letter of January 6. You asked for an advisory opinion concerning a situation in which Johnstown City officials have refused to accept your requests made under the Freedom of Information Law.

In this regard, as a general matter, I believe that agencies must accept requests and respond by granting access to records, denying access in writing, acknowledging the receipt of a request and estimating the date when the records sought will be granted or denied, or by indicating that they do not maintain the records sought. The only instances in which it has been advised that agencies need not respond have involved situations in which an individual has made repeated requests for the same records. In those cases, it has been suggested that an agency state in writing that it will not respond to such requests, unless circumstances have changed requiring a different response, or a request involves material not previously sought.

I believe that I discussed the subject matter of the request at issue with you and officials of the City of Johnstown in relation to an earlier request for the same records. At that time, you and I were informed that the records sought did not exist. I would conjecture that the refusal to respond to your recent request was based upon a similar finding. Nevertheless, if that is so, in my view, City officials should have indicated that the records sought do not exist.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ms. Entelisano, Health Department
Mayor, City of Johnstown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7537

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

January 22, 1993

Mr. Daniel Miller
91-B-2153
Ogdensburg Correctional Facility
One Correction Way
Ogdensburg, NY 13669-2288

The staff of the Committee on Open 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 January 8. You have asked whether an agency may require that payment for copies of records be made before copies are made available.

In this regard, it has been held judicially that an agency may require payment in advance of the preparation of copies of records (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982), and this office has so advised on many occasions.

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-7538

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

January 22, 1993

Ms. Cindy Ann Mullen
[redacted]

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

Dear Ms. Mullen:

I have received your letter of January 6 in which you sought assistance in obtaining records.

Your inquiry involves your right to review the "trial testimony" of a co-defendant of your husband "either with his police statement upon arrest or any testimony given on events for the night the incident occurred." The incident was a murder for which your husband was later convicted. Two co-defendants were convicted of lesser crimes.

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 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) of the Law defines "judiciary" to mean:

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

Based on the foregoing, police departments or offices of district attorneys, for example, would constitute agencies required to

comply with the Freedom of Information Law. The courts and court records, however, would be outside the coverage of the Freedom of Information Law.

That is not to suggest that court records are not available to the public, for there are other provisions of law that may require the disclosure of court records. For instance, §255 of the Judiciary Law states generally that a clerk of a court must search for and make available records in his custody. Insofar as your inquiry involves court records, i.e., testimony given during a public judicial proceeding, it is suggested that you seek such records from the clerk of the appropriate court. A request should include sufficient detail to enable court personnel to locate the records in which you are interested.

With respect to agency records, such as records maintained by a police department or office of a district attorney, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

It would appear that the primary basis for withholding statements of co-defendants would be §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."

As such,the capacity to deny access is limited to the circumstances involving harmful effects of disclosure described in subparagraphs (i) through (iv). 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 subparagraph (iii) of §87(2)(e). To that extent, records or portions of records might justifiably be withheld.

I point out that when a denial is challenged in court, the agency denying access has the burden of proving that the records withheld in fact fall within one or more of the grounds for denial [see Freedom of Information Law, §89(4)(b)], and the Court of Appeals, the State's highest court, has held that "Only where the material requested falls squarely within the ambit of one of [the] statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]. In one decision, it was held that since a police department did not show "that anyone was promised anonymity in exchange for his cooperation in the investigation so as to qualify as a 'confidential source'", §87(2)(e)(iii) could not properly be asserted as a basis for a denial of access [Cornell University v. City of New York Police Department, 153 AD 2d 515, 517 (1989)].

It is also noted that in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

Lastly, in terms of procedure, each agency subject to the Freedom of Information Law is required to designate a "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and a request should be directed to the records access officer at the agency that maintains the records sought. Further, §89(3) of the Freedom of Information Law requires that an applicant for records must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate and identify the records.

Enclosed for your review are copies of the Freedom of Information Law and "Your Right to Know", which describes that statute and includes a sample letter of request.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7539

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

January 22, 1993

Ms. Susan R. Rosenberg
Assistant Commissioner
The City of New York
Police Department
New York, N.Y. 10038

Dear Ms. Rosenberg:

I appreciate the routine receipt of determinations that you render following appeals made pursuant to the Freedom of Information Law.

In the case of a recent appeal made by Mr. Cornelius Mahoney, you upheld a denial of access to "complaint follow-up reports (DD5's) and enclosed a copy of the decision rendered in Scott v. Slade [577 NYS 2d 861, Ad 2d (1992)], which affirmed a decision upholding a denial of a request for a DD-5. While the decision might have been correct in that instance, another decision rendered by same court reached a different conclusion following an in camera inspection. In Mitchell v. Slade, it was found that:

> "[t]he Motion Court, after reviewing the documents in camera, declined to dismiss the petition and held that respondent had failed to meet its burden of proving exemption for the redacted DD-5 follow up report. The Motion Court held that the exceptions contained in Public Officers Law §87(2) did not apply in this factual context, citing *Cornell Univ. v. City of N.Y. Police Dept.* (153 Ad 2d 515), and ordered production of the DD-5 with appropriate redaction. On this record, after a careful review of the documents produced to the Motion Court, we are satisfied that the materials are not exempt under the law enforcement exemption (Public Officers Law §87[2][e] or the intra-agency (Public Officers Law §87[2][g])" [173 Ad 2d 226, 227 (1991)].

From my perspective, based upon Mitchell, it would be inappropriate to engage in blanket denials of access to DD-5's in every instance

in which they are requested. Rather, as suggested in that decision, the "factual context", the specific contents of the records, and the effects of their disclosure are the factors that must be considered in determining the extent to which those records may be withheld or, conversely, must be disclosed.

As you are aware, §87(2)(e) 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."

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).

The other basis for denial cited earlier, §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.

Again, I believe that the contents of the records and the effects of disclosure determine rights of access, and that blanket denials of requests of DD-5's would be inappropriate.

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:pb
cc: Cornelius A. Mahoney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7540

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

January 27, 1993

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

I have received your letter of January 8 in which you raised an issue involving rights of access to a record.

In brief, in response to a request for a copy of a letter sent by a district attorney to the Parole Board concerning your release, you were informed that the letter consists of "privileged information". You questioned your right to obtain the letter under the Freedom of Information Law.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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). 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, unless a different ground for denial applies.

A letter sent to the Parole Board by a district attorney would constitute inter-agency material. Further, assuming that such letter consists of the district attorney's opinion or recommendation concerning your release, I believe that it could be withheld under §87(2)(g).

Lastly, when a request is denied, the denial may be appealed pursuant to §89(4)(a) of the Freedom of Information Law, which state in relevant part that:

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

I believe that 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7541

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

January 29, 1993

Mr. Peter J. Zwerlein
[redacted]

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

Dear Mr. Zwerlein:

I have received your letter of January 12. You have asked whether volunteer fire companies, which are generally organized as not-for-profit corporations, are required to comply with the Freedom of Information Law, and if so, what their obligations are under that statute.

In this regard, I offer the following comments.

It is noted initially 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.

More recently, another decision confirmed in an expansive manner that volunteer fire companies are subject to the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the court stated that:

"Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:

> '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having, by law, control over the prevention of extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'

"These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiff's contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.

"It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).

"This Court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

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, when records are accessible under the Law, it has been

held that they must be made equally available to any person, without regard to one's status or interest [see Farbman v. New York City, 62 NY 2d 75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976)].

Third, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency must designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests, and requests should be directed to the records access officer at the agency that maintains the records. Section 89(3) of the Law enables an agency to require that a request be made in writing. That provision also requires that an applicant "reasonably describe" the records sought. Therefore, a request should provide sufficient detail to enable agency officials to locate and identify records.

Lastly, the Freedom of Information Law provides direction concerning the time 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)].

Enclosed are copies of the Freedom of Information Law and "Your Right to Know", which describes the Law and includes a sample request letter.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7542

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

January 29, 1993

Mr. Samuel Jackson
91-R-3715
Great Meadow Correctional Facility
P.O. 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. Jackson:

I have received your letter of January 6, which reached this office on January 13.

According to your letter and the correspondence attached to it, having requested records from the Town of Warwick, you were informed that copies of six pages would be disclosed upon payment of a fee of $5.00 per page for a total of $30.00. You have asked for assistance in seeking a waiver of the fee.

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law pertaining to the waiver of fees for copies, and it has been held that an agency is not required to waive fees even when the applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Second, however, it appears that a fee of five dollars per photocopy is inconsistent with the Freedom of Information Law. 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 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.

I know of no statute that would authorize the Town of Warwick to charge in excess of twenty-five cents per photocopy. Consequently, I believe that the Town could properly charge a maximum of $1.50 for photocopies of six pages of documents, so long as those documents do not exceed nine by fourteen inches.

A copy of this response 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: Karen S. Lavinski, Town Clerk and Records Management Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7543

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

February 1, 1993

Mr. Kelvin Dove
88-A-9997
Wende Corr. Fac.
P.O. Box 1187
Alden, N.Y. 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. Dove:

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

According to your letter, during your trial, the complainant was charged with illegal possession of a weapon, and she was also charged in a federal indictment. You wrote, however, that she served no time, and it is your view that "she received a favor and deal from the state and Fed's for her testimony". You have raised the following questions concerning the foregoing:

> "1. How can I go about receiving a copy of her plea and sentencing minutes from the State and Fed's?
>
> 2. Am I entitled to her plea and sentence minutes?
>
> 3. What information can I ask for that would reveal if a deal was made? Who can I write? And at what addresses?"

In this regard, I offer the following comments.

First, on the basis of the facts that you provided, it appears that the information sought may be in possession of federal as well as state or local agencies or courts. Here I point out that the New York Freedom of Information Law pertains to records maintained by agencies of state and local government in New York. Separate from the New York Freedom of Information Law is the federal Freedom

of Information Act (5 U.S.C. 552), which applies to federal agencies. It is also noted that neither the State nor the federal freedom of information statutes applies to court records. This is not to suggest that court records are not accessible, for often other provisions of law, both state and federal, may require the disclosure of court records. In those instances, requests should be directed to the clerks of the courts in which the proceedings were conducted. Any such requests should include sufficient detail to enable court personnel to locate the records.

Second, it appears that you have assumed that the complainant was convicted following an agreement to plead guilty to a lesser crime. If that did not occur, and if the charges were dismissed in her favor, any such state charges and the records relating to them would likely be sealed and confidential pursuant to §160.50 of the Criminal Procedure.

Third, assuming that she did plead guilty, I believe that the records reflective of her plea and sentencing minutes would be maintained by the court or courts in which she might have been sentenced. Again, a request for those records should be directed to the clerk of the appropriate court or courts.

With respect to records involving a "deal", on the basis of your correspondence, it is unclear with whom such a deal might have been made. It would appear that such an arrangement might have been made with the Nassau County District Attorney and or the United States Attorney for the Eastern District of New York.

To seek records from an agency subject to the New York Freedom of Information Law, a request should be made to the agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests. In the case of a federal agency, a request should be made to its freedom of information officer. Both the federal and state laws require that an applicant "reasonably describe" the records sought. Therefore, a request must include adequate detail to enable agency staff to locate and identify the records.

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. Consequently, if records containing the information sought do not exist, an agency would not be obliged to prepare records on your behalf.

Lastly, although the Freedom of Information Law provides broad rights of access, it is noted that §87(2)(e) 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 investigation techniques or procedures, except routine techniques and procedures."

In addition, §87(2)(f) permits an agency to withhold records when disclosure "would endanger the life or safety of any person". It is possible that §87(2)(e)(iii) or (f) would be applicable under the State Freedom of Information Law, or that an equivalent basis for denial might apply under the federal Act.

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 7544

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

February 1, 1993

Michael J. Skoney
[redacted]

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

Dear Mr. Skoney:

As you are aware, your letter of January 6 addressed to Comptroller Regan 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, several years ago an employee of the Tonawanda School District filed complaints with the State Division of Human Rights against officials of the District. You wrote that there were findings of probable cause, and that the Board of Education settled the claims and "paid a substantial amount of money to the claimant". You added that "[t]he School Board claims it cannot disclose the amount of public money paid to the claimant because it was 'ordered' by a State Division of Human Rights Hearing Officer to keep the terms secret", but that the terms of the settlement specifically provide "they shall be made public as required by law."

In this regard, I offer the following comments.

First, a recent judicial decision dealt with a somewhat related situation. In Paul Smith's College v. Cuomo [589 NYS 2d 106, ___Ad___(1992)], the facts involved a complaint alleging that a former employee of the College was a victim of age discrimination. Prior to a hearing before the State Division of Human Rights, the College entered into a stipulation of settlement with the complainant in order "to eliminate any negative publicity resulting from a public hearing on the allegations" (id., 106, 107). The order issued by the Commissioner of Human Rights following the stipulation provided for confidentiality, the withdrawal of charges and a discontinance of the proceeding. Nevertheless, thereafter the Division of Human Rights issued a

press release describing the allegations, disclosing that the matter had been settled and indicating certain aspects of the terms of the settlement. The College then brought a proceeding against the Division concerning the disclosure, and the Court found that the disclosure was "both arbitrary and capricious and an abuse of discretion serving no function but to rob plaintiff [the College] of the benefit of its settlement bargain" (id., 107). Nevertheless, the Court found that the Division would not be prohibited from "further disclosure of the settlement stipulation pursuant to requests made under the Public Officers Law article 6"(id.), which is the Freedom of Information Law.

Second, therefore, I believe that the issue raised in your inquiry involves the extent to which the Freedom of Information Law requires that the terms of the settlement 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.

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 Will, 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, particularly since the identities of those involved are known, it is my view that the terms of the settlement would result in a permissible rather than an unwarranted invasion of personal privacy, except to the extent that disclosure involves intimate personal details in the nature, for example, of unsubstantiated allegations.

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. 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], except to the extent that a different ground for denial applies.

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, at the very least, that the settlement agreement in question be disclosed insofar as it indicates terms involving the payment of public monies.

I hope that 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, Tonawanda City School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7545

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

February 1, 1993

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 letters of January 13, both of which pertain to requests for records directed to the New York City Department of Personnel.

As I understand the matter, by way of background, in March of 1990 you requested an "MPD's" (Management Position Descriptions) regarding employees of the Office of Management and Budget, the Financial Information Services Agency, and the Office of the Actuary for fiscal years 1976 to 1990. Recently you requested the same kind of records concerning the Office of Municipal Labor Relations. Nevertheless, in response to an appeal, you were informed by Denise Washington, Deputy General Counsel of the Department of Personnel, that your appeal would be denied because the information sought had been previously made available to you.

If indeed the records sought had been previously disclosed, I would agree that a request and appeal could be denied. However, it appears there might have been confusion concerning your recent request, for it involved records pertaining to an agency different from those that were the subject of your request in 1990. As such, your recent request should, in my view, have been treated as a new request. Further, I believe that the records sought in that request should be disclosed, for none of the grounds for denial appearing in §87(2) of the Freedom of Information Law would be applicable.

In an effort to assist you, a copy of this response will be forwarded to Ms. Washington.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Denise Washington, Deputy General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7546

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

February 2, 1993

Mr. Wallace S. Nolen
Paralegal & Recovery Services, Inc.
P.O. Box 1378
Pleasant Valley, NY 12569-1378

The staff of the Committee on Open 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 13 in which you sought an advisory opinion concerning requests for records directed to the Town of Lloyd.

The first issue involves a request for the payroll record required to be prepared pursuant to §87(3) of the Freedom of Information Law. That provision states that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

It appears to be your contention that the record required to be maintained must include reference to persons appointed by and who serve as "volunteers" on various Town created entities, such as the Planning Board, the Zoning Board of Appeals, the Recreation Committee, and the Environmental Commission and Beautification Committee. Your correspondence indicates that your contention is based in part on the definition of "employee" in the Labor Law.

In this regard, the Labor Law includes reference to at least six definitions of "employee". From my perspective, although I believe that the payroll record in question must refer to both full time and part time employees, those who are not compensated and who serve essentially as volunteers need not, in my view, be identified in the list required to be maintained in the record envisioned by §87(3)(b) of the Freedom of Information Law.

The other issue pertains to a denial of a request for "summonses, applications, incident reports, complaints, etc. relating to Donna and Joseph DiBlanca individually and d/b/a Hudson Valley Parking Management, Allan Herring, and/or any employee of Hudson Valley Parking Management." The correspondence indicates that the aforementioned individuals and firm are involved in a towing business in the Town of Lloyd. Although you were initially informed that the records would be made available, you wrote that the request was denied "because there is an investigation", which was commenced on the basis of information that you provided.

Here 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. I am unaware of the contents of the records sought, the effects of their disclosure, or the status of the investigation. However, the following paragraphs will review the grounds for denial that may be relevant.

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. I am unaware of whether the records sought include criminal charges that might have been dismissed. Insofar as the request may include records relating to such charges, I believe that they would be confidential.

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, an application for a license or permit would have been prepared or received in the ordinary course of business. Those kinds of records would have been prepared independent of the investigation, and I do not believe that §87(2)(e) could be asserted to withhold them. Similarly, 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, the Town 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.

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)]. For instance, insofar as records identify complainants or witnesses, disclosure, depending upon the circumstances, might result in an unwarranted invasion of personal privacy.

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.

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).

Lastly, it is possible that some of the records sought relate to judicial proceedings. In this regard, although the courts and court records are not subject to the Freedom of Information Law, other statutes often provide rights of access to court records (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a). Further, if a court record is available, I believe that a copy of the same record maintained by an agency subject to the Freedom of Information Law would be available from that agency.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rosaria Peplow, Town Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7547

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

February 2, 1993

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 January 13 concerning the fees for copies established by various law enforcement agencies.

You raised the issue initially concerning a different agency, and in an opinion rendered on October 14, it was advised, in brief, that an agency may charge a maximum of twenty-five cents per photocopy for reproducing records up to nine by fourteen inches, unless a statute other than the Freedom of Information Law authorizes the assessment of a different fee.

Among the agencies that you identified in your recent letter, it appears that only the State Police may charge the fees to which you referred. I believe that a provision included in an appropriations bill permits the State Police to charge $15.00 for a copy of a police report. In the cases of the other agencies that you identified, I am unaware of any statute that would authorize the assessment of fees above those prescribed by the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7548

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

February 2, 1993

Mr. Edwin Garcia
92-A-9233
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. Garcia:

I have received your letter of January 10.

You wrote that you are a former state trooper, and that, following an investigation by the State Police, you were convicted of armed robbery. You have sought advice concerning your ability to gain access to your personnel file.

In this regard, I offer the following comments.

First, a request should be directed to the "records access officer" for the Division of State Police. The records access officer has the duty of coordinating the 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 staff to locate and identify the records in which you are interested.

Third, I am unaware of the contents of your personnel file. However, 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.

Enclosed for your review are copies of the Freedom of Information Law and "Your Right to Know", which describes that statute and includes a sample letter of request.

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-7549

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

February 3, 1993

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 January 19, as well as the correspondence attached to it.

As "Freedom of Information Officer for the State", you asked that I review your letter of request directed to the New York City Board of Education on March 24, 1992 and offer recommendations concerning your rights under the Freedom of Information Law. Although the letter to which you referred was not included among the materials that you sent, I have reviewed the remaining documentation, including responses to the request rendered by Board officials.

It is noted at the outset that the primary function of this office involves providing advice concerning the Freedom of Information Law. The Committee cannot enforce the law or compel an agency to grant or deny access to records.

While the response of December 2 indicates that some of the records sought were disclosed, in several instances, it was indicated that the requested records do not exist. In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no list of attendance teachers seeking appointments who were present at a particular location on a certain date, the Board would not be required to create such a list on your behalf. Similarly, although the Freedom of Information Law requires agencies to respond to requests for existing records and disclose those records in accordance with its provisions, that statute is not a vehicle that requires agencies to provide information by responding to questions. Certainly agency

officials may offer responses to questions. However, the Freedom of Information Law does not require that they do so. Rather than requesting lists that may not exist or seeking information by raising questions, it is suggested that you request existing records.

One area of the response involved records pertaining to complaints made to the Board's Inspector General regarding an employee of the Board. Although I am unaware of the outcome of any such investigation, 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.

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. However, factual information would in my view be available, except to the extent that it falls within a different ground for denial. Findings and conclusions may be available when they constitute final agency determinations.

Lastly, you questioned a portion of a response of December 18 indicating that "some documents that are not accessible under the Freedom of Information Act [sic] may be generated for purposes of litigation." In this regard, 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. Similarly, §3101(c) exempts attorney work product from disclosure. However, when records were prepared or acquired in the ordinary course of business, rather than for any purpose relating to litigation, I do

not believe that either §87(2)(a) of the Freedom of Information Law or §3101(c) or (d) of the Civil Practice Law and Rules would apply. 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce Gelbard, Secretary
Ruth Bernstein, Deputy Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7550

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

February 3, 1993

Mr. Daryl Lee Adams
90-T-3671
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. Adams:

I have received your letter of January 18.

According to your letter, you submitted a request for records to the Office of the Albany County District Attorney on December 28. As of the date of your letter, you had received neither a response nor an acknowledgement of the receipt of your request. You asked that this office "take immediate steps" to attempt to gain compliance.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office cannot compel an agency to comply with the Law or grant or deny access to records. However, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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: Records Access Officer, Office of the District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7551

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

February 3, 1993

Mr. Walter Harris
80-B-1974
Attica Correctional Facility
Attica, NY 14011-0149

Dear Mr. Harris:

I have received your letter of January 27. Although it is addressed to the Committee on Open Government, you asked that the Department of State provide "a copy of the list of all the licenses, that are issued by New York State on data base."

In this regard, the Committee on Open Government, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law. This office does not maintain custody or control of records generally, such as license records.

I point out, too, that many agencies of State government engage in licensing activities, including the Department of State, the Department of Motor Vehicles and the Department of Education. Moreover, there is no single agency that maintains records pertaining to all licenses or licensees.

Further, as you may be aware, §87(1)(b)(iii) of the Freedom of Information Law authorizes agencies to charge for copies of records. Unless a different statute applies, an agency may charge up to twenty-five cents per photocopy. In the case of records that cannot be photocopied, such as computer tapes or disks, agencies may charge on the basis of the actual cost of reproduction, unless a statute other than the Freedom of Information Law authorizes the assessment of a different fee.

Requests should generally 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 the agency's response to requests. Finally, §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 personnel to locate 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-7552

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

February 3, 1993

Mr. Betty A. Loriz
[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. Loriz:

I have received your letter of January 17 and the materials attached to it.

The materials consist of two statements of policy adopted by the Liberty Central School District. The first, Policy 3300 states generally that access to District records shall be conferred in a manner consistent with the Freedom of Information Law and the regulations promulgated by the Committee on Open Government. The second, Policy 3310, is entitled "Confidentiality of Computerized Information" and states that:

> "The development of centralized computer banks of educational data gives rise to the question of the maintenance of confidentiality of such data. There are legitimate concerns that central files of information and other data be maintained at the highest level of security. The safeguarding of the data from inappropriate use is essential to the success of the district's operation.
>
> "Therefore, it shall be the policy of the District to release computerized data only to authorized personnel of the school District to which the data belong or to others as directed by the Superintendent.
>
> "Furthermore, such information shall be treated as confidential data by all school District employees. It shall be a violation of the district's policy to release

> computerized data to any unauthorized person or agency. Any employee who releases or otherwise makes improper use of such computerized data shall be subject to disciplinary action."

You have asked whether it is "proper and legal" for the District "to deny the public access to computerized information." 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 §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, computerized information maintained by an agency is subject to the requirements of the Freedom of Information Law in a manner analogous to traditional paper 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: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7553

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

February 3, 1993

Mr. Abraham Friedman
[redacted]

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

Dear Mr. Friedman:

I have received your letter of January 20. You raised several issues relating to your efforts in obtaining records from the New York City Departments of Buildings, Law and Investigation.

One issue pertains to the effect of litigation in which you are involved on your rights under the Freedom of Information Law. In this regard, 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.

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. When the records sought were prepared or acquired in the ordinary course of business, rather than for any purpose relating to litigation, I do not believe that either §87(2)(a) or §3101(d) of the Civil Practice Law and Rules would apply. 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.

A second issue appears to involve delays in responding to requests. Here I point out that 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)].

Another issue appears to involve the existence of records and the ability of agency personnel to locate records. In this regard, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, insofar as requested records do not exist, the Freedom of Information Law would not apply. That provision also states that an applicant must "reasonably describe" the records sought. As such, a request should include sufficient detail to enable agency officials to locate and identify the records.

Lastly, you referred to fees for copies of records. 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 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carol Slater, General Counsel
Lawrence Levy, Records Access Officer
Paul Silverman, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7554

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

February 4, 1993

Mr. Richard Winkler
81-B-2146
Sing Sing Corr. Fac.
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. Winkler:

I have received your letter of January 18 in which you sought assistance concerning a request made under the Freedom of Information Law.

According to your letter, you recently requested various records from the police department that arrested you regarding a witness who testified against you at your trial. The request was denied based on a claim that the records were made available to your trial counsel. It is your view that the records should be available pursuant to a "Rosario claim". Further, although you included a request for the name and address of the person to whom an appeal could be made, the agency failed to provide that information.

In this regard, I offer the following comments.

First, your rights of access to records as a defendant under the discovery provisions of the Criminal Procedure Law are separate from rights conferred by the Freedom of Information Law. Discovery rights are based on one's status as a defendant or litigant. The Freedom of Information Law does not generally distinguish among applicants, and rights conferred by that statute are conferred upon applicants for records as members of the public.

Second, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)] appears to be relevant to the situation that you described. In Moore, it was found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

With respect to access to the kinds of records in which you are interested, the Court in Moore also noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

Lastly, as you may be aware, when a request for records is denied, a 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 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.

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-7555

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

February 4, 1993

Mr. Kenneth Rogers
90-T-5500
Wallkill Correctional Facility
Box G
Wallkill, NY 12589-0286

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

Dear Mr. Rogers:

I have received your letter of January 19 in which you raised questions relating to access to records.

First, you asked "what are all of the exact names of records/documents that are accessible & can be readily attained by a state inmate..." While I am unaware of all of the names or kinds of records that may readily be accessible, I have enclosed a copy of the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law. Various provisions of the regulations describe records which, in my view, could be "readily attained" by an inmate.

Second, you asked whether you may obtain records indicating why you were "denied C.A.S.A.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 likely relevance 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. Therefore, opinions prepared by staff prior to a determination could in my view be withheld.

Third, you asked whether you can use the Freedom of Information Law "as a tool to restrict counsels to a time limit in answering appeals/letters/reminders, etc..." Insofar as you are referring to letters of request or appeals made under the Freedom of Information Law, that statute provides direction concerning the time within 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)].

Lastly, you asked "what is a non-specific cancellation." I am not familiar with that term.

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-7556

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

February 4, 1993

Mr. Angelo Mendoza
91-A-3546
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929

Dear Mr. Mendoza:

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

You referred to the acknowledgement on January 20 by the New York City Police Department of the receipt of a request made on January 13 in which it was indicated that a determination concerning the request would be made on or about March 2. Based upon that response, citing 5 U.S.C. 552a, you appealed to this office claiming that your request was denied.

In this regard, I offer the following comments.

First, 5 U.S.C. 552a is the federal Privacy Act. That statute applies to federal agencies; it does not apply to entities of state or local government, such as the New York City Police Department. The New York Freedom of Information Law, however, does apply.

Second, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee cannot require an agency to grant or deny access to records, and it has no power to determine appeals. The provision pertaining to the right to appeal a denial, §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."

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

Lastly, it appears that the Department's response acknowledging the receipt of your request was appropriate, for §89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and statement of the approximate date when such request will be granted or denied..."

I hope that I have been of some assistance and that the foregoing serves to clarify your understanding of the role of this office, as well as the provisions of the Freedom of Information Law.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. William J. Matusiak, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOIL-AO-7559

February 5, 1993

Mr. Arnis Zilgme, Esq.
Town Attorney, Town of Colonie
Memorial Town Hall
P.O. Box 508
Newtonville, N.Y. 12128

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

Dear Mr. Zilgme:

I appreciate receiving a copy of your determination of an appeal rendered on January 22 under the Freedom of Information Law concerning a request for assessment records.

The record sought, an "RPS Assessment File", was denied because it contains information derived form real property transfer reports, and on the ground that the records "contain lists of names and addresses which would be used by the applicant for commercial purposes" and, therefore, may be withheld as an unwarranted invasion of personal privacy. While I agree with your determination insofar as it pertains to real property transfer data, I offer the following comments.

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

As you may be aware, §574(5) of the Real Property Tax Law states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection of copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced above are usually "EA 5217" forms, which include the selling price of a parcel when real property is transferred.

To give effect to §574(5) of the Real Property Tax Law, I believe that information derived from EA 5217 forms that is transferred to other records should be considered confidential to the same extent as that statute confers confidentiality with respect to the forms [see Property Valuation Analysts v. Williams, 164 Ad 2d 131 (1990)]. Any different result would, in my opinion, essentially nullify the direction given by §574(5). Further, the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". In this instance, section 574(5) of the Real Property Tax Law, a statute, would exempt the form or reports from disclosure, except as otherwise provided.

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create 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)].

If, for instance, transfer data appears on the same tape or disc as other assessment data that would be public, I believe that the Town would be obliged to disclose the available data, if it has the capacity to do so based upon its existing computer programs. If it is unable to do so, a tape containing both kinds of information could in my view be withheld. Alternatively, the data could be printed out, and the confidential portions could be deleted manually.

Third, it has been held that assessment rolls, whether kept on paper or electronically, are accessible, irrespective of their intended use.

With respect to the privacy provisions of 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, unless it contains confidential data in conjunction with the conditions described earlier that would restrict access.

If you would like to discuss the matter, please feel free to contact me. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Rosemary Roberts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERN

FOIL-AO-7558 52

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

February 5, 1993

Mr. Rafael Robles
L-H-2-44/88-A-8275
C.C.F. 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. Robles:

I have received your letter of January 18.

According to your letter, you requested records from an agency in 1990. The request was denied, you appealed, and the appeal was denied as well. You asked whether you can "still appeal" that denial.

In this regard, after an appeal has been denied, an applicant has exhausted his administrative remedies and may seek a judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. However, the statute of limitations relating to the commencement of such a proceeding is four months from the date of the agency's final determination. As such, you could not seek judicial review of the determination rendered in 1990 following your appeal. It is noted, however, that you would not be barred from seeking records by means of a new request made under the Freedom of Information Law (see Matter of Mitchell, Supreme Court, Nassau County, March 9, 1979). If such a request is denied, you may appeal the denial. If the appeal is also denied, I believe that you may seek judicial review of that denial.

You also wrote that your case was reported in several newspapers, and asked whether you are entitled to gain access to their records under the Freedom of Information Law. Here I point out that the Freedom of Information Law is applicable to agency records. Section 86(3) of that statute defines the term "agency" to mean:

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

Therefore, the Freedom of Information Law would not apply to newspapers or records that they maintain.

Lastly, as you 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7558

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

February 5, 1993

Mr. Ronald Goldstock
Deputy Attorney General
Statewide Organized Crime Task Force
143 Grand Street
White Plains, NY 10601

Dear Mr. Goldstock:

I have received a copy of a letter of January 22 addressed to you by Jeremy Travis, Deputy Commissioner of the New York City Police Department, regarding your disclosure of a so-called "DD-5" prepared by the Department to the New York Times.

In brief, Mr. Travis wrote that the Police Department has taken the position, based upon a judicial decision, that DD-5's "are not disclosable" under the Freedom of Information Law, for they consist of "intra-agency materials which do not contain final agency policy or determinations, and therefore are exempt from disclosure." Further, he asked that your office "adopt the same legal position."

From my perspective, the position taken by the Department, to engage in blanket denials of DD-5's generally, is overly simplistic and is inappropriate as a matter of law.

The case that Mr. Travis cited, Scott v. Slade [577 NYS 2d 861, Ad 2d (1992)], affirmed a decision upholding a denial of a request for a DD-5. While that decision might have been correct in that instance, another decision rendered by the same court, the Appellate Division, First Department, reached a different conclusion following an in camera inspection. In Mitchell v. Slade, it was found that:

> "[t]he Motion Court, after reviewing the documents in camera, declined to dismiss the petition and held that respondent had failed to meet its burden of proving exemption for the redacted DD-5 follow up report. The Motion Court held that the exceptions contained in Public Officers Law §87(2) did not apply in this factual context, citing

> *Cornell Univ. v. City of N.Y. Police Dept.* (153 Ad 2d 515), and ordered production of the DD-5 with appropriate redaction. On this record, after a careful review of the documents produced to the Motion Court, we are satisfied that the materials are not exempt under the law enforcement exemption (Public Officers Law §87[2][e] or the intra-agency (Public Officers Law §87[2][g])" [173 Ad 2d 226, 227 (1991)].

In my opinion, based upon Mitchell, it would be inappropriate to engage in denials of access to DD-5's in every instance in which they are requested. Rather, as suggested in that decision, the "factual context", the specific contents of the records, and the effects of their disclosure are the factors that must be considered in determining the extent to which those records may be withheld or, conversely, must be disclosed.

As you are aware, §87(2)(e) 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."

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).

The other basis for denial, which was cited by Mr. Travis, §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.

Again, I believe that the contents of the records and the effects of disclosure determine rights of access, and that a policy of denying requests for DD-5's in every instance is inconsistent with the requirements of the Freedom of Information Law.

Moreover, even when an agency has the authority to withhold records in accordance with the grounds for denial, it is not required to do so. The introductory language of §87(2) of the Freedom of Information Law indicates that an agency "may" withhold records falling within the scope of the exemptions that follow and, as stated by the Court of Appeals, "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeremy Travis, Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7569

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

February 5, 1993

Mr. Michael Jon Spencer
Executive Director
Hospital Audiences, Inc.
220 West 42nd Street, 13th Floor
New York, NY 10036

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

Dear Mr. Spencer:

I have received your letter of January 21 and the materials attached to it. You have sought assistance in obtaining records from the New York State Urban Development Corporation ("UDC").

By way of background, you wrote that your organization responded to "an RFU (REQUEST FOR USERS)" issued by the UDC in 1988, and that four years later, you were informed that your proposal and forty-three others were rejected. Although your request for a list of applicants was granted, in response to a second request for additional information concerning your response to the RFU, you were informed that UDC had "nothing in the files". You wrote that the "missing link here is a group called The New 42nd St., previously called the 42nd Street Entertainment Corporation (ETC) set up as an agent of UDC to help carry out UDC's policy" and that the group "received all proposals after the UDC personnel evaluated this for over a year and a half." Further, in response to your request to "ETC/New 42", you were informed that it was "an independent entity" and that it is "apparently accountable to no one."

Attached to your letter is a request for users issued by that entity. The first sentence of that document states that:

> "The 42nd Street Entertainment Corporation, ('the Entertainment Corporation') at the request of the New York State Urban Development Project Inc. ('42nd Street D.P.'), and in consultation with the New York City

> Public Development Corporation ('PDC'), is soliciting proposals from potential users..."

The document also states that: "The Entertainment Corporation is conceived of as an independent, self-perpetuating, not-for-profit entity with a Board whose members are appointed initially by the Governor and the Mayor", and that "proposals will be evaluated by the Entertainment Corporation, which will make recommendations to UDC and the City" based on criteria described in the document.

It is your view that "the ETC/New 42 is acting as an agent for the UDC and is therefore accountable to supplying the requested information."

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."

UDC is in my view clearly an agency, for it is a governmental entity that performs a governmental function for the state. The status of "ETC/New 42" is unclear. Although it appears to be intended to be an "independent", not-for-profit entity, its board apparently consisted or continues to consist of members appointed by the Governor and the Mayor of New York City. Its status, however, is in my opinion not necessarily determinative of the matter.

Second, similarly, the physical possession by the UDC of the records sought, or the absence thereof, is not necessarily determinative of rights of access. As indicated earlier, the Freedom of Information Law pertains to agency records. 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 records sought were produced for an agency, i.e., the UDC, I believe that they would fall within the coverage of the Freedom of Information Law, even if they are in the physical possession of a different entity.

I direct your attention to the judicial interpretation of the Freedom of Information Law concerning records prepared by outside consultants for 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 expertise or advice. Even though

consultants or consulting firms may be private entities rather than governmental entities, it has been found that the records prepared by those entities or firms for agencies 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 UDC must give effect to the Law so as to "extend public accountability wherever and whenever feasible."

If the not-for-profit entity produced records for UDC or maintains records for or on its behalf, UDC should in my opinion direct that agency to release records to the extent required by the Freedom of Information Law, or, alternatively, UDC could obtain the records sought or copies thereof for the purpose of reviewing them and determining the extent to which the Freedom of Information Law requires disclosure.

Since you characterized the ETC/New 42 as an "agent", I point out that I am not an expert with respect to the use of that term or the functions, duties of agents and the relationships they have with their principals. Consequently, in an effort to provide useful advice, I reviewed New York Jurisprudence, 2nd, for guidance. Under the subject entitled "Agency", §1 states in relevant part that:

> "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. The word 'agency' imports the contemporaneous existence of a principal; there is no agency unless one is acting for and on behalf of another.
>
> "An agency is a person authorized by another to act on his account or under his control. An agent is one who acts for or in the place of another by authority from him. He is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other. He is a substitute or deputy appointed by his principal, with power to do the things which the principal may or can do, and primarily to bring about business relationship between the

> principal and third persons. It is generally understood that a 'manager' is an agent."

On the basis of the materials you forwarded, it appears that ETC/New 42 may have served either in the capacity as an agent of UDC or a consultant to UDC, or both.

Third, assuming that ETC/New 42 is or had been an agent of or consultant to the UDC and that the records at issue are subject to the Freedom of Information Law, the remaining question involves the extent to which the records must be disclosed.

The records in which you are interested include reviews, evaluations, critiques, recommendations and the like prepared by UDC staff, consultants or others designated by UDC concerning your organization's proposal. 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. Recommendations and similar records prepared by UDC staff and its consultants would, as indicated by the Court of Appeals in Xerox Corp. v. Town of Webster, supra, constitute "intra-agency materials". Therefore, those kinds of records would fall within the scope of the provision dealing with those materials, §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. As such, even if the Freedom of Information

Law is applicable, the extent to which the records in which you are interested would be accessible under the Law may be limited.

Lastly, it is questionable in my view whether the UDC, after having had custody of the records at issue, could validly have transferred them to ETC/New 42 or otherwise disposed of the records. Under Article 57 of the Arts and Cultural Affairs Law, it is my understanding that a state agency, such as UDC, cannot dispose of or transfer records from its custody without receiving prior approval from the Commissioner of Education. Unless such approval was obtained by UDC, it is possible that the transfer of records by UDC to ETC/New 42 was inconsistent with legal requirements.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence M. Gerson
Virginia M. Ryan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7561

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

February 8, 1993

Mr. Pete Panse
Wallkill Citizens' Coalition, Inc.
Rd 1 Box 492 Van Duzer Road
Middletown, N.Y. 10940

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

Dear Mr. Panse:

I have received your letter of January 18 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter and the material attached to it, your request for "departmental worksheets used to prepare the 1993 budget" was denied by the Supervisor of the Town of Wallkill on the ground that those records "are intra-agency documents and are exempt".

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 agree that the records in question constitute "intra-agency documents". However, the provision that deals with those kinds of records, 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.

In a case involving similar records, also called "budget worksheets", it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, §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 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 document is a part of the deliberative process is irrelevant in New York State because §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 no apparent necessity for such a limitation" (id. at 449).

Based upon the language of the determination quoted above, which was affirmed by the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible under the Freedom of Information Law.

Further, another decision highlighted that 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 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
Executive Director

RJF:pb
cc: William Cummings, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7562

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

February 8, 1993

Mr. James A. Constantino, Supervisor
Town of Rotterdam
Town Hall
Vinewood Avenue
Rotterdam, N.Y. 12306

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

Dear Mr. Constantino:

I have received your letter of January 21, as well as copies of portions of requests made under the Freedom of Information Law.

The requests involve the "total amount" of costs relating to a variety of expenditures and "breakdowns" of certain areas of expenditures. It is your view that the requests are "unreasonable", and you sought my comments and suggestions concerning how they might best be resolved.

In this regard, as you are aware, 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 breakdowns or totals that have been requested have not be prepared, the Town would not be obliged to prepare new records in order to accommodate an applicant. Similarly, the Freedom of Information Law does not require that agency officials provide information by providing answers to questions. Certainly those officials may answer questions; nevertheless, that is not the function of the Freedom of Information Law. It is suggested that you or your staff indicate that the title of the Freedom of Information Law is somewhat misleading, explaining that it is not a vehicle that requires agency officials to prepare new records by performing research, creating new records or providing information in response to questions, and by further explaining that it is intended to involve requests for existing records.

Further, §89(3) also requires that an applicant must "reasonably describe" the records sought. It has been held that a

request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of the requests that you have received, I must admit to being unfamiliar with the Town's record-keeping systems; whether you have the ability to locate and identify existing records sought in the manner in which they have been requested is unknown to me. It is possible, however, that based upon your filing or indexing mechanisms, certain requests might not have reasonably described the records.

When appropriate to do so, it might be worthwhile to explain to applicants how records are kept in order that they can make requests on the basis of your record-keeping systems, thereby enabling Town officials to readily retrieve or locate records. In addition, applicants might be offered an opportunity to inspect records in order that they may prepare their own breakdowns or totals when the Town does not maintain those kinds of records or figures.

I hope that 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 7563

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

February 9, 1993

Ms. Irma DeHaro Frier
Frier Associates, Inc.
368 W. 46th Street
New York, N.Y. 10036

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

Dear Ms. Frier:

As you are aware your letter of January 22 addressed to Richard Rifkin of the Department of Law has been forwarded to the Committee on Open Government. The Committee is authorized to advise with respect to the Freedom of Information Law. It is noted that there is no state agency empowered to enforce the Freedom of Information Law or compel an agency to grant or deny access to records.

The materials attached to your letter pertain to a request directed to the Port Authority relating to a request for proposals ("RFP"), as well as correspondence, memoranda and similar records concerning the RFP process in a particular case, and records of a RFP evaluation committee.

In this regard, it is emphasized 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 mean:

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

Since the Port Authority is a bi-state entity operating in New York and New Jersey, 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, and it has been held that the Freedom of Information Law does not apply to

a bi-state agency (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 New York Freedom of Information Law.

Assuming that the Port Authority were to give effect to the New York Freedom of Information Law, several points should be made.

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, potentially relevant is §87(2)(c), which enables agencies to 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 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.

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."

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 forms responding to RFP's. 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 §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.

Lastly, internal communications between or among an agency's staff would be subject to §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.

I hope that 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: Karen Eastman
Dorothea Manning

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7564

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

February 10, 1993

Mr. Raymond Campanale
88-A-6177
P.O. Box 500
Elmira, N.Y. 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. Campanale:

I have received your letter of January 21 in which you sought guidance concerning a request made under the Freedom of Information Law.

Having made a request to the New York City Department of Records and Information Services relating to the "building specification" of a particular address in the Bronx, you were directed to make your request to the office of Department of Buildings in the Bronx. Since you received no response, you asked whether the Department of Buildings is subject to the Freedom of Information Law.

In this regard, I offer the following comments.

First, it is clear in my opinion that the Department of Buildings is an agency required to comply with the Freedom of Information Law.

Second, under regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests. In my view, the person in receipt of your request should have responded in accordance with the Freedom of Information Law, contacted the records access officer in order to obtain instructions or forwarded the request to the records access officer. Under the circumstances, it is suggested that you resubmit your request to the records access officer, Mr. Charles Sturcken. His address is New York City Department of Buildings, 60 Hudson Street, New York, N.Y. 10013.

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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Charles Sturcken

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7565

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

February 10, 1993

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 January 24 and the correspondence attached to it. You have sought an advisory opinion concerning a series of delays in response to your requests for records directed to the Town of Newburgh.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agency officials 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7566

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

February 11, 1993

Mr. Charles Millson
81-D-0019
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 Mr. Millson:

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

You have raised the following questions concerning the Freedom of Information Law:

> "1. Can a person designate another person to act as his agent in pursuing a F.O.I.L. request and obtaining documents?
>
> 2. Can a person have access to the District Attorneys' files in pursuing their own F.O.I.L. request as long as they have the permission of the defendant in that action?
>
> 3. As noted in 1 & 2, can a denial by a District Attorney be legal simply because he demands the request be done in a particular way by a particular person?
>
> 4. Can an agency deny a F.O.I.L. request for records known to be in the agencys' possession on the basis that another agency may also have copies of the records being requested?"

In this regard, I offer the following comments.

First, as a general matter, any person may seek records under the Freedom of Information Law. Further, it has been held that when records are accessible under the Freedom of Information Law, they must be made equally available to any person, without regard to one's status or interest [see e.g., Burke v. Yudelson, 51 AD 2d 673 (1976); Farbman v. New York City, 62 NY 2d 75 (1984)]. However, in some circumstances, records may be available under the Freedom of Information Law only to the subject of the records. If, for example, a record pertains to a particular individual, it may be available to that person, but disclosure might constitute "an unwarranted invasion of personal property" [see Freedom of Information Law, §87(2)(b)] if disclosed to others. In such a circumstance, I believe that the subject of a record may authorize another person to seek and obtain the records on his or her behalf. As stated in §89(2)(c), unless a different ground for denial would apply, "disclosure shall not be construed to constitute an unwarranted invasion of personal property...when the person to whom a record pertains consents in writing to disclosure". Therefore, assuming that records would be available to you under the Freedom of Information Law, you could provide written consent to disclose the records to a person acting on your behalf.

Second, with respect to a demand that a request "be done in a particular way", §89(3) of the Freedom of Information Law states in part that an agency must respond to a "written request for a record reasonably described". Therefore, an agency may require that a request be made in writing and that the request must contain sufficient detail to enable agency officials to locate and identify the records sought.

Third, I do not believe that an agency may deny a request for records solely on the basis that another agency possesses copies of the same record. It is noted that §86(4) of the Freedom of Information Law defines the term "record" to mean:

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

Further, §87(2) requires that agencies disclose records to the extent required by law. Therefore, in my view, if a record is "kept, held [or] filed" by an agency, the agency would be obliged to respond to a request for the record by granting or denying access in accordance with §87(2), even though duplicates of the same record may be maintained by another agency. Moreover, in some instances, when copies of records are maintained by two or more agencies, one might have the ability to retrieve the record

quickly; another might have to engage in more significant or time consuming search techniques.

Lastly, as suggested above, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Although I am not familiar with the contents of the records which you are interested, the following paragraphs will review the grounds for denial that may be relevant.

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 §422 of the Social Services Law. However, it appears that you received an order of disclosure regarding the records subject to that statute.

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, in which case, §87(2)(e) would not apply. To the extent that the records in question 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. 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)].

There is no indication in your correspondence that 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.

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 7567

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

February 12, 1993

Mr. Albert Nolan
91-A-2963
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. Nolan:

I have received your letter of January 26 in which you sought assistance in obtaining your trial court minutes.

In this regard, the statute within the scope of the Committee's advisory jurisdiction, 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, §86(1) defines "judiciary" to mean:

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

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

This is not to suggest that court records are not available, for other statutes often grant broad rights of access to those records (see e.g., Judiciary Law, §255). It is suggested that you seek the records in question from the clerk of the court in which your proceeding was conducted, citing an applicable provision of law. Any such request should include sufficient detail to enable court officials to locate 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-A07568

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

February 12, 1993

Mr. Terrance McMahon
895-92-00857 (6L)
1818 Hazen Street
East Elmhurst, N.Y. 11370

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

Dear Mr. McMahon:

I have received your letter of January 27 in which you requested assistance concerning access to records.

You wrote that you are interested in obtaining a copy of a "clemency request" made to the Governor by a member of the news media on behalf of an inmate.

In this regard, I offer the following comments.

First, §5(3) of the Executive Law states that the Governor shall keep "[s]eparate registers containing classified statements of all applications for pardon, commutation or other executive clemency, and his action thereon". In construing that provision, it has been held a register must be maintained and made available "which contains the name of each applicant for a pardon, commutation or other executive clemency" and that the register must "indicate whether the application has been granted or denied, or is still pending" [Rold v. Cuomo, Supreme Court, Albany County, May 31, 1988].

Second, although the curt in Rold described the contents of the register required to maintained and found that it is available under the Freedom of Information Law, the decision specifies that "[t]he issue of precisely what portions of a clemency application may fall within the penumbra of the exceptions to FOIL is beyond the scope of the proceeding." As such, the court did not deal with the issue of rights of access to clemency applications and inferred that such applications could be withheld to the extent that the grounds for denial appearing in paragraphs (a) through (i) of

§87(2) of the Freedom of Information Law could appropriately be asserted.

While I am unfamiliar with the content of the record in question, which was apparently prepared by a member of the news media, it would appear that the most relevant provision would be §87(2)(b) of the Freedom of Information Law. That provision authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Under the circumstances, there may be privacy implications relating to the author of the application, the inmate and perhaps others. Further, there may be other grounds for denial or potential significance.

In short, while I believe that the record in which you are interested is subject to rights conferred by the Freedom of Information Law, one or more of the grounds for denial might properly be asserted to withhold the record or portions thereof.

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-1569

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

February 12, 1993

Mr. Brian Cullen
HC-1
Sloatsburg, N.Y. 10974

The staff of the Committee on Open 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 January 26. Your inquiry concerns your right to obtain "itemized vouchers" concerning payments made to attorneys retained by the Tuxedo Union Free School District. You asked further that I inform the District's business administrator, Joseph Zanetti, of the District's obligations and that I "open the door to sincere freedom of information".

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 enforce the Freedom of Information Law or compel an agency to grant or deny access to records. However, in an effort to provide guidance, a copy of this letter will be sent to Mr. Zanetti.

I point initially that the Freedom of Information Law pertains to existing records. Section 89(3) of the Freedom of Information Law states in part that an agency need not create a record in response to a request. Therefore, if the District does not maintain itemized vouchers, it would not be obliged to prepare new records on your behalf.

Insofar as the kinds of records in which you are interested are maintained by the District, it is noted 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.

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:Joseph Zanetti, Business Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7570

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

February 16, 1993

Mr. Louis A. Daprano
[redacted]

The staff of the Committee 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. Daprano:

I have received your letter of January 28 concerning a denial of access to records by the Division of State Police.

Under separate cover and as required by §89(4)(a) of the Freedom of Information Law, the Division forwarded copies of your appeal and its determination to this office. Your request involved material gathered in the course of an investigation, and it was denied based upon contentions that the records were "compiled for law enforcement purposes and if, disclosed, would reveal criminal investigative techniques and procedures", are "intra-agency materials", and because disclosure would constitute an unwarranted invasion of personal privacy. You wrote, however, that "[t]he reality is that all of the materials in question were also supplied to the District Attorney of Dutchess County and would be available for [your] review and copying had [you] gone to trial", and that "[t]hat in itself seems to negate the rationale used in the denial".

You have asked "what further action" you might take relative to the matter. In this regard, I offer the following comments.

First, while it may be true that, as a defendant in a criminal trial, you might have had access to the records in question, your rights in that context differ from your rights under the Freedom of Information Law. As a defendant in a criminal proceeding, you likely could have obtained the records in their entirety or perhaps in part pursuant to provisions of the Criminal Procedure Law. Your ability to obtain records in that circumstance would have been due to your status as a defendant. Rights granted by the Freedom of Information Law, however, are conferred upon the public generally.

As such, your ability to obtain records under the Freedom of Information Law is as a member of the public. Consequently, as indicated earlier, your rights of access to records may be different as a defendant under the Criminal Procedure Law than as a member of the public under the Freedom of Information Law.

Second, although I am unfamiliar with the contents of the records in question or the effects of their disclosure, the following paragraphs will review the provisions to which the Division referred in its denial.

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 primary basis for withholding in the response, §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 of judicial proceedings...
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

It is emphasized that §87(2)(e)(iv) does not enable agencies to withhold all criminal investigative techniques and procedures, but rather those that are not "routine". 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)].

With respect to intra-agency materials, §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 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.

Section, §87(2)(b) enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be relevant insofar as records identify persons other than yourself, such as witnesses or informants, for example.

Lastly, since your appeal has been denied, if you choose to do so, you could seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. The statute of limitations regarding the initiation of such a proceeding is four months from the date of an agency's final determination.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Francis A. DeFrancesco, Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7571

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

February 16, 1993

Mr. Frederick Patterson
92-B-2591
Mohawk Correctional Facility
6100 School Road 73-B-1
P.O. Box 8451
Rome, N.Y. 13442

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

Dear Mr. Patterson:

I have received your letter of February 1.

You asked initially "under what statute New York State is under for the Freedom of Information Act". The statute in question, the New York Freedom of Information Law, is found in Public Officers Law, Article 6, sections 84 to 90.

Second, you asked whether you can obtain information from a sheriff's department concerning the investigation of a police officer.

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 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. Further, in interpreting section 50-a in a case involving grievances made against correction officers, the Court of Appeals, the state's highest court, found that:

> "Documents pertaining to misconduct or rules violations by correction officers - which could well be used in various ways against the officers - are the very sort of record which, the legislative history reveals, was intended to be kept confidential" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

The Court also found that the purpose of section 50-a "was to prevent release of sensitive personnel records that could be used in litigation for the purposes of harassing or embarrassing correction officers" (id. 193). Since §50-a of the Civil Rights Law also pertains to police officers, it appears that it would serve as a basis for denial in the context of the information provided in your letter.

Lastly, you asked how your wife can obtain copies of receipts for payment at a motel. Her I point out that the Freedom of Information Law applies only to records maintained by governmental entities. It does not apply to records kept by motels or other commercial establishments. Therefore, while the management of a motel could choose to provide copies of receipts, there would be no obligation to do so under the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO 1411
FOIL-AO 7572

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

February 18, 1993

Mr. Charles Siewert
[redacted]

The staff of the Committee 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. Siewert:

Your letter of February 3 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State on which the Secretary serves, is authorized to provide advice concerning the Freedom of Information Law and the Personal Privacy Protection Law. Although we discussed the issue raised in your letter, I would like to offer a written response to your inquiry.

According to your letter, it is the practice of the City of Tonawanda Police Department to release "complaint/arrest information to the local newspaper", which publishes the information. You indicated that the information includes names, ages and home addresses. Further, by means of example, you wrote that if $1,000 was stolen form your home, your complaint, your name and your address would appear in the local newspapers. You have asked whether the practice violates either the Freedom of Information Law or the Personal Privacy Protection Law.

In this regard, I offer the following comments.

First, the Personal Privacy Protection Law is applicable only to records maintained by state agencies; it does not apply to entities of local government.

Second, the Freedom of Information Law is applicable to records maintained by both state and local governmental entities. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or

more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I would agree with your inference that in certain situations, an agency may withhold records or perhaps portions of records when disclosure would constitute "an unwarranted invasion of personal property" [see Freedom of Information Law, §87(2)(b)]. For instance, if a complaint identifies an aged woman who lives alone as the subject of a burglary, I believe that identifying details concerning that individual could be deleted from a record in order to protect against an unwarranted invasion of personal property.

Nevertheless, it is emphasized that even when an agency has the authority to withhold records in accordance with the grounds for denial, it is not required to do so. The introductory language of §87(2) of the Freedom of Information Law indicates that an agency "may" withhold records falling within the scope of the exemptions that follow and, 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 Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7573

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

February 18, 1993

Mr. Julio Figueroa
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. Figueroa:

I have received your letter of January 31 in which you sought assistance in obtaining records from your trial attorney and from the Kings County District Attorney. In brief, you have sought an variety of records relating to your arrest.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, 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."

In view of the foregoing, an office of a district attorney is clearly an agency subject to the Freedom of Information Law. Ordinarily, an attorney or attorney's office would not constitute an agency, and records maintained by an attorney or his or her office fall beyond the coverage 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. 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. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Since you referred to various grand jury related records, it is my view that those records could be withheld if requested under the Freedom of Information Law. 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, "subdivision three" of §190.25 includes specific reference to the district attorney. As such, 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.

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 an 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7574

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

February 19, 1993

Mr. Lester Freundlich
[redacted]

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

Dear Mr. Freundlich:

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

According to the materials, on December 30 you wrote to the freedom of information officer at the New York City Board of Education and requested:

> "Any statistical or factual tabulations or data as to the number of children in New York City's public schools who live in a household with two parents of the same sex, i.e., two male fathers or two female mothers. If you do not have actual numbers, please provide whatever estimates you have."

Having received no response to that request, you appealed on January 26. As of the date of your letter to this office, you had received no response to either the request or the appeal.

In conjunction with the foregoing, you asked that I issue a "ruling" that the Board "is required to: i) acknowledge [your] request; ii) respond to [your] request; and iii) provide [you] with the information requested".

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice pertaining to the Freedom of Information Law. The Committee cannot issue a "ruling" or otherwise compel an agency to comply with the Law.

Second, 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)].

Third, the Freedom of Information Law pertains to existing records, and §89(3) also states in part that an agency need not create a record in response to a request. Therefore, if the statistics or estimates that you requested do not exist or have not been prepared, the Board would not be required to create new records on your behalf. If the Board does not maintain the records sought, I believe that it must respond to your request and so indicate.

Lastly, if the Board does maintain records containing the figures or estimates in which you are interested, 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 section 87(2)(a) through (i) of the Law. Relevant would be §87(2)(g)(i), which states that "statistical or factual tabulations or data" contained within "inter-agency or intra-agency materials" are 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:pb
cc: Ruth Bernstein, Deputy Records Access Officer
Bruce Gelbard, Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7575

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

February 22, 1993

Mr. Victor Santos
82-B-1505
P.O. Box 51
Comstock, NY 12821

Dear Mr. Santos:

I have received your letter of February 15 in which you requested materials concerning the federal Freedom of Information Act and the New York Freedom of Information Law. You wrote that you are having difficulty obtaining records from the Department of Correctional Services and the Division of Parole.

In this regard, the Committee on Open Government is authorized to provide advice concerning the New York Freedom of Information Law. Enclosed are copies of that statute and an explanatory brochure that should be useful to you. It is noted that the federal Freedom of Information Act pertains to records maintained by federal agencies. As such, that law does not apply to agencies to which you referred, and this office does not maintain significant information on the subject.

I point out that 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. With respect to the Department of Correctional Services, its regulations indicate that a request for records kept at a facility may be made to the superintendent or his designee; for records kept at the Department's Albany offices, a request may be made to the Deputy Commissioner for Administration. The records access officer at the Division of Parole is William Altschuller.

Lastly, §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 personnel to locate and identify the records.

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-7576

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

February 22, 1993

Mr. Edwin Russell
[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. Russell:

I have received your letter of February 3, in which you indicated that you have been refused permission to see the membership cards of the Almanzo and Laura Ingalls Wilder Association in Malone.

In this regard, assuming that the association is a private, not-for-profit entity, the general public would not likely have rights of access to its records. I point out that the Freedom of Information Law is applicable 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 or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law pertains to records maintained by entities of state and local government. In short, it does not appear that the Association would be required to disclose the records in which you are interested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7577

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

February 22, 1993

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 February 8 in which you indicated that you have encountered difficulty in attempting to obtain 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

OML-AO-2188
FOIL-AO-7578

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

February 22, 1993

Mr. Robert F. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your letter of February 8 and the materials attached to it.

The issues that you raised relate to requests for records directed to the Town of Greenburgh. One aspect of the request involved minutes of a meeting, and you asked whether there is "a time limit on making minutes available." With respect to the other, the correspondence indicates that the Town Clerk believed that the materials were made available. If that was not so, she suggested that you contact the Building Inspector.

In this regard, I offer the following comments.

First, the Open Meetings Law provides guidance concerning minutes, their contents and the time within which they must 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. It is also clear that minutes need not consist of a verbatim account of all that was said at a meeting, for §106 provides what might be viewed as minimum requirements concerning the contents of minutes. While a clerk or public body may choose to prepare expansive minutes, they must consist only of the kinds of information described in §106.

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 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 are 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.

Second, with regard to the second issue, 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 Town of Greenburgh, 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, §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, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
>
> (4) Upon request for copies of records:
>
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records.

(5) Upon request, certify that a record is a true copy.
(6) Upon failure to locate the records, certify that:

(i) the agency is not the custodian for such records; or
(ii) the records of which the agency is a custodian cannot be found after diligent search."

I hope that I have 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 Tolchin, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7579

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

February 19, 1993

Mr. Darryl Lee
88-A-4283
Auburn Correctional Facility
135 State Street
Auburn, N.Y. 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. Lee:

I have received your letter of February 4 in which you sought assistance concerning the Freedom of Information Law.

You asked initially whether it is possible to obtain an "interpretation" of a complainant's hospital records, as well as typewritten copies of those records. You wrote that you now have copies of the records, but that they are of such poor quality that they are difficult to read.

In this regard, there is nothing in the Freedom of Information Law that would require that agency officials interpret or explain the contents of records. Further, the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency need not create records in response to a request. Therefore, if the records in question do not exist in typewritten form, an agency would not be required to prepare them in that form. If the records have been prepared in typewritten form but cannot be read due to their poor quality, it is suggested that you so explain to the agency that possesses them and request legible copies.

Second, you questioned your right to obtain autopsy reports under the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute. I believe that autopsy reports are exempted from disclosure by

statute and may be withheld from all but a district attorney and the next of kin of the deceased. Court ordered disclosure would in my opinion be required in other instances.

Lastly, you indicated that you have requested an "index of all the [records] that are available under the Freedom of Information Law" from several agencies, but that you have received no response. It appears that you are referring to §87(3) of the Law, which states in relevant part that:

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

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, whether or not they are available. It is suggested that you seek the subject matter list from the "records access officers" at the agencies in question. The records access officer has the duty of coordinating an agency's response to requests.

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- 7580

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

February 24, 1993

Mr. David R. Scrima
[redacted]

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

Dear Mr. Scrima:

I have received your letter of February 11 and the materials attached to it.

In brief, you wrote that you have been involved in a series of proceedings and issues relating to your academic standing as a graduate student at the State University at Albany. You indicated that you would like to obtain copies of the "memos that occurred between the committees that acted on [your] case" and examine your "University, College and Department files", and you have requested an opinion on the matter.

In this regard, from my perspective, the statute governing access to the records in question 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 the State University. In brief, FERPA confers rights of access to "education records" pertaining to a student under the age of eighteen to the parents of the students or to eligible students. An "eligible student" is "student who has reached 18 years of age or is attending an institution of postsecondary education" (34 CFR 99.3), such as yourself. Concurrently, it generally requires that education records be kept confidential, unless the parents or eligible student, as the case may be, 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..." (34 CRF 99.3).

Based upon the foregoing, insofar as the documents in which you are interested constitute "education records", I believe that they would be available to you, not under the Freedom of Information Law, but rather pursuant to 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

cc: Records Access Officer, State University of New York at Albany

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7581

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

February 24, 1993

Mr. James E. Cliff
92-A-2300
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. Cliff:

I have received your letter of February 2, as well as the correspondence attached to it. Please note that the materials did not reach this office until February 12.

As in the case of your previous communication, your letter deals with a request directed to the Office of the Westchester County District Attorney involving records relating to a proceeding in which you were convicted. Although you asked your attorney for copies of records, he informed you that there was too much to copy and that there was no need for you to have all such records. It is your view that the denial by the District Attorney is based solely on the ground that the records sought were disclosed to your attorney. It is your belief, however, that your attorney declined to review various exhibits entered into evidence at your trial. Further, while you contend that a "deal" was made with the victim, you were informed that there are no records concerning that claim.

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

First, the opinion prepared on January 11 in response to your initial inquiry included an expansive review of the Freedom of Information Law and rights of access conferred by that statute. Consequently, it is unnecessary to reiterate those points.

Second, it is emphasized that the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency need not create new records in response to a request. Therefore, whether or not a deal was made, if there is no record of any such deal, the Freedom of Information Law would not apply.

Third, the responses to both your request and appeal refer to Moore v. Santucci [151 AD 2d 677 (1989)]. In that decision, it was found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

With respect to access to the kinds of records in which you are interested, the Court in Moore also noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7582

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

February 25, 1993

Mr. Kevin McGlynn
92-B-1342
Mid-State Correctional Facility
P.O. Box 216
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. McGlynn:

I have received your undated letter, which reached this office on February 17. You have asked whether you may use the Freedom of Information Law to "make [law enforcement agencies] force over information they have" concerning "how they created informants out of various individuals."

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, insofar as the information in which you are interested does not exist in the form of a record or records, the Freedom of Information Law would not apply, and an agency would not be required to create a new record on your behalf.

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

Most relevant to your inquiry in my view is §87(2)(e), which 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."

It is noted that in a recent decision, it was held that the purpose of §87(2)(e)(iv):

> "is to prevent violators of the law from being apprised of nonroutine procedures by which law officials gather information (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572, 419 N.Y.S.2d 467, 393 N.E.2d 463). 'The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe' (id., at 573, 419 N.Y.S.2d 467, 393 N.E.2d 463). '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 [law enforcement] personnel***' (id., at 572, 419 N.Y.S.2d 467, 393 N.E.2d 463 [citations omitted]). Even though a particular procedure may be 'time-tested', it may nevertheless be nonroutine (id., at 573, 419 N.Y.S.2d 467, 393 N.E. 2d 463). Likewise, a highly detailed step-by-step depiction of the investigatory process should be exempted from disclosure" [Spencer v. New York State Police, 591 NYS 2d 207, 209-210, ___AD___(1992)].

Additionally, the Court found that:

> "petitioner is not entitled to disclosure of portions of the file relating to the method by which respondent gathered information about petitioner and his accomplices from certain private businesses because the disclosure of such information would enable future violators of the law to tailor their conduct to avoid

detection by law enforcement personnel" (id. 210).

Based on the foregoing, if the records in which you are interested exist, it is likely that they could be withheld 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7583

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

February 25, 1993

Ms. Betty Higgins
[redacted]

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

Dear Ms. Higgins:

As you are aware, I have received your letter of February 13 in which you sought an advisory opinion concerning a denial of access to a record by Sullivan County.

Your letter and the materials attached to it pertain to your request for records relating to a HUD project in Parksville. Several records were disclosed to you, one of which makes reference to "a memorandum dated 10/10/89 from David R. Siebert, [County] Commissioner of Planning and Economic Development, to William C. Rosen, County Attorney, apprising Mr. Rosen of the project's problems." That memorandum was denied on the basis of §87(2)(g) of the Freedom of Information Law. Since you are unfamiliar with that provision, you sought my 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, §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.

Also 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 county official and the County Attorney, 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)].

Whether the privilege was waived by means of disclosure of the memorandum to a thirty party is unknown.

Lastly, an applicant may appeal a denial pursuant to §89(4)(a) of the Freedom of Information Law, which states in part that:

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

A person who appeals may but need not include the reasons for appealing.

Enclosed is a copy of "Your Right to Know", which includes a sample letter of appeal.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: John Kramer, Records Access Officer
Marvin Newberg, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7584

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

February 25, 1993

Mr. Henry F. Sobota
Scolaro, Shulman, Cohen,
Lawler & Burstein, P.C.
Attorneys and Counselors at Law
90 Presidential Plaza
Syracuse, N.Y. 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:

I have received your letter of February 9, as well as the materials attached to it. You have sought an advisory opinion concerning rights of access to certain records maintained by the State Division of Human Rights.

By way of background, on February 1 you wrote to the Division and requested "[a]ll policy statements of the State Division...that are currently in effect pertaining employment discrimination under the Human Rights Law." For purposes of clarity, you included with your request a sample policy statement signed by the Commission in 1989. In response to the request, you were informed by Lawrence Kunin, General Counsel, that:

> "The division is unable to comply with your request as the information is not available on existing computer-generated reports, and we are not obliged to prepare special computer reports in response to FOIL requests. Public Officer's Law Section 89.3. You are also further advised that this agency is not required "to ease the research burdens of private litigants" (D'Allesandro, et al. v. Unemployment Insurance Board, et al., 56 A.D. 762, 763, 392 N.Y.S.2d 433 (1st Dept. 1977))."

In this regard, in an effort to learn more of the matter and to attempt to gain insight concerning the means by which the

records sought are maintained, I contacted Mr. Kunin. He indicated that the issuance of a policy statement, such as the sample that you enclosed, is unusual and that such statements are not issued on a regular or ongoing basis. He also said that the sample statement was part of what he characterized as a "drug file", and that no policy statements have been issued on any other subject. Mr. Kunin referred to a fourteen volume set of materials containing a variety of information, some of which might include what you consider to be policy statements. That set is apparently indexed in broad, general categories, and he said that the process of locating the kinds of records that you requested would take weeks and would involve a review of much of the fourteen volumes.

From my perspective, the issue in terms of the Freedom of Information Law is whether the request "reasonably describes" the records sought as required by §89(3) of the Law. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. 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 case of your request, based upon Mr. Kunin's remarks, the Division's record-keeping system does not enable the staff to retrieve the kinds of records in which you may be interested, except by reviewing various aspects of the fourteen volumes page by page. In my view, an agency would not be required to go to such lengths in order to comply with the Freedom of Information Law.

Lastly, it is emphasized that Mr. Kunin expressed a willingness to discuss the matter with you and suggested that you might want to contact him directly. He can be reached at (212) 870-8667.

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: Lawrence Kunin, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7585

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

February 25, 1993

Ms. Karen Welch
New York Civil Liberties Union
Western Regional Office
775 Main Street, Suite 326
Buffalo, NY 14203

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

Dear Ms. Welch:

I have received your letter of February 1, which reached this office on February 12.

You described a situation in which your office was contacted by a citizen whose request was denied under the Freedom of Information Law by the City of Niagara Falls. According to your letter, the person in question sought to make a complaint concerning two officers of the City's Police Department. Subsequently, a captain retrieved an "Officer Complaint Report" form, asked the individual questions, and completed the form. Following being questioned, the Captain gave the form to the individual "to read and sign". After signing the report, the individual asked for a copy. In response, he was informed that he must request it under the Freedom of Information Law. After having made such a request, the report was withheld on the basis of §50-a of the Civil Rights Law, by means of a claim that the form is a "personnel record" within the meaning of that statute.

You have sought an advisory opinion 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 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. Further, in interpreting section 50-a in a case involving grievances made against correction officers, the Court of Appeals, the state's highest court, found that:

> "Documents pertaining to misconduct or rules violations by correction officers - which could well be used in various ways against the officers - are the very sort of record which, the legislative history reveals, was intended to be kept confidential" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

The Court also found that the purpose of section 50-a "was to prevent release of sensitive personnel records that could be used in litigation for the purposes of harassing or embarrassing correction officers" (id. 193). Since §50-a of the Civil Rights Law also pertains to police officers, I believe that it would constitute a proper basis for withholding the form in question if the form is sought by the public generally.

However, in this instance, disclosure of the form had previously been made to the person making the request. Again, he was asked to read and sign the form. Due to his familiarity with and knowledge of its contents, he would presumably be free to discuss or disclose its contents to anyone. In my opinion, in view of the factual circumstances present, the purpose of §50-a of the Civil Rights Law and the harm that it seeks to avoid are largely irrelevant due to the personal knowledge of the content of the record by the requester. As such, I do not believe that §50-a or any ground for denial appearing in the Freedom of Information Law could justifiably 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:jm

cc: William D. Zarr, Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-142
FOIL-AO-7586

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

February 26, 1993

Mr. David Lewis
Staff Writer
Gannett Suburban Newspapers
1 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. Lewis:

I have received your letter of February 15 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to the correspondence attached to your letter, you sought from the Executive Chamber "any and all public documents on the application for executive clemency and parole by Jean S. Harris". In response to the request, you were provided access to the certificate issued by the Governor that granted clemency. However, other records falling within the scope of your request were denied pursuant to §87(2)(g) of the Freedom of Information Law on the ground that they constitute "intra-agency materials". Your appeal was denied on the same basis, and you questioned 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.

I am unaware of any judicial decision that has considered public rights of access to clemency applications. However, in a decision that dealt with a register required to be maintained pursuant to §5(3) of the Executive Law, the court specified that "[t]he issue of precisely what portions of a clemency application may fall within the penumbra of the exceptions to FOIL is beyond the scope of the proceeding" [Rold v. Cuomo, Supreme Court, Albany County, May 31, 1988]. In my view, the court inferred that

clemency applications may be accessible or deniable, in whole or in part, depending upon their contents, in accordance with the grounds for denial.

Second, insofar as the records sought were furnished to the Governor or his representatives by Ms. Harris, her attorney or other persons outside of government, I do not believe that §87(2)(g) would serve as a basis for denial. 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."

While I believe that communications between or among agency officials or those prepared and transmitted by officials within an agency would fall within the scope of §87(2)(g), those transmitted to an agency, i.e., the Executive Chamber, from a person outside of government and who is not an officer or employee of an agency could not in my view be characterized as inter-agency or intra-agency materials. Such a person or entity would not be employed by or be an agency; consequently, in my opinion, a communication from that person or entity would be neither inter-agency nor intra-agency material.

Third, related to the application may be letters or memoranda prepared by agency officials, such as those employed at a correctional facility, by the Division of Parole, a district attorney, or others. Those kinds of records would in my opinion fall within the coverage of §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, however, those 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, for example a superintendent of a correctional facility provides an opinion to the Governor or his representatives concerning an application for clemency, that kind of record would clearly fall within the exception.

Lastly, most significant in my opinion is §87(2)(b), which authorizes 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." You pointed out in your appeal that a variety of information pertaining to Ms. Harris has been widely publicized and disclosed by her, and you suggested that "these facts imply a substantial waiver of her right to privacy in this case..." From my perspective, notwithstanding your suggestion, a state agency is obliged to comply with the Freedom of Information Law, as well as the Personal Privacy Protection Law.

With respect to the Freedom of Information Law, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy. Although those examples may not be specifically pertinent, I believe that they represent few among many conceivable unwarranted invasions of privacy. In my opinion, a clemency application, and perhaps related documentation, would likely constitute an unwarranted invasion of personal privacy if disclosed. That would be particularly so in this instance if the materials contain information regarding Ms. Harris' medical condition.

With respect to the Personal Privacy Protection Law, §96(1) of that statute precludes a state agency from disclosing personal information about a "data subject", unless disclosure is permitted pursuant to exceptions authorizing disclosure that appear in the ensuing portions of that provision. 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)].

Section 96(1) provides in relevant part that:

"[illegible] agency may disclose any record or personal information unless such disclosure is:

(a) pursuant to a written request by or the voluntary written consent of the data subject, provided that such request or consent by its terms limits and specifically describes:
(i) the personal information which is requested to be disclosed;
(ii) the person or entity to whom such personal information is requested to be disclosed; and
(iii) the uses which will be made of such personal information by the person or entity receiving it."

Similarly, §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...when the person to whom a record pertains consents in writing to disclosure."

Further, §89(2-a) of the Freedom of Information Law states that:

"Nothing in this article [the Freedom of Information Law] shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter."

As such, when the Freedom of Information Law and the Personal Privacy Protection Law are read in conjunction with one another, a state agency cannot release records when disclosure would result in an unwarranted invasion of personal privacy, unless disclosure is otherwise permitted by §96. Therefore, assuming that disclosure would constitute an unwarranted invasion of personal privacy, and I believe that it would, in order to acquire the records, consent to disclose by Ms. Harris as described in §96(1)(a) would be needed to obtain them.

In sum, while I disagree in part with the basis for withholding offered in response to your request and appeal, I believe that the records in question could only be disclosed only if Ms. Harris so consents as described in the previous 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: Elizabeth D. Moore, Counsel to the Governor
Eileen D. Chang, Assistant Counsel to the Governor
and Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7587

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

March 1, 1993

Ms. Marie L. Pratz
President
East Quogue Union Free School District
Board of Education
6 Central Avenue
East Quogue, NY 11942-9632

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

Dear Ms. Pratz:

I have received your letter of February 22 in which you raised a question concerning the "ballot process" relating to the appointment of a district superintendent of a board of cooperative educational services (BOCES).

In your capacity as President of the East Quogue Board of Education, you wrote that, due to a retirement, the BOCES board will be called upon to appoint a replacement for the position of BOCES I District Superintendent. The procedure for selecting a new superintendent is described in §2204 of the Education Law, which in subdivision (1) states in part that:

> "The board of cooperative educational services of a supervisory district shall meet upon the direction of the commissioner of education, at a time and place designated by the commissioner, for the purpose of appointing a district superintendent of schools whenever a vacancy in such office shall occur..."

Subdivision (2) of §2204 states that:

> "In the appointment of such district superintendent the vote shall be by ballot and the person receiving the majority of all votes cast shall be appointed subject to approval of the commissioner of education. Each member of the board of cooperative educational services shall be entitled to one vote in such appointment."

You have asked "whether this ballot can be done in secret, or if it must be voted upon in public and properly recorded in the public minutes."

In this regard, I offer the following comments.

First, by way of background, §1950 of the Education Law pertains to the creation of a BOCES and states in part that the Commissioner of Education has the authority to establish such a board "for the purpose of carrying out a program of shared educational services in the schools of the supervisory district and for providing instruction in such special subjects as the commissioner may approve." Based upon the foregoing, I believe that a BOCES is subject to the Freedom of Information Law. That statute is applicable to agencies, and §86(3) defines the term "agency" to mean:

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

Since a BOCES is clearly a governmental entity performing a governmental function, again, in my view it is required to comply with the Freedom of Information Law.

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, 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, each person voting would be a member of a BOCES, an "agency". As such, to comply with the Freedom of Information Law, I believe that a record must be prepared and maintained indicating how each member cast his or her vote. From my perspective, disclosure of the record of votes represents the only means by which the public could know how their representatives asserted their authority. Ordinarily, a record of votes of the members will appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

Lastly, I have discussed §2202(2) of the Education Law concerning the "ballot process" with an attorney from the Education Department. It is his view, as well as mine, that there is nothing in that provision that suggests that the ballots are intended to be cast in secret. On the contrary, he agreed that a record indicating how each member casts his or her vote should be prepared and made available.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1588

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

March 1, 1993

Mr. James K. Grass
[redacted]

Dear Mr. Grass:

I have received your letter of February 19 concerning the status of a request made under the Freedom of Information Law involving the physical agility test requirements for the position of New York State trooper.

As you are aware, following denials of your request on appeal by the New York State Police, I prepared an opinion in which it was advised that the record in question should be disclosed under the Freedom of Information Law. You wrote that, following the receipt of that opinion, you were contacted by the Division of State Police and were asked to provide that agency with a letter "stating in part that [you] no longer requested said information." You chose not to do so. Further, when asked why you want the information, you indicated that you sought it "for academic objectives, a comparison and contrast to other state police organizations, i.e., New Hampshire, Vermont, Maine, etc..." At that time, you were informed that "the information was restricted to candidates for the position of state trooper."

In this regard, I offer the following comments.

First, it is noted that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office cannot compel an agency to disclose records or otherwise enforce the provisions of that statute.

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 purpose for which a request is made and the intended use of records are generally irrelevant to rights of access. 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 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)]. Therefore, if none of the grounds for denial can appropriately be asserted to withhold a record, that record would be available to anyone, whether a request is made for purposes of "comparison and contrast", or even out of curiosity.

Lastly, unless the Division of State Police alters its determination to withhold the record in question, the only remaining remedy would involve the initiation of a lawsuit, a proceeding under Article 78 of the Civil Practice Law and Rules, to seek judicial review of the denial.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis A. DeFrancesco, Chief Inspector

PPPL-AO-143
FOIL-AO-7588A

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

March 1, 1993

Mrs. Patricia J. Roberts
[redacted]

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

Dear Mr. Roberts:

I have received your letter of February 23. As requested, enclosed is the brochure pertaining to the Personal Privacy Protection Law.

You wrote that you are attempting to obtain a copy of a psychiatric evaluation that appears to be maintained by a court. In this regard, I offer the following comments.

First, it is emphasized that the Personal Privacy Protection Law applies to certain records maintained by state agencies. For purposes of that law, the term "agency" is defined to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys" [Personal Privacy Protection Law, §92(1)].

As such, the Personal Privacy Protection Law does not apply to records maintained by units of local government, such as a city, or the courts.

Second, for purposes of the Freedom of Information Law, "agency" is defined in §86(3) of that law to include:

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

In turn, §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.

The foregoing is not intended to suggest that court records are not available, for other provisions of law often require the disclosure of court records (see e.g., Judiciary Law, §255). If the record in which you are interested is maintained by a court, it is suggested that a request be made to the clerk of the court, citing an applicable provision of law.

Lastly, although it may not be relevant in this instance, I point out that, under §33.16 of the Mental Hygiene Law, a person receiving mental health treatment generally may obtain records regarding treatment from the mental health professional or facility that provided the treatment.

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 7589

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

March 2, 1993

Mr. Bill Gage
[redacted]

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

Dear Mr. Gage:

I have received your letter of February 24 and the correspondence attached to it.

According to your letter, you requested various "solid waste files" from Washington County involving the period of 1980 to 1984. In response to the request, the Chairman of the County Board of Supervisors, Mr. R. Harry Booth, wrote that:

> "All County records in regard to the solid waste issues have been confiscated by the County to protect ourselves during the litigation. Any information released will have to be approved by our attorneys."

As such, issue pertains to the effect of litigation on your rights under the Freedom of Information Law.

In this regard, 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.

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. When records were prepared or acquired in the ordinary course of business, rather than for any purpose relating to litigation, I do not believe that either §87(2)(a) or §3101(d) of

the Civil Practice Law and Rules would apply. 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. Since I am unfamiliar with the records that you have requested, I cannot conjecture as to the extent to which they must be disclosed or may be withheld. However, again, assuming that they were prepared or received in the ordinary course of business, in my view, the pendency of litigation would not affect public rights of access to those records under the Freedom of Information Law.

It is also noted that the Freedom of Information Law provides direction concerning the time within 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)].

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: Hon. R. Harry Booth, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7590

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

March 2, 1993

Mr. Eugene Forman
91-A-8549
Clinton Correctional Facility
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. Forman:

I have received your letter of February 18 in which you raised two questions concerning the Freedom of Information Law.

First, you asked how long an agency has to respond to an appeal following a denial of a request for records. 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."

Second, you asked "what would be [your] next remedy, besides a[n] Article 78 proceeding..." If an applicant's appeal is denied, the only legal remedy that would require an agency to disclose records would involve the initiation of an Article 78 proceeding. Alternatively, although the Committee on Open Government cannot compel an agency to grant or deny access to records or otherwise enforce the Freedom of Information Law, any person may seek an advisory opinion from this office. While the opinions of this office are not binding, it is my hope that they are educational and persuasive. It is noted that, as a matter of policy, an advisory

opinion will not be prepared following the initiation of litigation brought under the Freedom of Information 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 7591

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

March 2, 1993

Mr. John B. Schamel
NEA/NY Field Representative
Elmira Service Center
Mark Twain Building #200
North Main and West Gray
Elmira, N.Y. 14901

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

Dear Mr. Schamel:

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

According to the materials, on February 3 you delivered a request to the Records Access Officer of the Elmira City School District involving "[c]opies of any and all correspondence between the Elmira City School District and the Schuyler-Chemung-Tioga BOCES, including its agents, concerning the Elmira City School District's take back of the 213 program." You added that "[t]his request is for any and all correspondence that makes reference to what will happen to staff either employed by the SCT BOCES or by the Elmira City School District as a result of the take back." The receipt of your request was acknowledged on February 8, and you were informed that the Records Access Officer would ascertain whether any existing records fall within the scope of your request, and that a determination "should be completed within two weeks." On February 16, the request was denied based on a claim that the records "are inter-agency or intra-agency."

You wrote, however, that, based upon personal knowledge, the records sought do exist. Further, you indicated that a "similar request" was made and that the records were disclosed.

In this regard, I offer the following comments.

First, when records are accessible under the Freedom of Information Law, I believe that they must be made equally available to any person, regardless of one's status or interest [see e.g.,

Burke v. Yudelson, 51 AD 2d 673 (1976); Farbman v. New York City Health and Hospitals Corporation, 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.

Third, while I agree that the records sought fall within §87(2)(g), the exception concerning inter-agency and intra-agency materials, that provision often requires disclosure due to its structure. Moreover, the mere characterization of records as inter-agency or intra-agency materials is not determinative of rights of access, for the content of those kinds of records serves as the primary factor in determining the extent to which they may be withheld or must be disclosed.

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, it is necessary to review the contents of inter-agency or intra-agency materials to ascertain rights of access. 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.

I hope that 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: Mary L. Budnick, Records Access Officer
Ann B. Fuqua, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1592

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

March 3, 1993

Ms. F. J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of February 25 and the correspondence attached to it.

Your comments pertain to a request to make an appointment to inspect records of the New York City Computer and Data Communications Service Agency. You referred to a portion of a response to the request by Ms. Lena Rettig, the Agency's General Counsel and Records Access Officer. She indicated that the rules and regulations adopted by the City of New York for the administration of the Freedom of Information Law require that all requests to inspect records be made in writing. She also alluded, however, to situations in which proposed contracts advertised in the City Record are available without making a written request pursuant to the City's procurement rules. It is apparently your view that a request to inspect records need not be made in writing.

In this regard, an agency may require that a request to inspect records be made in writing. As indicated in §89(3) of the Freedom of Information Law, an agency must respond to a "written request for a record reasonably described." Further, the regulations promulgated by the Committee on Open Government, 21 NYCRR §1401.5(a), state that "An agency may require that a request be made in writing or may make records available upon oral request."

Further, I believe that an applicant for accessible records should be able to make an appointment to inspect those records during regular business hours when an agency has regular business hours. Alternatively, if an applicant cannot know precisely when he or she may have an opportunity to inspect records, it has been suggested that agencies indicate that the records will be available

for inspection during business hours for a certain period, two weeks, for example, after a request has been granted. If the records are not inspected within such a specified reasonable period, it has been suggested that a request may be considered to have been withdrawn.

A copy of this response will be forwarded to Ms. Rettig.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Lena Rettig, General Counsel and Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7593

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

March 3, 1993

Ms. Dierdre A. Burgman
Senior Vice President
and General Counsel
1515 Broadway
New York, N.Y. 10036-0209

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

Dear Mr. Burgman:

I have received your letter of February 26 and appreciate your forwarding of correspondence pursuant to §89(4)(a) of the Freedom of Information Law relating to certain appeals.

The materials involve requests for information and records concerning the proposed Olympus Headquarters and Land Use Improvement Project. Having reviewed the requests, appeals and the responses thereto by the records access officers designated by the Urban Development Corporation (UDC), it is clear that a great deal of documentation has been made available. However, other documentation was withheld.

Since you referred to your desire to receive an "advisory guideline" regarding the treatment of the requests, I offer the following comments.

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

Second, it appears that the records withheld involve lease agreements between UDC and the Parr Development Company and between Parr and Olympus, related draft documents, and appraisals. With respect to those documents, it appears that two of the grounds for denial may be relevant.

Section 87(2)(c) permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." As it relates to the impairment of "contract awards", §87(2)(c) is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals has been reached, often the passage of that event results in the elimination of harm. Further, it has been held that bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

The other situation in which §87(2)(c) has successfully been asserted to withhold records pertains to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Again, premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving an optimal price [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In both of the kinds of the situations described above, there is an inequality of knowledge. More specifically, in the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an appraisal would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

If there is no inequality of knowledge between or among the parties to negotiations, and if records have been shared or exchanged by the parties, it is questionable and difficult to envision how disclosure would "impair present or imminent contract

awards (see Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Further, if a lease or contract has been signed, presumably negotiations have ended, and any impairment that might have existed prior to the consummation of an agreement would essentially have disappeared.

Also of potential relevance is §87(2)(g), which pertains to the authority to withhold "inter-agency or intra-agency materials." If an appraisal or survey is prepared by agency officials, it could be characterized as "intra-agency material." Further, the Court of Appeals has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of §87(2()(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

More 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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under §87(2)(g).

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data

> is so intertwined with 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 [i.e., §87(2)(c)] 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
Executive Director

RJF:pb
cc: Gerald S. and Elfriede Craddock

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 319
FOIL-AO 1594

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

March 3, 1993

Mr. Larry Bliss
Citizen's Council of Willsboro
Essex Inc.
P.O. Box 76
Willsboro, N.Y. 12996

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

Dear Mr. Bliss:

I have received your letter of March 2 in which you asked that I prepare a written opinion confirming the advice recently offered during a telephone conversation.

You indicated that the Willsboro Board of Education has informed you that copies of minutes of meetings will not be made available until they have been approved by the Board. Similarly, bills received by the District are not available until the Board acts on them, and you wrote that the Board contends that the bills are not public records until it has taken action on them.

In this regard, I offer the following comments.

With respect to minutes of meetings, 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, for subdivision (3) of §106 states 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 not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. 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.

With regard to access to bills, I direct your attention to the Freedom of Information Law. That statute pertains to rights of access to agency records, and §86(4) defines the term "record" broadly to include:

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

Therefore, as soon as bills come into the possession of the School District, I believe that they constitute "records" subject to rights of access conferred by the Freedom of Information Law,

irrespective of whether the Board has paid or otherwise acted on them.

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, in most instances, none of the grounds for denial could be appropriately be asserted to withhold bills, even if the Board has taken no action on them. Moreover, the contents of the bills do not change whether the Board acts upon them in a week or a month or perhaps even longer.

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: Willsboro Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7595

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

March 4, 1993

Mr. Bernard T. Callan
[redacted]

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

Dear Mr. Callan:

I have received your letter of March 2 and related correspondence.

According to the materials, in response to a request by the Brentwood Union Free School District for a report of all certiorari writs, the District was informed that the Town's computer system had been reformatted, that the writs are not filed as they once had been and that, therefore, the record sought "does not exist and must be created specifically for [the District's] needs." As such, the District was informed that a "pre-paid fee of $350.00 will be charged for the creation of computer program with an additional fee of $50.00 for each hour of computer time needed to produce the program."

You have sought an advisory opinion concerning the propriety of the response. 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 by the Freedom of Information to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

If an agency chooses to engage in the development of new or altered programs, I believe that it would be acting beyond the requirements of the Freedom of Information Law. As such, I believe that it could charge for such a service based upon considerations separate from the provisions concerning the assessment of fees described in §87(1)(b)(iii) of the Freedom of Information Law.

That provision pertains to existing records and requires agencies to establish rules and regulations pertaining to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record,

except when a different fee is otherwise prescribed by statute."

Consequently, once a program has been created or altered, and information can be retrieved on the basis of that program, I believe that an agency may charge only on the basis of the actual cost of reproduction, i.e., computer time, plus the cost of an information storage medium, such as paper, a computer tape or a computer disk. In my view, if the actual cost of computer time is less than $50.00 per hour, the fee of $50.00 would be inconsistent with the Freedom of Information Law. Again, the fee in that circumstance in my opinion could appropriately be based on the actual cost of generating the data.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Frank Diamante, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7596

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

March 5, 1993

Ms. Carman Y. Williams
[redacted]

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

Dear Ms. Williams:

I have received your letter of February 27. You complained that a request made several weeks ago to the New York State Higher Education Services Corporation pertaining to your loans had not been answered.

In this regard, as you requested, I have contacted that agency on your behalf. In brief, it appears that your initial request was never received by the Corporation. However, I was informed that a second request dated February 27 was received by the Corporation on March 3. In addition, assurances were given that your request would be treated in accordance with the requirements imposed by law.

For future reference, as you may be aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an

agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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: John Fraser, Office of Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1597

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

March 5, 1993

Mr. Jonathan Odom
92-T-0387
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. Odom:

I have received your letter of February 28 in which you requested assistance in obtaining records from the Office of the New York County District Attorney, your attorney, and the New York Telephone Company.

Having reviewed your requests, 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."

Based upon the foregoing, the Freedom of Information Law pertains to records maintained by entities of state and local government. Therefore, although the Freedom of Information Law applies to records maintained by a district attorney, it would not apply to records of a private attorney or the New York Telephone Company, for example.

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 you referred in your request to grand jury minutes, I believe that 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 Criminal Procedure Law, 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, "subdivision three" of §190.25 includes specific reference to a district attorney. Consequently, 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.

The remaining category of records that you requested involves pretrial and trial minutes. If the Office of the District Attorney maintains such records, I believe that they would be subject to rights conferred by the Freedom of Information Law. Alternatively, although the courts do not fall within the coverage of the Freedom of Information Law, court records are often available under different provisions of law (see e.g., Judiciary Law, §255). It is suggested that you might seek court records from the clerk of the court in which the proceedings were conducted, citing an applicable statute as the basis for your 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

PPPL-AO 144
FOIL-AO 7598

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

March 5, 1993

Mr. Edwin Garcia
92-A-9233 1B10
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. Garcia:

I have received your letter of February 23, which reached this office on March 3. You have sought advice concerning the Personal Privacy Protection Law.

According to your letter, you were a police officer, and your former employer used your academy graduation photo, which was eleven years old, in a "photo array in a case where [your] employer had made [you] a suspect." You wrote that you gave no permission to use the photo, that you were not aware that it had been used, and that no court order was obtained. You asked whether an employer has the right to use "any part of employment personnel records for law enforcement purposes."

In this regard, I offer the following comments.

First, if you were employed by a municipal police department, rather than the State Police, the Personal Privacy Protection Law would not be applicable. That statute pertains to agencies, and for the purposes of its coverage, the term "agency" is defined to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government

attorneys" [Personal Privacy Protection Law, §92(1)].

Second, there is a statute, §50-a of the Civil Rights Law, that generally prohibits police agencies from disclosing certain personnel records, those that are used to "evaluate performance toward continued employment or promotion." In my opinion, a graduation photo would not be the kind of record subject to §50-a, for it would not be used for the purposes described in that statute.

Third, assuming that neither the Personal Privacy Protection Law nor §50-a of the Civil Rights Law would be applicable, I do not believe that the Freedom of Information Law or any other provision of law would prohibit a municipality from disclosing your graduation photo. It is noted that the Freedom of Information Law is permissive; while an agency may withhold records in certain circumstances, it is generally not required to do so [see Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 2599

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

March 5, 1993

Mr. James D. Hicks
85-A-0498
P.O. 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. Hicks:

I have received your letter of March 1 in which you raised questions concerning access to records.

According to your letter, while serving your sentence, a term of fifteen years to life imprisonment, your mother and sister have died, and you have lost contact with other family members. You have sought guidance concerning the following records:

> "1. A full autopsy report, plus who performed by.
>
> 2. The full toxicology laboratory reports.
>
> 3. The medical certificate of death.
>
> 4. Names of cemetery or crematory cremation location."

You did not indicate in your letter whether the records in question would relate to family members or others. Nevertheless, I offer the following comments.

First, autopsy and toxicology reports are not prepared with respect to all deaths. As such, it is possible that no such reports exist with respect to persons whose deaths are of interest to you.

Second, although the Freedom of Information Law provides broad rights of access, the initial ground for withholding records §87(2)(a), pertains to records that "are specifically exempted from

disclosure by state or federal statute." In the case of autopsy reports and related records, as well as death records, there are statutes that exempt records from disclosure, except in specified circumstances. Autopsy reports are confidential under §677 of the County Law, except with respect to the next of kin and a district attorney. Death records are confidential pursuant to §4174 of the Public Health Law, except in certain circumstances. Two of the circumstances in which disclosure is permitted involve the "specific request of the spouse, children, or parents of the deceased or the lawful representative of such persons, or ...pursuant to the order of a court of competent jurisdiction on a showing of necessity..." Further, I believe that a death certificate includes the site of the burial of the deceased. Therefore, if you are qualified to obtain a death certificate under the Public Health Law, you should be able to learn of the site of a person's remains.

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 1600

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

March 9, 1993

Mr. Joseph S. DeFazio
[redacted]

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

Dear Mr. DeFazio:

I have received your letter of March 3 and the materials attached to it.

As I understand their contents, you requested records indicating the annual salaries for certain years of certain named employees of Monroe Community College. In response, you were given a form entitled "Notice of Intention to Examine Public Employment Records." That form refers to provisions of the Freedom of Information Law and indicates that only members of the news media may obtain records indicating salaries of public employees.

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

First, the form in question is out of date and is no longer valid. The Freedom of Information Law as initially enacted in 1974 made reference to such a form and stated that records of names and salaries of public employees were accessible only to the news media. However, that version of the Freedom of Information Law was repealed and replaced by a new version of the Freedom of Information Law that became effective in 1978. Since that time records reflective of salaries of public employees have been accessible to the public generally.

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

Third, 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, 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 even before 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 an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the person at the College with whom you communicated.

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: Marie Lee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7601

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

March 10, 1993

Mr. Edward Torralbes
89-T-2384 H1-33B
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. Torralbes:

I have received your letter of March 1 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you wrote to the Superintendent of your facility to request copies of "the master index and subject matter list of the documents in [your] institutional folder." Two weeks passed without having received a response. Thereafter, you requested copies of your personal history and correctional supervision history, as well as the master index. As of the date of your letter to this office, you had received no response. You asked whether your requests were unreasonable.

In this regard, I offer the following comments.

First, 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 required to 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.

Second, §5.20(a) of the Department's regulations state in part that an inmate may request records kept at a facility from the facility superintendent or his designee. Further, based upon the regulations, I believe that the master index, as well as the other records sought, should be available to you.

Lastly, 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Diane Warner, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7602

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

March 10, 1993

Ms. Stephanie Gibbs
The Post-Standard
Clinton Square
P.O. Box 4818
Syracuse, NY 13221

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

Dear Ms. Gibbs:

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

According to the materials, you requested a final determination relating to a complaint of misconduct by an officer of the Town of Manlius Police Department. Both your initial request and the ensuing appeal were denied, and you have sought an advisory opinion concerning the propriety of the denial.

In this regard, I offer the following comments.

I point out initially that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, three of the grounds for denial, each of which was cited in response to your appeal, may be relevant in consideration of rights of access to the record in question.

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 §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 a 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 record sought in my opinion consists of intra-agency material. However, insofar as your request involves a final agency determination, I believe that such a determination 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 L. Lowenberg, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1603

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

March 10, 1993

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 February 23, as well as a copy of a request for records of the City of Binghamton Police Department.

According to your letter, the matter pertains to a fire claim that your company is handling for the insurance carrier of the owner of the property, and you requested "copies of all info related to fire & subsequent arrest etc for fire at 15 Pine st Bing, N.Y. 1-12-93." The request was denied on the ground that the records sought were compiled for law enforcement purposes and would if disclosed interfere with law enforcement investigations or judicial proceedings.

You have asked that I clarify "just what a police department has to give out on each request."

In this regard, I am unfamiliar with the contents of the records in which you are specifically interested or the effects of their disclosure. Those elements, the contents of records and the effects of disclosure, in my view are the factors that would determine the extent to which a police department may be required to disclose 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. 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, for example, or other record might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

As you are likely aware, 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 know, 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.

Several grounds for denial may be relevant with respect to access to police records, 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). Further, when charges are dismissed in favor of an accused, the charges and related records are often sealed pursuant to §160.50 of the Criminal Procedure Law.

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.

When police blotters or other records are prepared by employees of a police department, I believe that they could be characterized as "intra-agency materials". However, insofar as they consist of factual information, for example, they would be available, unless a different ground for denial applies.

In sum, as indicated at the outset, police records may be accessible or deniable, defending upon their specific contents and the effects of disclosure.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Captain John Butler
Hon. Juanita Crabb, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1604

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

March 11, 1993

Mr. Eugene Forman
91-A-8549
Clinton Correctional Facility
Dannemora, NY 12929

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

Dear Mr. Forman:

I have received your letter of February 24, which reached this office on March 4.

According to your letter, on February 5, you appealed a denial of access to records by the Office of the Bronx County District Attorney. As of the date of your letter to this office, you had received no response to the appeal. You sought assistance in the matter.

In this regard, §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."

Further, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required 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

cc: Anthony Curise, Counsel to the District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1605

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

March 11, 1993

Mr. Michael Browning
91-R-5191
P.O. Box 436
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 Mr. Browning:

I have received your letter of March 1. As you requested, enclosed are copies of "Your Right to Know", which describes the Freedom of Information Law, the Open Meetings Law and the services rendered by the Committee on Open Government, and the Committee's recent annual report. The report includes indices to advisory opinions prepared by this office and summaries of judicial decisions.

According to your letter, you wrote to the Director of Student Activities at York College and requested the following:

> "1. A listing of York College chartered organizations (student), the name and address of each chairman of said organization;
>
> 2. a copy of the criteria a group must meet in order to establish a college charter organization;
>
> 3. and a list of faculty members who assist and consult with students in the development of groups and provide resources and assistance as necessary."

However, you indicated that you received no response to the request. You asked what your recourse might be.

In this regard, I offer the following comments.

First, each agency is required to designate one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests. In the case of the City University of New York, I believe that the president of each college designates a records access officer. Although I believe that the person to whom you directed your request should have responded or forwarded the request to the records access officer, it is suggested that you resubmit a request to records access officer in care of the president of York College.

Second, 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 list of student organizations chartered by the College and the names and addresses of the chairpersons of those organizations, there would be no obligation on the part of College officials to create such a list on your behalf.

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 believe that the person designated to determine appeals by the City University is Robert E. Diaz, General Counsel, whose office is located at 535 East 80th Street, New York, N.Y. 10021.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Kieron Sharp, Director of Student Activities

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7606

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

March 11, 1993

Ms. Bernice E. Bray
[redacted]

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

Dear Ms. Bray:

I have received your letter of March 8 and the materials attached to it.

You have sought assistance concerning the ability to inspect records of the Town of Chili. According to your letter, you are "not allowed to see documents that are held in any department other than the Town Clerk's." Further, in response to a request to inspect records located in various departments of the Town government, the Town Clerk wrote that doing so "would mean setting up a time with various departments...and thus cause disruption in daily work routine." The Clerk added that:

> "The most economical way to obtain these records is for my department to make copies of your request and charge you 25¢ per copy. If you choose to have me compile these records please do so in writing. If I do compile the records for you, you will be required to take the entire package and pay for it. In the past I have spent a great deal of time compiling information that you did not feel you wanted and only paid for a portion thereof."

In this regard, I offer the following comments.

First, having reviewed a copy of a request attached to your letter, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency is not required to create or prepare records in response to a request. Therefore, if, for example, the Town maintains no list of Park or Recreation Department equipment, Town officials would not be required to prepare such a list on your behalf. Similarly, one aspect of your request involved a report "showing in

consecutive order the receipts issued, amount received, date, what program the money was received for, and for whom the money was received." If no report exists in the format that you described or containing each of the elements indicated, I do not believe that Town officials would be obliged to "compile" or create a new record containing the information or prepare a new record in the desired format.

Second, insofar as records exist, assuming that they are accessible under the Freedom of Information Law, an applicant has the right to inspect and copy those records, and if the applicant seeks photocopies, an agency may in most instances charge up to twenty-five cents per photocopies. If copies are requested and an agency makes them, I believe that an applicant can be required to pay the appropriate fee. However, if an applicant seeks to inspect accessible records, in my opinion, no fee can be charged. 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.

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, although the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests, it does not include any provision that specifies a period within which records must be disclosed. 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..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Carol O'Connor, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1607

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

March 11, 1993

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 6 and the correspondence attached to it.

You have sought an advisory opinion concerning a request for bills involving the use of a fax machine by officers and employees of the City of Binghamton. The bills were disclosed, except those portions indicating the fax numbers to which the transmissions were made. You have questioned the propriety of the deletion of those numbers.

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 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.

In my view, a number of the grounds for denial may be 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.

Another potentially relevant ground for denial 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 fax machine in the course of his or her official duties, bills involving the use of the machine 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 fax numbers appear on a bill, those numbers do not necessarily indicate who in fact was received the transmission. An indication of the phone number would disclose nothing regarding the nature of a conversation in the case of a telephone call or the information transmitted in the case of a fax communication. 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 bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a fax machine is used in a law enforcement context or, for example, to transmit information to a certain class of individuals, i.e., 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 numbers listed on a bill. In my view, the numbers could likely be deleted in those circumstances to protect against an unwarranted invasion of personal privacy due to the status of those contacted. Similarly, if a law enforcement official phones informants or is engaged in an investigation, 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 hope that I have been of some assistance.

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-1608

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

March 15, 1993

Hon. Robert G. Seidel
Sixth District Councilman
City of Binghamton
City Hall
Governmental Plaza
Binghamton, NY 13901

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

Dear Councilman Seidel:

I have received your letter of March 8 and the materials attached to it.

According to your letter, you have submitted three requests to the City Clerk of the City Binghamton for a copy of a contract. As of the date of your letter to this office, you had received no response. You have sought assistance in the matter.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time 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 City of Binghamton is Mayor Crabb.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, a contract into which an agency has entered would be available under the Freedom of Information Law, for none of the grounds for denial would be applicable.

Lastly, in your request, you referred to a contract between "All-Right Parking and the City of Binghamton or the Binghamton Parking Authority." It is noted that the City of Binghamton Parking Authority is a public benefit corporation separate from the City of Binghamton (see Public Authorities Law, 1599-a et seq.). As such, if the City of Binghamton is not a party to the contract in question, it may not possess a copy of the contract. Further, while I believe that the City Clerk should have responded to your request, irrespective of whether the City is a party to the contract, it may be worthwhile to submit a separate request to the City of Binghamton Parking Authority. I point out that, due to its status as a public benefit corporation, the Authority is 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

cc: City Clerk
Hon. Juanita Crabb, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7609

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

March 15, 1993

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 March 1, which reached this office on March 10.

Your correspondence relates to a response to a request for records of the New York City Department of Health. Although portions of certain records were disclosed, others were deleted, including the site of dog bites, how bites occurred, the names of health professionals who treated the wounds, and the home addresses and salaries of public employees. Those items were deleted on the grounds that some are confidential pursuant to §11.07 of the New York City Health Code, because disclosure would constitute an unwarranted invasion personal privacy, and because those items are part of "intra and inter-agency documents.

You asked that the Committee "intervene and read these people the riot act."

In this regard, it is emphasized that 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 or otherwise comply with law. Nevertheless, I offer the following comments concerning the issues that you raised.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One of the issues is whether §11.07 of the Health Code constitutes a statute that would confer confidentiality. Subdivision (a) of that provision confers confidentiality with respect to reports and records of cases of "venereal disease, non-gonococcal urethritis, narcotics addiction, or drug abuse" and states that such records "shall not be subject to subpoena or to inspection by persons other than authorized personnel of the Department". Subdivision (b) pertains to reports and records "of carriers of diseases and conditions other than" those described in subdivision (a) and states that those records are confidential with respect to all but authorized personnel of the Department, Corporation Counsel or the subject of such records or his legal representative.

Here I point out that 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 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, if the New York City Health Code was not enacted by the State Legislature, it would not constitute a "statute" that exempts records from disclosure. Conversely, if it was enacted by the State Legislature and includes the records in question within its scope, the records would, in my view, be specifically exempted from disclosure by statute.

Assuming that §11.07 is not a statute, I believe that rights of access to the records in question would be governed by the Freedom of Information Law. If the Freedom of Information Law applies, it would appear that records involving incidences of animal bites would be available, except to the extent disclosure would constitute "an unwarranted invasion of personal privacy" in accordance with §§87(2)(b) and 89(2)(b) of the Freedom of Information Law. Section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first two of which specifically refer to medical histories and medical records. However, the introductory language of that provision states that an unwarranted invasion of personal privacy includes but shall not be limited to the examples that follow. Therefore, although §89(2) does not include specific reference to records involving animal bites, I believe that such records or portions thereof may be withheld in appropriate circumstances to protect privacy. In my view, names of persons bitten and other identifying details pertaining to those persons could justifiably be withheld or deleted from the records on the ground that disclosure would result in an unwarranted invasion of personal privacy.

From my perspective, although the name, address, telephone number or other personally identifiable details concerning a dog bite victim could properly be withheld, the location of a dog bite incident, a description of how the bite occurred and the name of a health professional who provided treatment would be available. If identifying details are deleted, those other items would in my opinion be available, for they would not identify the victim of a dog bite.

With respect to §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.

While the records in question could be characterized as "intra-agency materials", I believe that they would consist solely of factual information accessible under §87(2)(g)(i), unless a different ground for denial could be asserted.

With regard to salary information I point out that, with certain exceptions, the Freedom of Information Law 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). As indicated earlier, that provision 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 an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Health Department officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Steven J. Matthews
Patricia J. Caruso

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7610

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

March 15, 1993

Mr. Emel McDowell
92-A-5351
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, N.Y. 12051-0999

Dear Mr. McDowell:

I have received your recent letter, which reached this office on March 12. You appealed to this office concerning denial of a request for pre-sentence reports by the Department of Correctional Services.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice relating to the Freedom of Information Law. The Committee is not empowered to determine appeals. The provision pertaining to the right to appeal a denial 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 therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

Further, 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 to your request 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:pb

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7611

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

March 15, 1993

Ms. Ellen DiScioscin
[redacted]

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

Dear Ms. DiScioscin:

I have received your letter of February 22 in which you sought assistance in your efforts in obtaining records relating to probation.

According to your letter, two members of your family were injured by a "D.W.I. driver" in June. The driver was convicted and placed on probation. It is your belief that a victim in such circumstances has the "right to follow up on the one whom was convicted of the charges that injured them, and to be kept in contact with the Probation Dept...in charge of the 'convicted' person." You wrote, however, that the local probation department has not provided any information.

In this 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 responsibility 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. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature 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".

There are, however, other provisions of the law that may be of interest to you. Section 440.50(1) of the Criminal Procedure Law states that:

> "Upon the request of a victim of a crime, the district attorney shall, within sixty days of the final disposition of the case, inform the

> victim by letter of such final disposition. If such final disposition results in the commitment of the defendant to the custody of the department of correctional services, the notice provided to the crime victim shall also inform the victim of his right to submit a written victim impact statement to the state division of parole pursuant to subdivision two of section two hundred fifty-nine-i of the executive law."

In addition, §440.10(1) of the Criminal Procedure Law states that:

> "When the court pronounces a sentence of probation or of conditional discharge it must specify as part of the sentence the conditions to be complied with. Where the sentence is one of probation, the defendant must be given a written copy of the conditions at the time sentence is imposed. In any case where the defendant is given a written copy of the conditions, a copy thereof must be filed and become part of the record of the case, and it is not necessary to specify the conditions orally."

Further, §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."

As such, certain records concerning the person convicted should be available from the Office of the District Attorney and the court in which the proceeding was conducted.

Lastly, 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 a record 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7612

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

March 15, 1993

Mr. Jose Alejandro
83-B-0542
Fishkill Correctional Facility
Box 1245
Beacon, N.Y. 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. Alejandro:

I have received your letter of March 5 in which you sought assistance concerning access to records.

Specifically, you wrote that you are interested in obtaining:

"1. Judges' Recommendations

2. District Attorney's Recommendations

3. Courts Recommendations

4. Parole Recommendations

5. Presentence Investigations."

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.

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 to your request 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.

Also of likely relevance 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. As such, recommendations and similar records prepared by agency officials and transmitted within or between agencies could in my view be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7613

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

March 15, 1993

Mr. Ray Simmons
92-T-0253
Adirondack Correctional Facility
P.O. Box 110
Raybrook, NY 12977-0110

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

Dear Mr. Simmons:

I have received your letter of March 7. You wrote that you requested records from the City of Schenectady Police Department on January 19, but that as of the date of your letter to this office, you had received no response.

Since you sought assistance in the matter, 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: Records Access Officer, Schenectady Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7613A

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

March 15, 1993

Mr. John J. 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 of March 9. You wrote that you sought information from the Mechanicville Public Library on several occasions. Although you received some of the information sought, you indicated you have not received complete answers to your correspondence.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains 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."

If the Mechanicville Public Library is part of the City government or is a school district library, I believe that it would be subject to the Freedom of Information Law. However, some libraries, even though they may be characterized as "public", may be not-for-profit entities that are not governmental. Those kinds of entities are generally not subject to the Freedom of Information Law.

Second, assuming that the Freedom of Information Law is applicable in this instance, it is emphasized that that statute pertains to existing records and that §89(3) of the Law provides in part that an agency need not create a record in response to a request. While I have not seen your requests, you appear to have inferred in your letter that you may have sought information by raising questions. While agency officials may provide information by answering questions, that is not the function of or required by

the Freedom of Information Law. That law requires that agencies respond to requests for existing records, and that they disclose records to the extent that rights of access must be granted.

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
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7614
FOIL-AO

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

March 17, 1993

Mr. Arthur K. Posluszny
[redacted]

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

Dear Mr. Posluszny:

I have received your note added to a copy of a letter addressed to Assemblyman Vincent J. Graber on March 8.

Attached to that letter is correspondence addressed to Assemblyman Graber on February 23 in which you requested information indicating the "approximate term" of an individual's employment as a member of the Assemblyman's staff. You added that you are particularly interested in knowing the individual's "date of separation/termination from [the Assemblyman's] staff employment".

In this regard, I offer the following comments.

First, I point out that the provisions of the Freedom of Information Law treat the State Legislature in a manner different from its treatment of state and local agencies generally. As that statute applies to agencies, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. As the Freedom of Information Law applies to the State Legislature, §88(2) and (3) specify the kinds of records that the State Legislature must disclose. As such, in many instances, the Legislature it not required by the Freedom of Information Law to disclose records to the same extent as state and local agencies. However, the Assembly has adopted a policy concerning the disclosure of its records that is more expansive than that required by law. That policy is in many respects analogous to the disclosure requirements imposed upon agencies.

Second, while I am unaware of the specific nature of your communications with Assemblyman Graber, I believe requests for records should generally be directed to and answered by the Assembly's designated records access officer. The records access officer has the duty of coordinating an entity's response to requests for records. If you have not received a response to your request by Assemblyman Graber, it may be appropriate to submit a request to the Assembly's records access officer, whose office is located in Room 202 of the Legislative Office Building, Albany, N.Y. 12248.

Third, with certain exceptions, the Freedom of Information Law 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 and subdivision three of section eighty-eight."

However, a payroll list of employees is included among the records required to be kept by agencies pursuant to the provisions referenced in the language quoted above. Specifically, S87(3) states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

With respect to the State Legislature, §88(3) similarly provides that:

> "Each house shall maintain and make available for public inspection and copying...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee."

As such, payroll record that identifying 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 are §§87(2)(b) and 89(2)(b) of the Freedom of Information Law, which permit an agency to withhold record or portions of records when disclosure would result in "an unwarranted

invasion of personal privacy." The Assembly policy refers to that standard as well. However, payroll information and other records pertaining to public employees have 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)].

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 records, as well as those indicating the initial and final dates of one's public employment, 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:pb

cc: Hon. Vincent J. Graber
Sharon Galarneau, Assembly Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7615

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

March 22, 1993

Mr. John J. Sheehan
[redacted]

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

Dear Mr. Sheehan:

I have received your letter of March 10 and the materials attached to it.

Having sought a "certificate of conviction" that was prepared by a town justice, you were charged $5.00. You asked whether the fee should be "25¢ or $5.00."

In this regard, in my opinion, for two reasons, the provisions concerning fees found within the Freedom of Information Law would not have been applicable.

First, as you are aware, the Freedom of Information Law pertains to existing records, and §89(3) of that statute states in part that an agency is not required to create or prepare a record in response to a request. It is my understanding that a certificate of conviction is a new record that is prepared on request as a service rendered by a court or court clerk. Such a service is not required to be performed under the Freedom of Information Law.

Second, the Freedom of Information Law is applicable to agency records, and §86(3) of the Law defines the term "agency" to include:

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

> thereof, except the judiciary or the state legislature."

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

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

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

I am unaware of the specific basis for the fee in question. In order to obtain information concerning the fees that may be assessed by justice courts, it is suggested that you contact a unit of the Office of Court Administration that deals specifically with those courts. The telephone number for that unit, the Town and Village Courts Resource Center, is (518) 474-8301.

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-7616

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

March 24, 1993

Mr. Tony Vallo
87-A-1848 C-2-162
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589

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

Dear Mr. Vallo:

I have received your letter of March 12 and the materials attached to it.

You have sought assistance in relation to a request directed to the Office of the New York County District Attorney for statements made during the course of a criminal proceeding. Your request was denied on the ground that the records were provided to your attorney.

In this regard, I offer the following comments.

Relevant in my view is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)]. With respect to access to the kinds of records in which you are interested, the Court in Moore also noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

While you may not have possession of the records sought, it appears that the records at issue were disclosed to your trial counsel. As such, it is suggested that you contact that attorney to obtain the records or to ascertain whether he or she maintains the records. If the attorney does not maintain the records, it is suggested that you renew your request, indicating that neither you nor your attorney has possession of the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Irving B. Hirsch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7617

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

March 24, 1993

Mr. John J. Culkin
[redacted]

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

Dear Mr. Culkin:

I have received your letter of March 11 in which you asked whether "redacted evaluations of State employees" are available under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is based on a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is also noted that the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record may be accessible or deniable in whole or in part. That phrase, in my view, also imposes an obligation upon agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Therefore, even though some aspects of a record may be withheld, the remainder would be available.

Second, in my view, two of the grounds for denial are relevant to ascertaining rights of access to employees' evaluations.

Section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Although 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. 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].

Another 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. In my view, an evaluation would clearly constitute intra-agency material.

Although the contents of evaluations may differ, 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 holding that position. Insofar as evaluations contain information analogous to that described, I believe that those 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 §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 §87(2)(g)(iii). It might also be considered factual information available under §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 §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 §87(2)(g)(iii), particularly if 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, as you requested, enclosed is a copy of the Committee's latest report. Also, mail may be sent to this office by fax. At present, our fax number is (518) 473-2464.

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-1618

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

March 25, 1993

Mr. Rudy A. Veruto
[redacted]

The staff of the Committee 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. Veruto:

I have received your letter of March 10 and the correspondence attached to it.

According to your letter and the materials you submitted, a request was made under the Freedom of Information Law to the City of Elmira on February 25. Since more than five days passed without receiving a response, you appealed. You asked that I review your request and offer whatever comments may be appropriate.

In this regard, your request, with few exceptions, involves an effort to obtain information by seeking answers to questions. Here I point out that the title of the Freedom of Information Law may be somewhat misleading. That statute does not require that agency officials answer questions. Rather, the Freedom of Information Law is a vehicle that pertains to existing records and which requires agency officials to grant or deny access to those records as required by law. Moreover, §89(3) of the Freedom of Information Law states that an agency is not required to create or prepare a record in response to a request. In short, I do not believe that City officials would have been required to answer your questions as a means of providing information in order to comply with the Freedom of Information Law.

It is also noted that the Freedom of Information Law provides direction concerning the time and manner in which agency officials 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, I have received a copy of a response to your request by W. Gregg LaMar, the City's records access officer, dated March 17. Although the response was somewhat late, I am in general agreement with its contents. However, I would like to offer a point of clarification concerning one aspect of Mr. LaMar's remarks. With respect to item 5 of your request, he based the denial in part on "Article 6-A of the Public Officers Law." That reference relates to the Personal Privacy Protection Law. That statute in my view is inapplicable in this instance, for it applies only to certain records maintained by state agencies. Section 92(1) of the Personal Privacy Protection Law indicates that the provisions of that law do not apply to "any unit of local government."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: W. Gregg LaMar

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1619

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

March 25, 1993

Mr. James Perron
89-A-9975
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, unless otherwise indicated.

Dear Mr. Perron:

I have received your letter of March 11, which pertains to a denial of access to records.

The records sought, according to correspondence that you had previously forwarded to this office, relates to the investigation leading to your arrest, as well as various other materials concerning the proceeding in which you were involved. You have requested assistance in the matter.

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 the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Since you referred to various grand jury related records, it is my view that those records could be withheld if requested under the Freedom of Information Law. 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, "subdivision three" of §190.25 includes specific reference to the district attorney. As such, grand jury minutes and related records 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.

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 an 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. However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert M. Winn, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7620

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

March 25, 1993

Mr. Michael C. Brady-President
Big Flats Taxpayer's Association
P.O. Box 307
Big Flats, N.Y. 14814

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

Dear Mr. Brady:

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

Your first area of inquiry relates to an investigation precipitated by your Association involving the conduct of an attorney. In brief, you were informed that the records sought could not be disclosed by Committee and Professional Standards, and you questioned whether "a State Agency can still cloak itself in secrecy."

In this regard, it is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which 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.

Further, 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.

The second area of inquiry involves the propriety of a policy adopted by the Town of Big Flats concerning the use of the Town Hall. One aspect of the policy states that the Town Hall "cannot be used for political purposes or lobbying."

I cannot answer effectively, for the issue falls beyond the scope of the advisory jurisdiction of this office. Although the Committee is empowered to offer advice concerning the Open Meetings Law, the policy does not deal with the use of Town property for the purpose of conducting meetings of public bodies. While I am not an expert on the subject, I point out that §64(3) of the Town Law

states that a town board "[s]hall have the management, custody and control of all town lands, buildings and property of the town..."

I regret that I cannot be of greater assistance. Should any questions arise regarding the Freedom of Information Law or the Open Meetings Law, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Michael Philip, Jr.
J. Clifford Schafer, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7621

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

March 25, 1993

Ms. Alma Giannini
[redacted]

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

Dear Ms. Giannini:

I have received your letter of March 7, which reached this office on March 16. You have sought assistance in obtaining a record from the Stevens-Swan Humane Society, Inc.

In this regard, the Freedom of Information Law is applicable to agency records. Section 86(3) of that statute defines the term "agency" to mean:

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

Based on the foregoing, as a general matter, the Freedom of Information Law applies to state and local governmental entities.

Assuming that the Humane Society is a not-for-profit corporation, which appears to be so, rather than an entity of government, it would not be subject to the Freedom of Information Law. If that is the case, although the Humane Society could choose to disclose its records, it would not be required to do so by the Freedom of Information Law.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2202
FOIL-AO 7622

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

March 26, 1993

Mr. Gerald S. Craddock
Ms. Elfriede Craddock
[redacted]

The staff of the Committee on Open 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. Craddock:

I have received your letter of March 12 and the materials attached to it. Having sought certain information from the Office of General Services, you requested an advisory opinion concerning "why these records should not be made available to the public."

According to your letter of request, you sought "information under the Open Meetings or 'Sunshine' Law", and you referred to notices of meetings and minutes of a committee established by Executive Order No. 137 relating to the Olympus Corporate Headquarters Project, as well as other records pertaining to that project. In response to your request, you were informed that the Office of General Services does not maintain information concerning the Open Meetings Law, and that no meetings of the committee in question have dealt with the project that is the subject of your request. Further, the records access officer indicated that if such a meeting occurs, you would receive "notices, minutes and other information."

In this regard, if the Office of General Services does not maintain the records sought, there would be no record to be disclosed. It is noted that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency need not create or prepare a record in response to a request. In short, since the agency does not apparently maintain the records that you requested, the Freedom of Information Law would not be applicable.

It is assumed that your reference to the Open Meetings Law was intended to pertain to minutes of meetings. It is noted that provisions concerning minutes and their contents are found in §106

of the Open Meetings Law. Those provisions, in my view, prescribe minimum requirements regarding 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.

In this instance, the Committee in question apparently has not discussed the project in which you are interested. Further, it is emphasized that when an issue is discussed, the Open Meetings Law does not require that minutes include reference to all comments or opinions, for example, that might be expressed during a meeting. Again, minutes of open meetings must consist merely of a "record or summary" of motions, proposals, resolutions, action taken and the vote of the members.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Neil Davidoff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 1623

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

March 29, 1993

Ms. Josephine 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 March 13 in which you sought an advisory opinion concerning a request for records of the City of Gloversville.

According to the form attached to your letter, you requested "a copy of February 1993's Insurance bill from the Preferred Assurance Co. along with the list of employees' names and amounts billed by the Insurance Co."

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 view is §87(2)(b), which enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) includes 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..."

Based upon the foregoing, I believe that medical records or records relating to medical problems or treatment may generally be withheld.

It is also noted that 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, whether an employee has chosen a medical insurance plan involving family coverage as opposed to individual coverage, for example, is irrelevant to the performance of that person's official duties. Consequently, I believe that records, insofar as they indicate the nature of coverage, could be withheld as an unwarranted invasion of personal privacy. Similarly, records of claims based upon medical treatment of an employee or members of the employee's family could in my opinion be withheld due to considerations of privacy.

On the other hand, however, I believe that any agreement or contract between the City and its insurance carrier would be available, for none of the grounds for denial would apply. Further, aggregate or statistical data concerning claims would also be available, so long as it does not include personally identifiable information. As such, there may be methods of acquiring information regarding insurance costs incurred by the City that would be relevant to your concerns, but which does not identify particular employees or family 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- 7624

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

March 29, 1993

Mr. Edward Nash
[redacted]

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

Dear Mr. Nash:

I have received your letter of March 12 in which you sought assistance concerning fees established by the Fulton County Board of Supervisors under the Freedom of Information Law.

Specifically, you wrote that County officials have informed you "that the charges for copies or printouts for the aforementioned information are provided at the following costs: 50¢ per page for photocopies and 25¢ per page for electronically stored information in printout form."

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 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)].

Based upon the foregoing, absent contrary statutory authority, an agency may charge a maximum of 25¢ cents per photocopy up to nine by fourteen inches; in the case of electronic information, an agency may charge a fee based on the actual cost of reproduction, which 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, or the cost of paper when a printout is prepared.

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)].

Lastly, I point out that while an agency may charge for printouts on the actual cost basis described above, legislation has been introduced that would authorize agencies to charge 25¢ per sheet when printouts are generated.

I hope that I have 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 Supervisors
James R. Hillier, Sr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7625

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

March 30, 1993

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 15 in which you sought comments concerning a matter involving the Freedom of Information Law.

According to your letter and the correspondence attached to it, in response to a request directed to the New York State Department of Transportation for records relating to accidents occurring at a specific location, you were informed that the material would be available "for a fee of $50.00 for the processing of this request."

In this regard, in my opinion, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for searching for records or for staff 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, as you are aware, 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 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. Therefore, insofar as the response to your request involves a fee other than a maximum fee of twenty-five cents per photocopy, I believe that it would be inconsistent with law.

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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James DelPrincipe, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7636

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

March 30, 1993

Mr. Pete Panse
Wallkill Citizens' Coalition, Inc.
RD1 Box 492
Van Duzer Road
Middletown, NY 10940

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

Dear Mr. Panse:

I have received your letters of March 13 and March 23, both of which pertain to your unsuccessful efforts to obtain budget worksheets from the Town of Wallkill.

By way of background, you requested an advisory opinion on the matter, and I responded on February 8 and advised that, with certain limitations, the records in question should be disclosed. Nevertheless, the Supervisor denied your request and claimed that attorneys for the Association of Towns support his position. You have sought advice concerning the procedures that may be used to "force access to this information."

In this regard, first, having reviewed the opinion of February 8, I believe that it was based on the language of the Freedom of Information Law and its judicial interpretation.

Second, a denial of a request for records 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 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."

Further, if an appeal is denied, an applicant may seek judicial review of the denial under §89(4)(b), which provides in part that:

> "...a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have burden of proving that such record falls within the provisions of such subdivision two."

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).

Lastly, you questioned whether advice rendered by an attorney for the Association of Towns to the Town Supervisor could be considered privileged. In my opinion, it may be deniable, depending upon whether the Association's attorney is considered an attorney for the Town or perhaps as a consultant.

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

Of potential 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 communications between an attorney and a client 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.

Further, 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 record 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. In this instance, if the Association of Towns could be characterized as a consultant, records reflective of its advice or opinions prepared for the Town could in my view be withheld.

I have spoken with Counsel to the Association of Towns, and it is his view that legal advice that he provides to officials of towns that are members of the Association would fall within the scope of the attorney-client privilege. I agree with his opinion.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Cummings, Supervisor
Kevin Crawford, Counsel, Association of Towns

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7627

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

March 30, 1993

Mr. Robert D. Rosenbeck
[redacted]

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

Dear Mr. Rosenbeck:

I have received you recent letter and the documentation attached to it.

You wrote that the Niagara County Pistol Permit Office denied your application for a pistol permit, and it is your belief that you have the right to the reasons for the denial in writing. The form attached to your letter indicates that the file containing your application was "turned over to Issuing Judge."

You have asked for assistance in the matter, and in this regard, I offer the following comments.

First, the statute within the advisory jurisdiction of this office, the Freedom of Information Law, applies 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, §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. Therefore, if records in which you are interested are maintained by a court or a judge, I do not believe that the Freedom of Information Law would be applicable.

Second, the provisions concerning applications for pistol licenses are found in §400.00 of the Penal Law. I point out that judicial decisions indicate that the licensing officer, a county judge, has broad discretion to grant or deny an application for a pistol license, but that such discretion is not unlimited. Since I am not an expert on that subject, and since I am unaware of whether reasons for denying an application must be given in writing, I have enclosed copies of several decisions relating to the issue that may be useful to you.

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-7628

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

March 30, 1993

Ms. Betty 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:

As you are aware, your letter of March 11 addressed to Richard Luke of the Department of Audit and Control 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 correspondence, you requested information from the accounting firm retained by the Liberty Central School District to prepare annual audits. A member of the firm indicated that the code of professional conduct applicable to certified public accountants precluded the firm from disclosing or discussing client information with you. As such, you asked whether the accounting firm could deny a request "concerning questionable excesses in the unreserved fund balance of said district."

In this regard, I offer the following comments.

First, the nature of the information that you requested was not stated. When the Freedom of Information Law is applicable, it pertains to existing records. Consequently, that statute does not require that information be disclosed by providing answers to questions or that information be interpreted.

Second, the Freedom of Information Law applies 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."

Based on the foregoing, while a school district is clearly an agency required to comply with the Freedom of Information Law, an accounting firm would fall beyond the coverage of that statute.

Third, although the accounting firm is not required to comply with the Freedom of Information Law, insofar as it has produced records for the District, those records in my view would constitute agency records subject to rights conferred by the Freedom of Information Law. In my opinion, the physical possession by the District of records, 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."

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 records maintained by the accounting firm that it has retained, I believe that materials maintained by the accounting firm that are "produced...for" the District would constitute "records" that are subject to the Freedom of Information Law. In that event, the accounting firm would not be required, in my opinion, to respond to a request for such records. However, a request could be made to the District's records access officer, who should have the ability to acquire the records for the purpose of reviewing and disclosing them to the extent required by law or instruct the firm to disclose records directly.

Again, whether you have requested "records" from the accounting firm is unclear. If the request does involve records, it is suggested that it be resubmitted to the District's records access officer. I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all agency records are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Liberty Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7629

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

March 30, 1993

Mr. Charles Millson
81-D-0019
135 State Street
Auburn, NY 13024

<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. Millson:

I have received your letter of March 14. You raised three questions, each of which deal essentially with the same issue. The issue is whether a court appointed attorney or records maintained by such an attorney are subject to the Freedom of Information Law.

In this regard, it appears that you are referring to attorneys appointed pursuant to Article 18-B of the County Law, which 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 be 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-7630

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

April 1, 1993

Mr. Keith J. Larsen
COMPS, Inc.
84-23 108th Street
Richmond Hill, N.Y. 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 March 18, as well as the materials attached to it.

Your inquiry concerns the fee that may be charged by the Town of Southampton for reproduction of "assessment computer tapes." You were informed that the cost of the tapes would be $1,250.

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 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 a computer tape, assuming that its contents are wholly available under the law, 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.

A copy of this opinion will be forwarded to Richard Blowes, the Town's Commissioner of General 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

Robert J. Freeman
Executive Director

RJF:pb

cc: Richard Blowes, Commissioner of General Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7631

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

April 2, 1993

Ms. Maria K. Smith
[redacted]

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

Dear Ms. Smith:

I have received your letter of March 20 in which you sought assistance concerning a request made under the Freedom of Information Law.

According to your letter, you have unsuccessfully attempted to obtain "a copy of the contract between Empire Blue Cross and the Albany-Schenectady-Troy B.O.C.E.S." Although you were given a copy of a handbook, you wrote that its language is "convoluted" and that it does not include "actual numbers mentioned as a per cent of the portion of the bills which Empire Blue Cross will consider for payment." In addition, you enclosed a copy of a letter prepared in 1991 in which you raised a series of questions and a response which you appear to consider unsatisfactory.

In this regard, I offer the following comments.

First, in order to ensure clarity concerning its application, 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, such as a BOCES, is not required to create or prepare a record in response to a request. Similarly, while agency officials may choose to offer information in response to questions, they are not obliged to do so by the Freedom of Information Law.

Second, 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. In my opinion, if the contract in which you are interested is maintained by the BOCES, it must be made available, for none of the

grounds for denial could appropriately be asserted to withhold such a record.

Third, an agency may require that a request for records be made in writing. A request ordinarily should be made to an agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests.

Lastly, if a request for a record is denied, the applicant may appeal the denial 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."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis D. Monterosso, Deputy District Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7632

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

April 2, 1993

Mr. J. Bryant
77-A-2816
P.O. Box 700
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. Bryant:

I have received your letter of March 22 in which you asked that I intervene on your behalf concerning a request directed to the Department of Correctional Services.

In this regard, although you referred to a copy of a request of February 15 that was sent to me, I did not receive a copy of that request, and I am unaware of the nature of the records that you requested. Although I cannot provide specific quidance under the circumstances, since it appears that you have questioned the delay in responding to your request and appeal, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an

agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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, I point out that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to enforce the Law or compel an agency to grant or deny access to records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Anthony J. Annuci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7633

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

April 5, 1993

Ms. Denise Shukoff
[redacted]

The staff of the Committee 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. Shukoff:

As you are aware, I have received your letter of March 16, which reached this office on March 24.

You have sought an advisory opinion concerning a request for records directed to the Rochester City School District in January. In response to the request, you were informed that some of the records sought would be made available, but that two of the categories of the records would be withheld. Although you appealed the denial on February 2, as of the date of our conversation on April 2, you had received no response to the appeal.

The records that were denied include the "final rating for each employee, the criteria used, and the name of the supervisor who completed the evaluation", and "[f]or the employees whose PART proposals were accepted for the 91-92 year: 1. The proposals accepted 2. The final rating, criteria used, and the name of the person prepared the final rating." You indicated during our conversation that "PART" is the acronym for "Performance Appraisal Redesign for Teachers", a new program under which new or different kinds of appraisals of teachers are prepared. It is my understanding, based upon our discussion, that teachers can choose among appraisal plans or create unique individual plans, and that those plans may include self-appraisals and peer appraisals for example. The "criteria used" may include duties descriptions with a variety of performance standards, including individual standards used to evaluate or judge performance.

The letter denying access to records described above states that "this information does not fall within the scope of the Freedom of Information Act and as such, is not considered public

records", that the information "is personal and confidential", and that "any disclosure without that individual's consent would constitute an unwarranted invasion of personal privacy."

In this regard, I offer the following comments.

First, both your request and the response by the District cited both the federal Freedom of Information Act and the "New York State Public Disclosure Law". For the purpose of clarification, I point out that the federal Freedom of Information Act applies only to records maintained by federal agencies. As such, it is inapplicable. The general disclosure statute applicable to state and local governmental entities in New York is the New York State Freedom of Information Law.

Second, since the response states that some of the information sought does not fall within the scope of the Freedom of Information Law and "is not considered public records", it is noted that the Freedom of Information Law pertains to all agency records. Section 86(4) of that statute defines the term "record" to mean:

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

Based on the foregoing, the documentation that was denied in my view would clearly consist of "records" that are subject to rights conferred by the Freedom of Information Law.

Moreover, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. 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 are the factors used 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 §87(2)(a) through (i) of the Law. While two of the grounds for denial may be relevant to an analysis of rights of

access to the records that were withheld, it is likely in my opinion that those records should be disclosed in great measure or perhaps in their entirety.

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, all of the records that were withheld could be characterized as "intra-agency materials". However, an approved proposal and the criteria used in evaluating performance would in my opinion be reflective of a final agency determination or an indication of the District's policy that is applied to a teacher or teachers in evaluating performance. If that is so, those aspects of the records would be available under §87(2)(g)(iii).

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. It is clear based upon judicial decisions 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 in a variety of contexts that 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)]. When a record is accessible because disclosure would result in a permissible invasion of privacy, no consent would be needed or required from the subject of the record as a condition precedent to disclosure. 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, objectives and similar criteria 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 disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. However, insofar as the documents include a supervisor's subjective comments or analysis of how well or poorly an individual has carried out goals or met the criteria, those portions of the records could in my view be withheld. Similarly, self-appraisals or peer appraisals would apparently consist of opinions that could also be withheld. In short, portions of those kinds of records reflective of opinions and could be withheld under §87(2)(g) and perhaps as an unwarranted invasion of personal privacy.

A 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 §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, as well as those of the supervisor who issues the rating. Therefore, I believe that the name of the employee, the final rating, and the name of the supervisor who made the rating would be available, for disclosure would not result in an unwarranted invasion of personal privacy of either the employee or the supervisor.

Lastly, since your appeal has not been answered, I point out that §89(4)(a) of the Freedom of Information Law requires that a determination must be rendered within ten business days of its receipt. That provision states in relevant part that:

> "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."

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: Manuel Rivera, Superintendent
Tynise Y. Edwards, Assistant Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7634

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

April 5, 1993

Mr. David C. 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 March 21, as well as the materials attached to it.

As a member of the Peekskill City School District, you indicated that, on some occasions, you have had difficulty acquiring information.

In this regard, 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.

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 matters 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, §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.

Further, in conjunction with the authority conferred by §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 note that one of your requests involves a "breakdown of teacher salaries by school." In my opinion, the District is required to maintain a record that includes the items in which you are interested.

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 the District is required to maintain a record that includes the name, title, salary and public office address (i.e., school) of all employees, including teachers.

Lastly, you asked whether a portion of the District's Code of Ethics is "a standard rule for boards in New York State." In short, I am familiar with school boards' codes of ethics. It is suggested that you raise the issue with a representative of the School Boards Association.

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- 2205
FOIL-AO- 7635

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

April 5, 1993

Ms. Lois Paine
[redacted]

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

Dear Ms. Paine:

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

Your inquiry pertains to delays in response to requests for records or incomplete responses, particularly by the Town of Eagle and the Wyoming County Department of Economic Development and Planning.

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 raised questions concerning whether the Eagle Town Board conducted meetings. With respect to that issue, it is noted 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).

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.

Lastly, the Open Meetings Law provides guidance concerning minutes, their contents and the time within which they must 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. It is also clear that minutes need not consist of a verbatim account of all that was said at a meeting, for §106 provides what might be viewed as minimum requirements concerning the contents of minutes. While a clerk or public body may choose to prepare expansive minutes, they must consist only of the kinds of information described in §106.

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 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 are 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.

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: Madonna Barber, Supervisor
Michelle J. Millen
Matthew J. Richard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7636

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

April 6, 1993

Ms. Cindy A. Mullen
[redacted]

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

Dear Ms. Mullen:

I have received your letters of March 22 and March 24. Based upon a review of both and the correspondence that you forwarded, the only remaining issue involves your right to obtain the names of jurors who participated in your husband's criminal trial.

In this regard, although the Freedom of Information Law provides broad rights of access, it has been held by the state's highest court that records identifying jurors are confidential. By way of background, in response to a request for jurors' names and addresses by a newspaper, the Court of Appeals referred to §509(a) of the Judiciary Law. That provision requires a commissioner of jurors to determine the qualifications of prospective jurors based in part on juror qualification questionnaires and states that "such questionnaires...shall not be disclosed except to the county jury board or as permitted by the appellate division." Based upon the quoted language, the Court found that the records in question were "specifically exempted from disclosure by statute", and, therefore, could be withheld under §87(2)(a) of the Freedom of Information Law [see Newsday v. Sise, 71 NY 2d 146 (1987)].

Since the Freedom of Information Law cannot be used to obtain jurors' names, it is suggested that you contact your husband's attorney. It is possible that the attorney may have records or notes that include jurors' names.

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-7637

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

April 6, 1993

Mr. O. Shelly
[redacted]

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

Dear Mr. Shelly:

I have received your letter of March 21. You have sought an advisory opinion concerning issues relating to the Freedom of Information Law, several of which pertain to the implementation of that statute by the State Insurance Fund.

First, you described your understanding of the time limitations with which agencies must comply when requests are made and of judicial decisions indicating that agencies cannot deny requests because the requests are voluminous. You asked whether your view of those matters is correct and "[e]xactly how many records would constitute a voluminous and burdensome request."

In this regard, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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, if an agency acknowledges the receipt of a request within five business days because additional time is needed to determine rights of access and includes an estimate of when the request will be granted or denied, so long as the estimate is reasonable, I believe that the agency would be acting in compliance with the Law.

With respect to what may be voluminous, I doubt that there is any way of determining "exactly" what would be voluminous. I point out that in a decision involving a request for thousands of records, the court upheld the agency's denial, stating that:

> "Petitioner's actual demand transcends a normal or routine request by a taxpayer. It violates individual privacy interests of thousands of persons...and would bring in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy" (Fisher & Fisher v. Davison, Supreme Court, New York Cty., Oct. 6, 1988).

I am unfamiliar with the volume of records that you might have requested. However, if the number of records is voluminous, the points made in Fisher & Fisher would apparently be apt.

It is also noted that in some instances, whether an applicant has "reasonably described" the records sought as required by §89(3) may be an issue. 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.

Second, you referred in several instances to regulations promulgated under the Freedom of Information Law by the State Insurance Fund and by agencies generally and questioned their authority or receipt of permission, for example, to adopt certain regulations. As I understand the law, agencies do not seek permission to promulgate regulations; rather they have the ability to do so pursuant to some statutory grant of authority. In the context of the issues raised in your letter, §89(1)(b)(iii) of the Freedom of Information Law requires that the Committee on Open Government promulgate general rules and regulations concerning the procedural aspects of that statute, as well as fees. In turn, §87(1) requires agencies to promulgate rules and regulations "pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article..." As such, agencies must adopt regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee. Insofar as regulations are inconsistent with the Freedom of Information Law or the regulations promulgated by the Committee, I believe that they are invalid.

On some occasions, the Committee is asked to review agencies' regulations. However, agencies' proposed regulations are not ordinarily sent to the Committee on Open Government for review. I believe that the Legislature's Administrative Regulations Review Commission reviews regulations prior to their adoption.

You referred to a portion of the regulations of the State Insurance Fund requiring that the reason for a request be stated. There is no such provision in either the Freedom of Information Law or the Committee's regulations. Further, 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 reason for which a request is made is largely irrelevant to rights of access.

Reference was also made to portions of that agency's regulations authorizing the assessment of fees at the rate of 30¢ per page for records generally, and $1.50 per page for copies of statements. 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 adopted by a state agency, 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. As indicated earlier §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).

Therefore, insofar as regulations, a local enactment or a policy authorize the assessment of a fee other than a maximum fee of twenty-five cents per photocopy, I believe that they would be invalid.

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

Third, you wrote that §89(8) of the Freedom of Information Law "appears to provide that the failure to permit the public access to releasable records is a violation." In my opinion, your statement is unduly broad. 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."

From my perspective, the language quoted above does not deal with situations in which records are requested and an agency determines to withhold them in accordance with one or more of the grounds for denial appearing in §87(2) of the Law. Rather, I believe that it pertains to situations in which agency officials knowingly conceal the existence of records or destroy records in order to prevent disclosure.

Lastly, you asked which agency enforces the Freedom of Information Law. The Committee on Open Government is authorized to provide advice concerning the statute. While it is my hope that advice and opinions rendered by this office are educational and persuasive, neither the Committee nor any other state agency has general authority to compel compliance with the Freedom of Information Law. The usual vehicle for challenging an agency's denial of access to records or perhaps the validity of its regulations is a proceeding brought under Article 78 of the Civil Practice Law and Rules. In the case of an alleged violation of §89(8), the matter could be brought to a district attorney in conjunction with §240.65 of the Penal Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Raymond C. Green

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7638

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

April 6, 1993

Mr. Harvey M. Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your letter of March 23 in which you raised a variety of issues concerning the implementation of the Freedom of Information Law by the New York City Board of Education.

One area of inquiry involves criticism relating to the timeliness of response to requests and appeals. 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, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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."

From my perspective, the language of §89(4)(a) is clear. When a proper appeal is made, the person or body designated to determine the appeal must within ten business days either disclose the records or explain the reasons for affirming an initial denial. It would be inappropriate in my opinion for an appeals officer or body to delay a determination beyond the ten business days by remitting the appeal to the records access officer or other staff person.

In addition, it has been held that 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)].

Another issue pertains to "U-Rating Reports" which had been made available years ago, but which are now effectively being withheld because the "records are not maintained in a manner that enables the information you seek to be extracted", or because a request is "too broad". While I have no personal knowledge of the matter, it is possible that the information contained in the reports might be maintained electronically, rather than in paper records. In this regard, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. 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 §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 related vein, §89(3) of the 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 inquiry, I must admit to being unfamiliar with the Board'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.

Since a records access officer, according to the regulations promulgated by the Committee (21 NYCRR §1401.2), must assist an applicant in identifying the records sought, if necessary, it is suggested that you discuss the matter with the records access officer.

A third issue involves access to so-called "personnel files". With respect to that issue, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. 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 are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

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. Two of the grounds for denial are likely most relevant to an analysis of rights of access to personnel records.

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.

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. It is clear based upon judicial decisions 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 in a variety of contexts that 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)]. When a record is accessible because disclosure would result in a permissible invasion of privacy, no consent would be needed or required from the subject of the record as a condition precedent to disclosure. 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].

Your last area of commentary relates to the McAulay decision, a subject that has been considered at length in our previous

correspondence. In my view, the decision need not be considered anew.

As requested, enclosed are copies of the Freedom of Information Law, the Committee's regulations, "Your Right to Know" and "You Should Know".

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Bruce K. Gelbard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1639

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

April 8, 1993

Ms. Patricia Carroll
[redacted]

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

Ms. Patricia Carroll:

I have received your letter of March 20. You wrote that you submitted a request, apparently to your school district, seeking "total w-2 reported wages" paid to staff. It was returned, however, because you did not "word it correctly." You have asked how such a request might be written.

In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient information to enable agency officials to locate and identify the records in which you are interested. In my view, if you requested "total w-2 wages paid" to particular employees during a certain calendar year, your request would have been appropriate. It is suggested that you use the sample letter of request in the enclosed brochure and that you seek w-2 forms or other records containing information reflective of gross wages paid to particular employees during a calendar year.

Second, with certain qualifications, I believe that W-2 forms or records containing equivalent information 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 inquiry, 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.

I hope that 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.

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7640

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

April 9, 1993

Ms. Caroline Silverstone, Supervisor
Town of Mamaroneck
Office of the Supervisor
Town Center
740 West Boston Post Rd.
Mamaroneck, N.Y. 10543-3319

The staff of the Committee on 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 Silverstone:

I have received your letter of April 2 in which you sought an advisory opinion concerning the Freedom of Information Law.

Specifically, you asked "whether the volunteer firefighters in the Town of Mamaroneck's fire district may withhold certain information from the Board of Fire Commissioners (Town Board) or from the general public." The records in question consist of reports of "income and expenditure of the annual fund raising conducted by the volunteers" and of "the 1.8% funds from foreign insurance companies that goes to the exempt firemen's benevolent associations." You indicated that requests have been made for the reports described above covering a period of five years.

In this regard, based on the assumption that the records in question are maintained by a volunteer fire company, 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."

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

However, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, the state's highest court, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than

> the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court stated that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability

> wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are 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.

If the reports were prepared by the company, insofar as they consist of statistical or factual information, I believe that they must be disclosed pursuant to §87(2)(g)(i). That provision requires that "statistical or factual tabulations or data" found with intra-agency materials" must be disclosed. If they were prepared for the company by others, I do not believe that any of the grounds for denial would be applicable and that the reports would likely be available in their entirety.

Lastly, 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 reason for which a request is made is largely irrelevant to rights of access. Therefore, when records of volunteer fire company are accessible under the Freedom of Information Law, they would be available to the Town Board and to the public generally.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1641

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

April 9, 1993

Mr. William H. Merle
[redacted]

The staff of the Committee 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. Merle:

I have received your letter of March 23 in which you requested an advisory opinion concerning the Freedom of Information Law.

Your inquiry concerns fees assessed by the Middle Country Library for copies of records. In short, following the inspection of records sought under the Freedom of Information Law and a request to photocopy the records, you wrote that you were not permitted to copy them on a public copy machine; rather, copies would be made on a different machine. A photocopy made on a public machine costs ten cent for copies of the records in question; however, the fee on the other machine would be twenty-five cents per photocopy.

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

During our discussion of the matter, there appeared to have been no rationale for precluding you from bringing records to a public photocopy machine and duplicating the records for ten cents per copy. However, having discussed the situation with Ms. Feinberg, the Director of the Library, it appears that there is a valid basis for the Library's policy.

According to Ms. Feinberg, the public machines can be used by patrons to copy library materials. She indicated that the records that you requested are not library materials but rather are records involving the administration of the Library that are kept at a location separate and apart from Library materials. She added that many of the records sought are original documents and that staff must insure that custody of those documents is maintained. In that circumstance, rather than permitting an individual to bring the

records to a copy machine in a different section and floor of the Library, to ensure continual custody of the records, they are copied by staff at the photocopy machine in offices used for administrative purposes.

In short, I believe that a rational distinction may be made between the treatment of library materials intended to be used, borrowed or copied by patrons, and those records involving the administrative functions of the library that are located separate from library materials. Based upon that distinction, it is my view that the Library may validly choose to prepare photocopies of its administrative records and charge at the rate of up to 25¢ 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

cc: Sandy Feinberg, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 764/2

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

April 9, 1993

Mr. John Trubin, Vice-Chairman
NYC Housing Authority
250 Broadway
New York, N.Y. 10007

Dear Mr. Trubin:

I appreciate having received a copy of your determination of an appeal of a denial of access to records requested by Mr. Richard Adler. Although I am in general agreement with the determination, it may be overbroad in terms of the extent to which the records were withheld.

In this regard, I offer the following comments.

First, 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, based upon the judicial interpretation of the Freedom of Information Law, internal memoranda and similar records, as well as 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 that you cited, 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, 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, intra-agency materials or records prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on their contents. In my view, insofar as the records in question consist of advice, recommendations or opinions, they could be withheld. However, to the extent that they consist of statistical or factual data, for example, I believe that they would be available, unless a different ground for denial could be asserted.

I hope that I have been of some assistance. If you would like to discuss the matter, please fill 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 1643

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

April 9, 1993

Ms. Winifred Veitch
[redacted]

The staff of the Committee 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. Veitch:

I have received your letter of March 25 in which you asked that I confirm our telephone conversation and "rule on the controversy" between yourself and officials of the Madrid-Waddington Central School."

According to your letter, on March 8, you wrote to the School's records access officer and requested that "an itemized list setting forth name, address, title and salary of every officer and employee in the Madrid-Waddington School System be compiled and made available for [your] inspection." A salary schedule was later provided, but it did not identify employees by name. Consequently, you discussed the matter with the Superintendent, Mr. James Boyle, who "agreed to have the list compiled." Soon thereafter, you were informed that the fee for the list would be $46.91, and that you should complete a form that was sent to you.

In conjunction with the foregoing, you raised the following questions:

> "Do I have the right to request to examine a list containing the name, address, title and salary of every employee of my school district? Do I have the right to copy the list? Can the school charge me for compiling the list? For copying it? Am I required to fill in the second request for the information and certify that the only purpose of the records inspection is for my information, and that it will not be used for any private, commercial, fund-raiser, or other purpose?"

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom

of Information Law. This office cannot "rule" or compel an agency to grant or deny access to records. Nevertheless, I offer the following comments that should be considered as advisory.

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.

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 described above 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.

Second, 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. 642 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. However, section 89(2)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses is relevant, and case law indicates that an agency can ask why a list of names and addresses has been requested [see Goldbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980).

Nevertheless, section 89(6) of the Freedom of Information Law states that:

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

As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since payroll information in question was found to be available prior to the enactment of the Freedom of Information Law, I believe that it must be disclosed, regardless of the intended use of the records. Consequently, in my view the

payroll record required to be maintained should be disclosed to any person, irrespective of its intented use, and that it should be unnecessary to complete the second form. I point out, too, that section 87(3)(b) refers to an officer or employee's "public office address", i.e., a business address. Therefore, the record maintained pursuant to that provision pertains to public employees in their business capacities. As such, there is little that could be characterized as intimate or personal in terms of that content of that record. Again, in the case of other lists of names and addresses, I believe that an agency may inquire as to the intended use of the list.

Third, with respect 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 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.

In my view, since the record in question must be "maintained" pursuant to §87(3)(b) of the Freedom of Information Law, I do not believe that any fee could be charged to inspect it. If a copy is requested, the School could charge up to twenty-five cents per photocopy for paper copies. If the record is computer generated, i.e., if a printout is prepared, the School could assess a fee based on the actual cost of reproduction, i.e., computer time and the cost of paper.

Moreover, 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)].

In order to enhance compliance with and understanding of the Freedom of Information Law, copies of the this opinion will be forwarded to the Superintendent and the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: James F. Boyle, Superintendent of Schools
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1644

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

April 15, 1993

Mr. Timothy J. Lippa
89-C-1381 D-1-98
P.O. Box 247
Ogdensburg, NY 13669

Dear Mr. Lippa:

I have received your letter of April 7 in which you requested from this office copies of your medical and mental health records.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not have possession of records generally, such as those in which you are interested. Further, this office has no power to acquire records on behalf of an individual.

However, an individual may obtain medical records from a physician or hospital that provided treatment under the provisions of §18 of the Public Health Law. Similarly, mental health records are generally available to the subject of those records under §33.16 of the Mental Hygiene Law by seeking them from the mental health professional or facility that provided 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-1644A

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

April 15, 1993

Mr. Terence Murphy
88-A-2495
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. Murphy:

I have received your letter of March 25. Enclosed are copies of the advisory opinions that you requested.

In addition, you sought my comments concerning a decision to withhold "telephone listings" for three employees of the Department of Correctional Services, the phone log of a particular employee pertaining to a certain date, and an employee's "time record" for certain dates. The records sought were withheld under §87(2)(b), (f) and (g) of the Freedom of Information Law, and because they "are protected by Civil Rights Law Section 50(a)."

In this regard, I offer the following comments.

First, as I understand the nature of the records sought, it is unlikely that §50-a of the Civil Rights Law would serve as a basis for denial. That statute provides in brief that personnel records pertaining to police and correction officers that "are used to evaluate performance toward continued employment or promotion" are confidential. It does not appear that an agency telephone directory or telephone bills could be characterized as personnel records subject to §50-a. Further, in a decision dealing specifically with attendance records pertaining to a particular police officer, it was found that those records are available and that §50-a would not serve as a basis for denial. Since that statute applies to police and correction officers, and since it was found to be inapplicable with respect to police officer's attendance records, it would be equally inapplicable in my opinion with respect to attendance records pertaining to correction officers [see Capital Newspapers v. Burns, 109 Ad 2d 292, aff'd 67 NY 2d 562 (1986)]. The subject of access to attendance records will be considered more fully later in this opinion.

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

With respect to a telephone bill or log, of potential 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."

For §87(2)(e) to be applicable, I believe that it must be found initially that those 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, but rather, in the ordinary course of business. Absent details concerning their content or function, it is unclear whether the telephone records you seek could be characterized as having been compiled for law enforcement purposes.

Insofar as those records 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. 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 subparagraph (iii) of §87(2)(e). To that extent, portions of the records might justifiably be withheld.

Aside from §87(2)(e), I believe that several of the grounds for denial may be relevant to a determination of rights of access to telephone logs or billing records. 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 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.

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, records 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. However, there may be privacy considerations concerning others identified in the records.

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 correction officer's or other law enforcement officials, §87(2)(f) might properly be asserted in a variety of contexts.

Similar analyses might apply regarding an agency telephone directory and attendance records. In this case of a directory, it would appear that only §87(2)(f) could serve as a valid basis for denial.

In the decision cited earlier concerning access to a police officer's attendance records, in addition to rejecting §50-a of the Civil Rights Law as a basis for denial, 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.

Finally, as requested, a copy of the determination of your appeal will be returned to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7645

Committee Members

Robert B. Adams
William Bookman, Chairman
Patrick J. Bulgaro
Walter W. Grunfeld
Stan Lundine
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Gail S. Shaffer
Gilbert P. Smith
Robert Zimmerman

Executive Director

Robert J. Freeman

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

April 16, 1993

Mr. David McCallum
86-B-2336
Box 338
Napanoch, NY 12450

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

Dear Mr. McCallum:

I have received your letter of March 25 in which you sought advice concerning the use of the Freedom of Information Law to obtain an autopsy report.

You referred to statutory and decisional law indicating that an applicant must demonstrate a "substantial interest" in such a report before a court may order its disclosure. As the defendant, you wrote that you have such an interest in the report.

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. Although that statute provides broad rights of access, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute."

On such statute is §677 of the County Law, which refers to autopsy reports and related records. Subdivision (3), paragraph (b) of that provision states that:

> "Such records shall be open to inspection by the district attorney of the county. Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any

> person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the foregoing, the Freedom of Information Law in my opinion is inapplicable as a basis for seeking or obtaining an autopsy report, for the ability to obtain such a report is based solely on §677(3)(b) of the County Law.

While you contend that you have a substantial interest in an autopsy report, §677 indicates that such an interest must be demonstrated "upon proper application" to an appropriate court. Further, only a court appears to have the authority to grant such an application, in which case an order to disclose may be made.

Since a court order is necessary to obtain an autopsy report, it is suggested that you confer with your attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1645A

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

April 16, 1993

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 letters of March 26 and March 27.

The latter involves requests directed to the Actuary of the City of New York. Although you wrote that you have not made "unscheduled visits" to that agency, the records access officer, Ellen Fox-Katine, indicated that you made 33 requests during a period of approximately six weeks and that the agency has sought to be responsive. Nevertheless, she added that you "have continually failed to follow-up", that you failed to appear "for scheduled appointments to review documents and/or xerox materials provided at that appointed time", and that your unscheduled visits disrupt the work of the office. Consequently, she wrote that "this matter is deemed closed and this determination is final."

You asked that I inform Ms. Fox-Katine that, as records access officer, she has no authority to make such a determination.

In this regard, as you are aware, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office cannot direct agency officials to act in a particular manner or to refrain from acting. Further, since you and Ms. Fox-Katine have presented different versions of the facts, I cannot provide guidance concerning whose version of events is accurate. However, it has been advised in similar situations that when an agency performs its statutory duties by retrieving or copying requested records, and the applicant fails or refuses to review or acquire the records at a scheduled time or within a reasonable time, the agency may consider the request to have been withdrawn. For instance, if records have been retrieved or copied, the agency might so inform the applicant, indicating

that if the records are not inspected or obtained by a certain date or specific time, the request will be deemed withdrawn.

With respect to your other letters, a review of our files indicates that copies of the appeals to which you referred have not been forwarded to this office as of this date.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Ellen Fox-Katine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7646

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

April 16, 1993

Francis A. DeFrancesco
Chief Inspector
New York State Police
State Office Building Campus
Albany, NY 12226

Dear Chief Inspector DeFrancesco:

Thank you for sending your determination of an appeal made under the Freedom of Information Law by Mr. Edward L. Fiandach. In brief, you affirmed a denial of a request for the "New York State Police Breath Test Operator's Training Manual" pursuant to §87(2)(e) and (g) of the Freedom of Information Law.

Mr. Fiandach indicated that he had reviewed earlier versions of the Manual and contended that such manual:

> "consists basically of antecdotal information relating to breath testing and alcohol consumption. It contains basic information concerning the effects of alcohol, and the absorption thereof, all of which is available at any public library. It contains schematic drawings and line drawings of the breathalyzer Model 900A, which likewise may be obtained through numerous publications such as Erwins Defense of Drunk Driving, Nichols Drunk Driving, Litigation Criminal and Civil and Brent and Stiller Handling Drunk Driving Cases.
>
> "Additionally, the techniques, forms, and methods which are contained in the Breath Test Operators Manual form the basic core of the People's proof in a prosecution for Driving While Intoxicated, and in fact, are required to be presented in a public courtroom as a matter of law."

I am unfamiliar with the manual that was withheld. However, if the manual is analogous to that described by Mr. Fiandach, it

would appear that the denial was overbroad. In this regard, I offer the following comments, some aspects of which may be repetitive of observations made in previous correspondence.

As a general matter, the Freedom of Information Law is based upon a presumption of 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 §87(2)(a) through (i) of the Law. From my perspective, while both of the grounds for denial to which you alluded are relevant to an analysis of rights to access, the extent to which they could properly have been asserted is questionable.

One of the provisions to which you referred, §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..."

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.

The other provision to which you referred 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 §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 its duties effectively.

It is respectfully requested that you reconsider your determination, and I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Edward L. Fiandach

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7647

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

April 16, 1993

Mr. Martin Flores
John R. Probst Investigations, Inc.
352 Loudon Road
Loudonville, N.Y. 12211

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

Dear Mr. Flores:

I have received your letter of March 30 in which you sought assistance concerning a request for records of the Town of Jackson.

By way of background, you wrote that you represent an individual who was involved in a motorcycle accident in the Town of Jackson on August 2, 1992. On September 17, your firm requested records concerning the maintenance of Skellie Road in the Town for the past three years. Because there was no response, you appealed on January 8. As of the date of your letter to this office, you received no response to either the request or the appeal.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time in which agencies must respond to requests 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)].

Second, I point out that §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.

I am unfamiliar with the means by which the records in question are maintained. If they are retrievable based on the terms of the request, I believe that you would have reasonably described the records. If they cannot be located on the basis of the terms of your request, it is suggested that you contact the Town's records access officer, who is likely the town clerk. I point out that the regulations promulgated by the Committee on Open Government state in part that the records access officer has the duty to assist a requester in identifying records, if necessary [21 NYCRR 1401.2(b)].

Lastly, with respect to rights of access, 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. It is likely that records concerning road maintenance would consist of factual information. If that is so, I believe that they would be available under §87(2)(g)(i) of 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 Town officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Allen Brown, Supervisor
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1648

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

April 19, 1993

Ms. Mary Thill
Press-Republican
P.O. Box 893
Lake Placid, NY 12946

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

Dear Ms. Thill:

I have received your letter of March 31 in which you indicated that you and other members of the news media met with Michael Saulpaugh, Lake Placid's Chief of Police, to discuss issues relating to access to the police blotter. In view of Chief Saulpaugh's concerns, particularly with respect to the issue of "unwarranted invasion of personal privacy", you wrote that it was agreed that my opinion would be sought.

For purposes of seeking guidance, you have requested my views concerning the following four examples:

> "1. A woman who is identified calls to report a neighbor looking into her bedroom window with a telescope. The neighboring residence was empty upon patrol arrival; end of entry. Can police show her name to reporters?
>
> 2. If a file is sealed by the court after it has been shown to reporters, do police bear any liability for prior release of this information?
>
> 3. An individual, identified, is reported as a possible shoplifter. He is located by police, who find complaint unfounded. The individual is never charged, but his name is in the blotter as a shoplifting suspect. Do police risk any liability for showing that information to public eyes?

> 4. Police are 'called to address domestic dispute. Found Mr. Smith and Mrs. Smith. She came home intoxicated. After a lengthy discussion, things were quieted down.' Can reporters view this entry, or would it amount to invasion of privacy?"

Before addressing the specific examples that you provided, I would like to offer initial and general commentary.

First, as you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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, 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. In a decision on the subject [Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)], it was 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 it in its entirety.

It appears that the blotter maintained by the Lake Placid Police Department may be more expansive than the traditional police blotter described in Sheehan. If that is so, although it is subject to rights of access, portions of the blotter might be withheld, depending upon its contents and the effects of disclosure.

Since several of the examples pertain in part to the Department's ability to disclose or the liability that might arise due to disclosure, I point out that the Freedom of Information Law

is permissive; while an agency in appropriate circumstances may withhold records or portions of records, ordinarily there is no obligation to do so. The introductory language of §87(2) states in relevant part that: "Each agency shall...make available for public inspection and copying all records, except that such agency *may* deny access to records or portions thereof" that fall within the grounds for denial that follow (emphasis added).

Moreover, the Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, even if it is determined that disclosure would constitute an unwarranted invasion of personal privacy, for example, an agency would have the authority to disclose.

The only situations in which an agency cannot disclose records would involve the proper assertion of §87(2)(a). That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." Two examples of statutes that prohibit disclosure involve records regarding arrests of juveniles and records that are sealed when charges are dismissed in favor of an accused. In the case of records pertaining to juveniles, §784 of the Family Court Act prohibits disclosure. When charges are dismissed in favor of an accused, the charges and records relating to them are generally ordered sealed pursuant to §160.50 of the Criminal Procedure Law. Prior to sealing, however, i.e., when charges are pending, a booking record would in my opinion be clearly available.

With respect to the provision upon which you focused dealing with unwarranted invasions of personal privacy, I believe that the standard is flexible and that subjective judgments must often be made. On the subject of privacy generally, individuals may differ as to what privacy is and when disclosure would be "unwarranted" as opposed to permissible.

In the case of the first example, although the Police Department could in my opinion disclose the identity of the woman who contacted the Department, it is likely in my view that her name could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Similarly, since her complaint was unsubstantiated, disclosure of the identity of the

neighbor might also result in an unwarranted invasion of that person's privacy.

With regard to the second example, I believe that records are subject to disclosure under the Freedom of Information Law, unless there is a basis for denial or until the record is sealed. As suggested earlier, a booking record, the record of an arrest made by the arresting agency, must in my opinion be disclosed. If the record is later sealed, I do not believe the prior disclosure would in any way be inappropriate.

The third example is similar in some respects to the first. While I believe that the name could be disclosed, since the complaint was unfounded, the Department in my opinion could withhold the name based on considerations of privacy. The same would be so on the case of the fourth example. While I do not believe that the Police Department would be required to disclose the names of those involved in a domestic dispute that did not result in any charge, it is likely that the names could be withheld as an unwarranted invasion of personal privacy.

It is emphasized that there are no concrete rules or decisions that deal specifically with the kinds of issues that are the subject of your inquiry. From my perspective, often determinations concerning privacy must be made on a case by case basis in view of the facts, and that those determinations should be based on reasonableness in conjunction with the facts and circumstances.

Enclosed is a copy of an article pertaining to police records that may be useful and which can be shared if you see fit to do so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Saulpaugh, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7649

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

April 19, 1993

Mr. David Hunt
83-A-4739
P.O. Box 149
Attica, NY 14011

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

Dear Mr. Hunt:

I have received your correspondence of April 1, which pertains to a request directed to the Office of the New York County District Attorney.

In brief, you indicated that you sent a request on February 5 for "the People's exhibits 1 through 7", but that you received no response to the request. You have sought an advisory opinion on the matter.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to 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 by the District Attorney to determine appeals is Mr. Irving Hirsch.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Assuming that the exhibits in question constituted "records" as defined by §86(4) of the Freedom of Information Law, I believe that they would be subject to rights of access.

Of possible relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)]. With respect to access to the kinds of records used in a public proceeding, the Court in Moore noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

While you may not have possession of the records sought, it is possible that the records at issue were disclosed to your trial counsel. As such, it is suggested that you contact that attorney to obtain the records or to ascertain whether he or she maintains the records. If the attorney does not maintain the records, it is suggested that you renew your request, indicating that neither you nor your attorney has possession of the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Irving B. Hirsch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1650

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

April 19, 1993

Mr. Patrick Sorentino
88-A-2272
Sing Sing Corr. Facility
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. Sorentino:

I have received your letter of April 1 in which you raised questions concerning access to records.

Your first question involves "what [you are] and [are] not allowed to see and review in your Department of Correctional Services and Division of Parole files. In this regard, without knowledge of the nature or content of those records, I cannot offer specific guidance. However, enclosed is a copy of the Freedom of Information Law. As a general matter, 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. Also enclosed is a copy of the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law. Those regulations include reference to particular kinds of records pertaining to inmates.

It is also noted 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 in which you are interested.

Your second area of inquiry involves "how to obtain [your] F.B.I. and N.C.I.C. 'rap' sheets." Those agencies are part of the federal government and, therefore, are not subject to the New York Freedom of Information Law. To obtain information concerning access to FBI records it is suggested that you contact that

agency's Freedom of Information Section, Room 6296, J. Edgar Hoover Building, Washington, DC 20535.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7651

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

April 19, 1993

Mr. Joseph R. Gonzalez
86-A-7623
Collins State Prison
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, unless otherwise indicated.

Dear Mr. Gonzalez:

I have received your letter of March 30 and the correspondence attached to it.

As I understand the materials, your correspondence pertains to two requests directed to the Office of the Kings County District Attorney. One request was initially made in 1991 and involves "each document on file" and an identification of each document that might be withheld and the "legal reasons" for withholding each. In response to that request, you were informed that it could not be processed, because it is "vague and unspecific". The other request involves materials relating to grand jury proceedings. In addition, you complained that the agency had not cashed a check that you forwarded for copies of records you requested and that it "failed to adhere to the five day deadline set by FOIL".

In this regard, I offer the following comments.

First, I have spoken with Lauren C. Joyner, the person with whom you have most recently corresponded. Ms. Joyner indicated that the check had not been cashed and was returned to you.

Second, with respect to the scope of your request or its absence of specificity, as you may be 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 [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 Attorney'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.

Third, when a request is denied, although the reasons must be given in writing pursuant to the regulations promulgated by the Committee on Open Government [21 NYCRR §1401.7(b)], there is no requirement that each record withheld be identified or indexed. As you may be aware, there is an interpretation of the federal Freedom of Information Act, Vaughn v. Rosen [484 F2d 820 (1973)], requiring the preparation of such an index to provide 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)].

Fourth, records concerning grand jury proceedings in my opinion may clearly be withheld when 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, "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.

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

cc: Lauren C. Joyner, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7652

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

April 19, 1993

Ms. Mary P. Sandoval
[redacted]

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

Dear Ms. Sandoval:

I have received your letter of April 1 concerning requests for records directed to Orange County.

In brief, your requests involve records concerning an investigation that focuses on you sought under the Freedom of Information and Privacy Acts. In response to your initial request of January 4, you were informed by the Assistant County Attorney on January 25 that he was "researching their files" and would attempt to respond within ten business days. You have received no further response to that request. You also wrote that you requested other information but were supplied with "the wrong information". Based upon the foregoing, you have sought assistance in the matter.

In this regard, I offer the following comments.

First, it appears that your requests might have been based upon the federal Freedom of Information and Privacy Acts. For purposes of clarification, those acts pertain only to records maintained by federal agencies. The statute that deals generally with access to records of state and local government in New York State is the State's Freedom of Information Law. Further although the New York Personal Privacy Protection Law might be viewed as the State equivalent of the federal Privacy Act, that statute is applicable to state agencies; it does not apply to local governments, such as counties.

Second, since I am unfamiliar with the particular nature or content of the records in which you are interested, I cannot offer specific guidance concerning rights of access. However, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an

agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

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)].

Enclosed for your review are copies of the Freedom of Information Law and an explanatory brochure on the subject. In addition, in an effort to enhance compliance with the Freedom of Information Law, a copy of this letter will be forwarded to the County official with whom you communicated on the matter.

I hope that I have 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 Coffey, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 765

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

April 20, 1993

Mr. Anthony Logallo
90-B-1210
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. Logallo:

I have received your letter of April 1 in which you requested copies of advisory opinions and raised questions concerning access to records.

Enclosed are copies of the opinions that you requested. Please note that several were prepared many years ago and may be out of date.

You asked whether the "son of a deceased mother" may obtain copies of the "mother's autopsy report and/or death certificate without violating the Personal Privacy Protection Law." In my view, since access to those records is governed by specific statutes, neither the Freedom of Information Law nor the Personal Privacy Protection Law would be applicable.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Although that statute provides broad rights of access, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute."

On such statute is §677 of the County Law, which refers to autopsy reports and related records. Subdivision (3), paragraph (b) of that provision states that:

> "Such records shall be open to inspection by the district attorney of the county. Upon

> application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the foregoing, the Freedom of Information Law in my opinion is inapplicable as a basis for seeking or obtaining an autopsy report, for the ability to obtain such a report is based solely on §677(3)(b) of the County Law. However, if you are the "next of kin", I believe that the provision quoted above would authorize disclosure of an autopsy report to you.

With regard to death records, §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. One of those circumstances pertains to a specific request by the children of a deceased.

Your remaining question, as I understand it, is whether the provisions of the Personal Privacy Protection Law and those in the Freedom of Information Law pertaining to unwarranted invasions of personal privacy may be asserted after the death of an individual. In my view, whether those statutes or perhaps others might serve as grounds for withholding records would be dependent on the nature of the records and the effects of their disclosure.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7654

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

April 20, 1993

Mr. Robert W. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your letter of April 3 in which you asked how the Freedom of Information Law relates to "public/semi-public data bases such as PALS."

Having reviewed the correspondence attached to your letter, I contacted Westchester County in an effort to learn more of the PALS or MPALS system. As I understand the system, it consists of a series of databases, including categories of library materials, indices to various kinds of information, and County data. Information contained within some of the databases is public and is available through a limited number of "ports" or terminals located at the White Plains Public Library and the Westchester Community College, for example. However, there may be other databases or aspects of data within them that would not be available to the public. It is assumed in those instances that security measures have been taken to prevent unauthorized access to the data, i.e., by means of establishment of access codes.

It is my understanding that the public data within the system is available, as described above, at various locations. If your question is whether the contents of the system must be made available to the public at remote locations, such as their homes, through the use of a personal computer and a modem, I do not believe that the Freedom of Information Law as it currently exists would require that kind of remote access. Agencies subject to the Freedom of Information Law are required to disclose records at governmental sites or to transmit records by mail, for instance. In my opinion, an agency would not be obliged to make records or data available under the Freedom of Information Law through electronic means to remote locations.

If I have misunderstood your inquiry, 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-7655

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

April 20, 1993

Mr. Wayne Minear
[redacted]

The staff of the Committee 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. Minear:

I have received your letter of April 1 and the materials attached to it.

You have asked for assistance in obtaining records from the Town of West Seneca. Having reviewed the correspondence that you forwarded, it is unclear which records you are interested in obtaining. Although some of the correspondence involves a request made nearly two years ago, the most recent series of correspondence describes the records requested as "the files in the engineering dept." Having discussed the matter with the Town Clerk, she could not ascertain which records are of interest.

In this regard, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, although an applicant need not name or specify particular records in a request, the applicant should include sufficient detail to enable agency officials to locate and identify the records. From my perspective, a request for files of the engineering department, absent additional detail, would not "reasonably describe" the records.

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

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of

the Freedom of Information Law. Section 1401.2(b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." Similarly, §1401.7(b) of the regulations provides in relevant part that:

> "Denial of access shall be in writing stating the reasons therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia C. Wisniewski, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1656

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

April 20, 1993

Mr. Alan F. Galuski
[redacted]

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

Dear Mr. Galuski:

I have received your letter of April 6 in which you sought guidance concerning a request made under the Freedom of Information Law to the City of Troy and the time limits for responding to a request.

In this regard, the Freedom of Information Law provides direction concerning the time within 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward Nare, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7657

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

April 20, 1993

Mr. Thomas Watson
92-B-1907
Orleans Correctional Facility
35-31 Gaines Basin Road
P.O. Box 436
Albion, NY 14411-0436

Dear Mr. Watson:

I have received your letters of April 14 in which you requested 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, such as the records in which you are interested.

A request for records made under the Freedom of Information Law should be directed to the "records access officer" at the agency that maintains the record in which you are interested. The records access officer has the duty of coordinating an agency's response to requests. Therefore, in the case of records maintained by the Monroe County Sheriff's office, a request should be made to the records access officer at that agency.

Your second request appears to relate to an investigation of an attorney. Here I point out that §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.

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-7658

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

April 20, 1993

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 April 5 in which you complained that the New York City Department of Environmental Protection has failed to comply with the Freedom of Information Law due to its failure to respond to your request in a timely manner.

In this regard, although I am unfamiliar with the records sought, 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)].

In an effort to enhance compliance with the Freedom of Information Law, a copy of this communication will be forwarded to the Department's records access officer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Marie A. Dooley, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7659

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

April 21, 1993

Mr. Ronald J. Longo
90-A-2507
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. Longo:

I have received your letter of April 7. In brief, you wrote that neither your request for records made to the Saratoga County District Attorney nor your ensuing appeal were 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 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: David A. Wait, District Attorney
Courtney W. Hall, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7660

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

April 21, 1993

Mr. Albert Merget
[redacted]

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

Dear Mr. Merget:

I have received your letter of April 6 in which you sought assistance in obtaining various records from the East Ramapo School District.

Having reviewed the materials attached to your letter, some of the records sought were made available; in other cases, you were informed that the records sought did not exist. Further, in response to a request for the "job description, qualifications, credentials and compensation package including salary, benefits and perquisites" for certain personnel, the job descriptions were made available, but the District Clerk wrote that "an individual's personnel files is confidential."

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law generally pertains to existing records. Section 89(3) of the Law states in part that, with few exceptions, an agency is not required to create a record in response to a request. Therefore, using one aspect of your request as an example, if the District maintains no list of lawsuits filed by or against the District between certain dates, it would not be required to prepare such a list on your behalf. Rather than requesting a "list", it is suggested that you seek records identifying lawsuits filed by or against the District during the period in question.

Second, the Freedom of Information Law, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or

portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

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 concerning personnel records 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, supra; 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).

Based upon the foregoing, an administrator'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. Similarly, records reflective of "benefits and perquisites", for example, would be available in my view, for disclosure of those items as they relate to public employees would result in a permissible, not an unwarranted invasion of personal privacy.

In a related vein, it would appear that the most important document regarding the qualifications of a teacher, administrator or supervisor, is a certification. As I understand it, the issuance of a certification, which I believe is the equivalent of a license, is based upon findings by the State Education Department that a particular individual has met the qualifications to engage in a particular area or areas of teaching or education. As such, the certification is likely the best and most accurate source of determining a teacher's qualifications. Further, I believe that it is clearly relevant to the performance of the employee's officials duties. Further, with respect to the qualifications of employees 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 the records sought contain information pertaining to the requirements that must have been met to hold a position, they should be disclosed. Again, 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.

With regard to salary information, as indicated earlier, 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 described above must be disclosed for the following reasons.

As stated previously, §87(2)(b) of the Freedom of Information Law 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 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. Moreover, 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.

Finally, since one aspect of your request involves payments made to attorneys by the District, I point out that although 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.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the District 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: Janet S. Hardwick, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7667

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

April 22, 1993

Mr. Rafael Robles
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. Robles:

I have received your letter of April 5 in which you sought an advisory opinion concerning the Freedom of Information Law.

Your first area of inquiry involves a denial of a request for a marriage record by the Bureau of Vital Records at the State Department of Health. It appears that you requested the record in order to obtain a name of a person who testified at your trial. You indicated that in the response to the request, you were informed that only a party to a marriage or that person's representative could obtain a marriage record. Further, you were not given an address for purposes of appealing a denial of the request.

In this regard, §201(1)(b) of the Public Health Law provides that the Department of Health shall "supervise and control the regulation of...marriages", and §206(1)(e) requires the Commissioner of the Department to "obtain, collect and preserve...information relating to marriage..." Nevertheless, I am unaware of any provision of the Public Health Law that pertains specifically to access to marriage records. Further, it is noted that marriage records are maintained in two locations, the State Department of Health, and at the offices of town and city clerks that issue marriage licenses. In a recent decision involving access to marriage records, it was held that "names of couples to whom marriage licenses have been issued, as those names are recorded in the City Clerk's Office" are accessible (Gannett Co., Inc. v. City Clerk's Office, City of Rochester, Supreme Court, Monroe County, March 15, 1993).

With respect to the right to appeal, when a request for records is denied, a 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 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.

Your remaining area of inquiry involves whether and where you can seek to obtain a determination rendered by the Parole Board. In my view, in general, a final determination of the Board would be available, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. In some instances, such a determination might include medical or psychiatric information, for example, that could be withheld.

To seek such a record, it is suggested that you write to:

William Altschuller, Records Access Officer
NYS Division of Parole
97 Central Avenue
Albany, NY 12205

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bureau of Vital Records

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7662

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

April 22, 1993

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 April 10. You have asked whether "a municipality [may] authorize, by resolution, a fee larger than 25 cents a copy for a photocopy of information requested under freedom of information."

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.

I hope that 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-7663

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

April 22, 1993

Mr. Joseph Micklas
[redacted]

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

Dear Mr. Micklas:

I have received your letter of April 12 concerning a denial of a request under the Freedom of Information Law.

Having requested notes taken and used for the purpose of preparing minutes of a meeting of the Mechanicville Board of Education, the Superintendent wrote that the notes do not constitute minutes and they "are intra-agency materials which are exempted from disclosure pursuant to §subd. 2(g) of the Freedom of Information Law."

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

First, I agree with the Superintendent's contention that the notes do not constitute minutes.

Second, I also agree that the notes could be characterized as intra-agency materials that fall within the scope of §87(2)(g) of the Freedom of Information Law. However, due to the structure of that provision, the contents of such materials determine the extent to which they are accessible or deniable. Specifically, §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.

I point out that there is a judicial decision that dealt with facts analogous to the situation that you described. Warder v. Board of Regents [410 NYS 2d 742 (1978)] involved a request for notes taken by the Secretary to the Board of Regents at a meeting for use in preparing minutes. The court found that the notes were "records" as defined by the Freedom of Information Law [see §86(4)]. Further, although they consisted of intra-agency materials, since they were a factual rendition of what transpired at the meeting, the notes were found to be available.

Based on the foregoing, in my opinion, insofar as the notes consist of factual information regarding events occurring at open meetings, I believe that they 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: Dr. Frank Greenhall, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7664

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

April 23, 1993

Ms. Barbara Ross
[redacted]

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

Dear Ms. Ross:

I have received your letter of April 12 in which you raised a question concerning the propriety of a notice of a public hearing published by the Village of Yorkville concerning its tentative budget.

The notice states in part that "[a]ny interest taxpayer may inspect the proposed budget by contacting the Village Treasurer." It is your view that the tentative budget and/or the public hearing on the subject may have been available only to "interested tax payers" and not to all residents of the Village.

In this regard, it is unclear whether the intent of the notice is to restrict access only to "taxpayers." Nevertheless, in my view, the term "taxpayer" means any resident, and not only those who own real property. Further, the language of the Village Law indicates that the tentative budget is available to any person. Specifically, §5-508(3) states in relevant part that "[t]he notice of hearing shall state the time when and place where such public hearing will be held, the purpose thereof, and that a copy of the tentative budget is available at the office of the village clerk where it may be inspected by any interested person during office hours" (emphasis added). As such, it is clear that any person, and not only real property taxpayers, may review a tentative budget.

Again, it is unclear whether the language of the notice was intended to be as restrictive as you inferred. However, in an effort to ensure that Village officials are aware of the provision quoted earlier, copies of this opinion will be forwarded to them.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Trustees
Leo Malecki, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7665

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

April 23, 1993

Mr. Patrick Lakamp, Staff Writer
Syracuse Herald-Journal
Clinton Square
P.O. Box 4915
Syracuse, N.Y. 13221-4915

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

Dear Mr. Lakamp:

I have received your letter of April 7 in which you questioned a denial of access to records by Onondaga County.

According to your letter, you requested copies of "Room Occupancy Tax Audits" conducted in 1992 and 1993 by the County Comptroller's Office. You indicated that the County spends the proceeds of the occupancy tax "to pay for convention center construction and support the Greater Syracuse Chamber of Commerce and tourism-related activities", and that the audits involved eleven hotels. Attached to your letter is a memorandum advising that the denial was based on §87(2)(d) of the Freedom of Information Law. You asked whether the audits may properly be withheld and whether the County can "conceal how much each hotel collected."

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 only ground for denial of apparent significance is the provision cited in the memorandum referenced above. Section 87(2)(d) 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 §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of the hotels identified in the records.

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 proper assertion of §87(2)(d) is dependent upon a variety of factors, such as the specific content of the records, the area of commerce in which business entities are involved, the degree of competition within that area of commerce and, again, most importantly, the effect of disclosure, i.e., the extent to which disclosure would "cause substantial injury" to an entity's competitive position.

From my perspective, if certain assumptions are accurate, it would be difficult if not impossible to justify a denial of the kind of information in which you are interested. It is assumed that hotel room rates are public, for any person could contact a hotel and inquire as to rates. If the occupancy tax figures enable a recipient of those figures to know the gross receipts or income of a hotel, perhaps it could be contended that the income of the hotel could become known and that disclosure of those figures might be used by competitors in a manner that could cause competitive injury to the entity that is the subject of the figures. However, if it can be assumed that the occupancy tax figures represent only

a portion of a hotel's business, those figures would not disclose a hotel's gross receipts or income. Other aspects of a hotel's business might involve revenue generated by sales in restaurants and bars, banquet facilities and night clubs, as well as conferences, meetings and similar functions. If income is generated by those kinds of activities, occupancy tax figures could not be used to ascertain the gross receipts or income of a hotel. Further, a hotel in the Syracuse area may be part of a large chain or corporation. If that is so, disclosure of the occupancy tax figures pertaining to a particular hotel might indicate little about the "competitive position" of the chain or corporation as a whole.

In short, if the assumptions described above are valid, the extent, if any, to which disclosure of the records in question would "cause substantial injury to the competitive position" of a hotel is questionable.

I am unaware of the degree of detail contained in the audits, such as whether they include aggregate figures pertaining to a hotel or perhaps figures involving percentages of occupancy or statistics concerning specific kinds of rentals (i.e., by single rooms, double, etc.). It is possible, depending on the degree of detail, that some information might properly be withheld under §87(2)(d). However, if your interest involves the collection and distribution of public monies generally, numbers, statistics and other figures might be disclosed following the deletion of the names of hotels. If the names of the hotels coupled with other information could justifiably be withheld under §87(2)(d), absent the names, it would be unlikely that disclosure would result in the harmful effects sought to be avoided under that provision.

Lastly, it is emphasized that the State's highest court has construed the Freedom of Information Law expansively. In a discussion of the scope and intent of the Law, it has been held 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" [Aggregate-Rockland Newspapers v. Kimball, 50 NY 2d 575, 579 (1980)].

Similarly, the Court of Appeals has also 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 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, 67 NY 2d 562, 565-566 (1986)].

Based upon the foregoing, I believe that a blanket denial of access to the records in question would be inappropriate. Further, although I am unfamiliar with the specific contents of the records, it appears that much of their contents should be disclosed.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Marisa V. Temple, Deputy County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7666

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

April 22, 1993

Ms. Ann Cooper
[redacted]

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

Dear Ms. Cooper:

I have received your letter of April 18 and the materials attached to it. Your correspondence focuses on your efforts to acquire information concerning expenditures and proposed expenditures by the Ichabod Crane School District and the Albany-Schoharie-Schenectady BOCES.

Having reviewed the materials, I offer the following comments.

First and perhaps most importantly in terms of your requests, 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, an agency does not maintain an "itemized billing and inventory for services and equipment", it would not be obliged to prepare such a record on your behalf. Similarly, although agency officials may provide information in response to questions, the Freedom of Information Law does not require that they do so. Consequently, while agency officials may "explain" why projections for a program might have increased, they would not be obliged by the Freedom of Information Law to do so.

Rather than seeking information in the manner described above, it is suggested that you seek existing records. Instead of seeking an "itemized billing" statement that may not exist and which would not have to be prepared, you might seek records reflective of certain kinds or categories of expenditures.

Second, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that

records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

In the context of the information in which you are interested, to the extent that records do exist, I believe that they would be available. One of the grounds for denial, due to its structure, 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 appears that existing records that fall within the scope of your area of interest would consist of either "statistical or factual tabulations or data" available under §87(2)(g)(i) or "final agency policy or determinations" available under §87(2)(g)(iii).

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-7667

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

April 27, 1993

Lee R. Gosselin
#92-B-1740
C.C.F. Main 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. Gosselin:

I have received your letter of April 8. You have sought advise relating to your difficulty in obtaining records pertaining to your case from the Washington County District Attorney and the Supreme Court Clerk.

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

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

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

Based on the foregoing, although the records maintained by the office of a district attorney are agency records subject to the Freedom of Information Law, the courts and court records fall outside the scope of that statute. Consequently, the procedural provisions of the Freedom of Information Law, such as those

involving the ability to appeal a denial of access to records, are inapplicable to the courts.

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

Robert J. Freeman
Executive Director

RJF:pb
cc: Robert M. Winn, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7668

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

April 27, 1993

Ms. Wanda McCabe
[redacted]

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

Dear Ms. McCabe:

I have received your letter of April 7 in which you questioned whether you have the right to listen to tape recordings of open meetings.

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."

According to your letter, since the tape recordings are produced by the Secretary of the Village of Lindenhurst Zoning Board of Appeals in the performance of her official duties, 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.

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: Gerard Glass, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7669

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

April 27, 1993

Mr. John B. Schamel
NEA/New York Field Representative
Elmira Service Center
Mark Twain Bldg.
North Main and West Gray
Elmira, N.Y. 14901

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

Dear Mr. Schamel:

I have received your letter of April 8 and the materials attached to it.

In brief, having submitted a request in writing to the records access officer at the Elmira City School District, you were asked to complete forms prepared by the District, "one item on each." You have asked whether your request is appropriate under the Freedom of Information Law and whether it is necessary to complete the District's forms.

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), 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 it unnecessarily serves to delay a response to or deny a request for records.

Second, there is nothing in the Freedom of Information Law that limits the number of records that can be sought in a single request or requires that separate requests must be made for each item requested.

Third, having reviewed your request, I point out that §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 District's record-keeping systems; whether it has the ability to locate and identify the records sought in the manner in which you requested them in every instance is unknown to me.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the District official who responded to your request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Mary L. Budnick, Computer Services Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7670

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

April 28, 1993

Mr. Isaiah Brown
92-R-5542
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 April 8 in which you questioned the "abnormally long length of time" taken by the New York County District Attorney's Office in making a determination to grant or deny your request 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, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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 by the District Attorney to determine appeals is Mr. Irving Hirsch.

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 7671

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

April 29, 1993

Ms. Michele Emmi
[redacted]

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

Dear Ms. Emmi:

As you are aware, I have received your letter of April 12. You have complained about "the Town of Chenango's disregard" for the Freedom of Information Law and sought my assistance on the matter.

By way of background, on February 22, you submitted a request to the Town Clerk seeking records indicating the "last 5 job openings and newly created positions and the last 5 positions advertised and posted, not to exceed 5 years." Three days later, you were advised to contact the Town Attorney. You did so, and wrote that he said that he did not have to "honor" your request because it involves "extensive research", and because "if the information is in personnel files it is considered confidential..." On February 27, you received an acknowledgement from the Town Clerk of the receipt of your request, and the Clerk wrote that the request would be granted or denied within thirty days. On March 19, you received a list identifying the five employees most recently hired. However, since other records sought were not included, you contacted the Attorney who informed you that you would receive a response to the remainder of the request. You had received no further response as of the date of your letter to this office. In addition, you wrote that you are required to complete the Town's request form in order to seek records.

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 do not believe that an agency can require that a request be made on a prescribed form. To reiterate, the Freedom of Information Law, §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 short, it is my opinion that the use of standard forms is inappropriate to the extent that it unnecessarily serves to delay a response to or deny a request for records.

Third, as you are aware, §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. If Town officials have the ability to locate and identify the records in which you are interested, I believe that you would have met the requirement that the requested records be reasonably described.

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

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 concerning personnel records 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, supra; 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).

Based on the foregoing, insofar as the records in question can be located and do not identify individuals, but rather positions, for example, there would be no issue involving privacy, and such records should in my opinion be disclosed. Further, even if the records do not identify public employees, in view of the broad judicial interpretation of the Freedom of Information Law, I believe that they would be available as well.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Bonnie Manning, Town Clerk
Don Walls, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 762

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

April 29, 1993

Mr. Alfred Adams
92-A-0154
Green Haven Corr. Facility
Drawer B
Stormville, N.Y. 12582-0010

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

Dear Mr. Adams:

I have received your letter of April 12. You wrote that, because you do know the name of the records access officer at the Mid-State Correctional Facility, you addressed a request to Superintendent on March 18. As of the date of your letter to this office, you had received no response to the request, and you have sought assistance in the matter.

In this regard, I offer the following comments.

First, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that a request for records kept at a correctional facility may be made to the facility superintendent or his designee. As such, it appears that your request was sent to the proper 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)].

For your information, the person designated to determine appeals at the Department of Correctional Service is Counsel to the Department.

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 7673

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

April 29, 1993

Mr. Charles Leahy
[redacted]

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

Dear Mr. Leahy:

I have received your letter of April 10 and various materials related to it. Based upon your commentary, it appears that you are involved in litigation with the New York City Police Department and that certain records sought have not been made available or perhaps do not exist. You asked that this office advise the Department to "produce information" or "deny via letter".

In this regard, I believe that an agency must respond to a request for records by granting a request or denying access. 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)].

In an effort to assist you, copies of this letter will be forwarded to the Department's records access officer, Sgt. William J. Matusiak, and the person designated to determine appeals, Susan R. Rosenberg, Assistant Commissioner.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. William J. Matusiak
Susan R. Rosenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7674

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

April 29, 1993

Mr. Michael Browning
91-R-5191
Orleans Corr. Facility
P.O. Box 436
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 Mr. Browning:

I have received your letter of April 12. Insofar as your commentary pertains to the Freedom of Information Law, your inquiry involves access to court papers and similar documents that are maintained by an agency.

In this regard, although the situation that you described appears to be unrelated to the Freedom of Information Law, I offer the following comments concerning access to the kinds of records that you described.

First, the Freedom of Information Law pertains to agency records, and §86(3) 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."

Therefore, litigation papers and related documents maintained by an agency would constitute "records" subject to right to conferred by the Freedom of Information Law.

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

Third, the initial 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". Attorney work product is confidential pursuant to §3101(c) of the Civil Practice Law and Rules. Material prepared solely for litigation is generally confidential pursuant to §3101(d). Similarly, communications between an attorney and a client that fall within the attorney-client relationship are considered privileged pursuant to §4503 of the Civil Practice Law and Rules. However, records, such as those exchanged between adversaries or that are submitted to a court and become part of public court records would in my opinion be available from an agency. Consequently, when records sought are publicly available from a court, I believe that they would also be available from an agency that mountains those records under the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Sally B. Johnson, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1675

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

April 29, 1993

Mr. Robert F. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your transmittal of April 16. In brief, your request for certain building plans was denied by the Town Clerk of the Town of Greenburgh because the building inspector informed her that "building plans are not released without permission from the owner."

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

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to mean:

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

Based on the foregoing, architects plans and similar or related documents in my view clearly constitute "records" subject to rights conferred by the Freedom of Information Law.

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

appearing in §87(2)(a) through (i) of the Law. From my perspective, it is unlikely that any of the grounds for denial could be asserted to withhold the records in question. Further, §87(2) of the Freedom of Information Law states that accessible records must be made available for inspection and copying, and §89(3) indicates that an agency is obliged to make a copy of an accessible record if the applicant pays the appropriate fee for copying. In my opinion, whether the owner of property consents to permit access to a building plan is irrelevant; if a record is available under the Freedom of Information Law, the subject of the record does not have the ability to control disclosure.

Second, access to plans and surveys that are marked with the seal of an architect or engineer has been the subject of several questions and substantial research. Professional engineers and architects are licensed by the Board of Regents (see respectively, Articles 145 and 147 of the Education Law,). While §7307 of the Education Law requires that an architect have a seal, and that state and local officials charged with the enforcement of provisions relating to the construction or alteration of buildings cannot accept plans or specifications that do not bear such a seal, I am unaware of any statute that would prohibit the inspection of such records under the Freedom of Information Law. Some have contended that an architect's seal, for example, represents the equivalent of a copyright. Having discussed the matter with numerous officials, including officials of the appropriate licensing boards, the seal does not serve as a copyright, nor does it restrict the right to inspect and copy.

Third, additional considerations become relevant if the records in question bear a copyright, and the question, in my view, involves the effect of a copyright appearing on a document. In order to offer an appropriate response, I have discussed the matter with a representative of the U.S. Copyright Office and the Office of Information and Privacy at the U.S. Department of Justice, which advises federal agencies regarding the federal Freedom of Information Act (5 U.S.C. §552), the federal counterpart of the New York Freedom of Information Law.

It is noted that the Federal Copyright Act, 17 U.S.C. §101 et seq., appears to have supplanted the early case law concerning the Act prior to its amendment in 1976. Further, I am unaware of any judicial decisions rendered in New York concerning the relationship between the Copyright Act and the New York Freedom of Information Law.

Useful to the inquiry is a federal court decision in which the history of copyright protection was discussed, and in which reference was made to notes of House Committee on the Judiciary (Report No. 94-1476) referring to the scope and intent of the revised Act. Specifically, it was stated by the court that:

> "The power to provide copyright protection is delegated to the Congress by the United States

Constitution. Article 1, section 8, clause 8, of the Constitution grants to Congress the power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'

Copyright did not exist at common law but was created by statute enacted pursuant to this Constitutional authority. See Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460, 98 L.ed. 630 (1954); see also MCA, Inc., v. Wilson, 425 F.Supp. 443, 455 (S.D.N.Y. 1976); Mura v. Columbia Broadcasting System, Inc., 245 F.Supp. 587, 589 (S.D.N.Y. 1965), and cases cited therein.

Prior to January 1, 1978, the effective date of the revised Copyright Act of 1976, there existed a dual system of copyright protection which had been in effect since the first federal copyright statute in 1790. Under this dual system, unpublished works enjoyed perpetual copyright protection under state common law, while published works were copyrightable under the prevailing federal statute. The new Act was intended to accomplish 'a fundamental and significant change in the present law by adopting a single system of Federal statutory copyright... (to replace the) anachronistic, uncertain, impractical, and highly complicated dual system.' H.R. Rep. No. 94-1476; 94th Cong. 2d Sess. 129-130, reprinted in [1976] 5 U.S. Code Cong. & Ad. News 5745. This goal was effectuated through the bed-rock provision of 17 U.S.C. subsection 301, which brought unpublished works within the scope of federal copyright law and preempted state statutory and common law rights equivalent to copyright. Id. at 5745-47. Thus, under subsection 301(a), Congress provided that Title 17 of the United States Code, the Federal Copyright Act, preempts all state and common law rights pertaining to all causes of action which arise subsequent to the effective date of the 1976 Act, i.e., January 1, 1978:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in Section 106 in works of authorship that are fixed in a tangible medium of expression and come within

> the subject matter of copyright as specified in sections 102 and 103, whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." [Meltzer v. Zoller, 520 F.Supp. 847, 853 (1981)]

Based upon the foregoing, "common law" copyright appears to be a concept that has been rejected and replaced with the current statutory scheme embodied in the revised Federal Copyright Act.

In view of the language of the Copyright Act, case law and discussions with a representative of the Copyright Office, it is clear in my opinion that architectural plans and similar documents may be copyrighted.

To be copyrighted, 17 U.S.C. §401(b) states that a work must bear a "notice", which:

> "shall consist of the following three elements:
>
> (1) the symbol c (the letter C in a circle), or the word 'Copyright,' or the abbreviation 'Copr.'; and
>
> (2) the year of the first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of the first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and
>
> (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner."

If those elements do not appear on a work, I do not believe that it would be copyrighted, and that it could be reproduced in response to a request made under the Freedom of Information Law.

Assuming that a work is subject to copyright protection, such a work that includes the notice described above is copyrighted. It is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. §408(a)] be registered with the Copyright

Office. No action for copyright infringement can be initiated until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the

effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive

position of the copyright holder, it appears that the work would be available for copying under the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Susan Tolchin, Clerk
Building Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7676

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

April 30, 1993

Mr. Lee E. Brothers
78-D-0143
Washington Correctional Facility
Comstock, NY 12821-0180

<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. Brothers:

I have received your letter and the materials attached to it, which reached this office on April 16.

In brief, having requested a copy of the "master index" from the inmate records coordinator at your facility, you were informed that the request would be forwarded to the freedom of information officer. You have contended that in so doing, the inmate records coordinator denied your request. Further, the freedom of information officer indicated that the record sought does not exist.

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

First, I would conjecture that the inmate records coordinator deals with records identifiable to inmates, rather than records generally. If that is so, her act of forwarding your request to the freedom of information officer would have been appropriate and could not be construed as a denial of your request.

Second, reference to a master index appears in the Department of Correctional Services' regulations. 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. I direct your attention to the regulations promulgated by the Department of Correctional Services, which in §5.13 state that:

> "(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in their possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office.
>
> (b) Each subject matter list and the master index shall be sufficiently detailed to permit identification of the file category of the record sought.
>
> (c) The master index shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list. Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such list shall be mailed or delivered."

Based on the foregoing, it is clear in my view that a master list must be maintained and made available at each facility. By reviewing a subject matter list, you can ascertain the kinds of records maintained by an agency and thereafter, request records based upon your review of the list.

Lastly, you sought advice concerning a "Vaughn motion". It appears that you are referring to an interpretation of the federal Freedom of Information Act, Vaughn v. Rosen [484 F2d 820 (1973)], requiring the preparation of such an index to provide 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Lorraine Hunt, Inmate Records Coordinator
Bradley Ward, Freedom of Information Officer
Anthony Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7677

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

April 30, 1993

Ms. Susan P. Hammond
[redacted]

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

Dear Ms. Hammond:

I have received your letter of April 12, which reached this office on April 20, as well as an ensuing letter of April 22 that was received on April 26.

In brief, you described a series of delays in responding to requests by the Department of Environmental Conservation (DEC) and Oswego County involving records relating to the "Village of Central Square Regionalized Wastewater Collection and Treatment Proposal." According to your letter, the Proposal arose out of a consent order issued by the DEC to the Village of Central Square, and Oswego County is the "lead agency" concerning "the planning, authorizing, and managing of the proposed sewer district." Although it appears at this point that the DEC has disclosed the records sought from that agency, the County has failed to indicate reasons for its denial and has not disclosed the records requested. In addition, you enclosed a resolution adopted by the Oswego County Legislature relating to §253 of the County Law and the preparation of a "map and plan presented...to [the] Legislature" and scheduling a public hearing on May 13 on the proposal to establish a sewer district. The resolution requires the clerk to publish notice of the hearing pursuant to §254 of the County Law.

You have sought my advice and opinions on 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 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)].

Second, §253 of the County Law includes detailed direction concerning the preparation and contents of maps and plans developed under that provision. Further, §254 of the County Law, which deals with the requirements relating to the upcoming public hearing, states in part that:

> "Upon receipt of the report and the maps and plans, the board of supervisors shall call a public hearing upon a proposal to establish a county district, to comprise the area or areas described and defined in said maps and plans. No public hearing shall be called to establish a water quality treatment district until the maps and plans have been submitted to and approved in writing by the state department of health. Copy of such notice of approval or denial of the maps and plans shall be filed in the office of the clerk of the board of supervisors of the county in which the proposed district is located. The clerk of the board of supervisors shall cause a notice of the public hearing to be published at least

> once in the official newspapers of the county in such other newspapers having a general circulation in the proposed district as the board may direct, the first publications thereof to be not less than ten or more than twenty days before the day set therein for the hearing. The notice of hearing shall contain a description of the area or areas to be included within the proposed district, and if the report shall have recommended the establishment of zones of assessment, a description of the area or areas to be included within each zone of assessment, the improvements proposed, the maximum amount to be expended for the improvement, the allocation of such maximum amount as between the zones of assessment recommended, if any, the proposed method of assessment of the cost and shall specify the time when and place where the board of supervisors will meet to consider the matter and to hear all parties interested therein concerning the same. In the event that zones of assessment are provided for and an allocation of costs of the facilities between such zones of assessment, said notice shall further state that said zones of assessment and said allocations of cost may be changed from time to time by resolution of the board of supervisors adopted after a public hearing whenever said board of supervisors shall determine that such changes are necessary in the public interest."

Since the hearing includes reference to the ability of "all parties interested" to express their views regarding a proposal to establish a county district, it is clear in my view, that to do so in a knowledgeable manner, maps and plans "filed in the office of the clerk of the board of supervisors" are intended to be available to the public in advance of the hearing.

I hope that the foregoing is useful to you and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marguerite Lincoln, Clerk, Board of Supervisors
Bruce Clark, County Attorney
Carol Hodgetts, FOIL Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1678

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

April 30, 1993

Mr. Richard Mackay
[redacted]

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

Dear Mr. Mackay:

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

Your inquiry pertains to the propriety of a denial of a request for the resume of are individual hired by the Gilbertsville Mt. Upton School District as clerk of the works. Based on the correspondence attached to your letter, the names of former employers of the person hired were withheld on the ground that disclosure would result in an "unwarranted invasion of personal privacy". However, it also indicates that information reflective of the "level of education, and years of job experience relevant to the position of clerk of the works" was disclosed. Further, you referred to an earlier advisory opinion on the same subject that apparently resulted in disclosure of a resume in its entirety.

In this regard, I offer the following commentary, much of which will reiterate points offered in the earlier opinion.

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 related context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that a resume contains information pertaining to the requirements that must have been met to hold the position, it should be

disclosed, for I believe that disclosure of those aspects of a resume 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, reference to former private employers could in my opinion be withheld. Further, 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 short, if the District disclosed portions of the resume or equivalent information derived from a resume consistent with the foregoing, it appears that the response to your request would have been proper. Again, while I believe that reference to one's previous public employment must be disclosed, reference to one's private employers could in my opinion properly be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Fred G. Loveland, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7679

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

April 30, 1993

Mr. Samuel Jackson
#91-R-3715
Washington Corr. Facility
Box 180 Lock 11 Road
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. Jackson:

I have received your letter of April 19. Your inquiry involves your inability to obtain records relating to your conviction for the sale of drugs, specifically "lab reports and test analysis." You have asked where you should request those records.

In this regard, I offer the following comments.

First, on the basis of your correspondence, it would appear that lab tests and analyses would ordinarily be performed by the arresting agency. However, if that agency is a small police department, for example, it may have tests performed by another law enforcement agency. Since a request should be directed to the agency that maintains the records sought, it is suggested that you attempt to ascertain which agency has possession of the records in which you are interested.

Second, 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 the tests or analyses in question were never prepared, there would be no obligation on the part of an agency to create new records on your behalf.

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

In my opinion, if the records in which you are interested exist and are maintained by an agency, I believe that they would be accessible under the Freedom of Information Law, for none of the grounds for denial would apparently be applicable. Although §87(2)(e) authorizes an agency to withhold records "compiled for law enforcement purposes" under certain circumstances, those circumstances, based on the facts described in your correspondence, would not appear to be applicable.

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 1680

Committee Members

Robert B. Adams
William Bookman, Chairman
Patrick J. Bulgaro
Walter W. Grunfeld
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Wade S. Norwood
David A. Schulz
Gail S. Shaffer
Gilbert P. Smith
Robert Zimmerman

Executive Director

Robert J. Freeman

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

April 30, 1993

Mr. Billy Billups
#80-A-1328
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 Billups:

I have received your letter of April 14 in which you asked "whether the New York City Probation Department and the New York City Parole Division are subject to F.O.I.L." You indicated that you have sought records from both agencies, but that neither has acknowledged the receipt of your requests.

In this regard, I offer the following comments.

First, having reviewed the Official Directory of New York City on your behalf, while there is a New York City Department of Probation, I do not believe that there is any New York City division or department of parole. As you may be aware, there is a New York State Division of Parole.

Second, the Freedom of Information Law pertains to agency records, and §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based upon the foregoing, as a general matter, state and municipal governmental entities, such as the New York City Department of

Probation and the New York State Division of Parole, are agencies required to comply with the Freedom of Information Law.

Third, requests 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. According to the Official Directory, the records access officer at the New York City Department of Probation is Fran Lubow, whose office is located at 115 Leonard Street, New York, N.Y. 10013.

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

Robert J. Freeman
Executive Director

RJF:pb

cc: Fran Lubow, Records Access Officer/General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7681

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

April 30, 1993

Mr. Pedro Nieblas
92-A-5555
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024-9000

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

Dear Mr. Nieblas:

I have received your letter of April 15 and the materials attached to it.

In brief, you have sought advice concerning a request for records directed to the New York City Police Department on March 26. As of the date of your letter to this office, you had 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, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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 by the Police Department to determine appeals is Susan R. Rosenberg, Assistant Commissioner.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. William J. Matusiak, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2210
FOIL-AO-7682

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

May 3, 1993

Mr. Patrick Riordan
[redacted]

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

Dear Mr. Riordan:

I have received your recent letter, which reached this office on April 20.

You asked that the Committee on Open Government investigate with respect to a series of allegations of conflicts of interest and similar improprieties on the part of the Town of Steuben. In addition, you described the Town's "refusal to abide by sunshine laws."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law and the Open Meetings Law. The Committee is not empowered to advise with respect to possible conflicts of interest or to investigate the activities of local governments. Consequently, the following comments will pertain to the issues that you raised relative to the Freedom of Information Law and the Open Meetings Law.

You wrote that the Town Board:

> "...continually goes into executive session to debate matters that should be open to public scrutiny. These include but are not limited to who is appointed to which positions, the purchase of services and equipment and where money's are to be disbursed.
>
> "Attempts to review these decisions is continually thwarted by the refusal of the town clerk to provide a detailed review of the voting on matters discussed in executive session or to provide to the town timely

> copies of budgetary documents, meeting minutes, etc."

It is noted initially that every meeting of a public body 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.

Second, 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 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. Since one aspect of your commentary involved executive sessions to discuss "who is appointed to which positions", I believe that an executive session could validly be held for that purpose.

However, 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 may relate to "personnel". 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 most budgetary matters or those involving the expenditure of public money 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.

With regard to minutes of meetings, §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, 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. 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.

I point out that if a public body has properly entered into an executive session but merely discusses an issue and takes no action, there is no requirement that minutes of the executive session be prepared. When action is taken in executive session, minutes must be prepared and made available in conjunction with §106(2) and (3) of the Open Meetings Law.

With regard to the voting by members of the Board, 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 town 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."

In addition, 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)].

You also complained that you:

> "...have been refused access to documents by various means including but not limited to a) statements by the officials involved that the documents did not exist b) the documents were lost c) the documents were in the

> possession of another and copies had not been kept by the town clerk as required by law d) the documents were locked up in another office to which access was not readily available and e) the documents were being kept at the domicile of a member of town government. In particular an attempt to review invoices paid by the town is being thwarted by the fact that all of the invoices are being kept at the town supervisors house."

It is emphasized that the Freedom of Information Law pertains to agency records, and that §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."

Therefore, whether Town documents are kept at the Town Hall or at the home of the Supervisor or another Town official, for example, they constitute "records" subject to rights conferred by the Freedom of Information Law. While I do not believe that there is a requirement that town records be kept continuously in town offices, 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)].

When an agency asserts that records do not exist or are lost, an applicant may seek a written statement to that effect. Relevant to such a situation is §89(3) of the Freedom of Information Law, which states in part that an agency, on request, "shall certify that it does not have possession of such record, or that such record cannot be found after diligent search."

Irrespective of where agency records may be kept, 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, since several of your comments involve town expenditures and finances, it is suggested that you raise those concerns with the Department of Audit and Control, which is also known as the State Comptroller's Office.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2211
FOIL-AO-7683

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

May 3, 1993

Hon. John J. Howland
Councilman
Town of Henrietta
67 Tumbleweed Drive
Henrietta, NY 14535

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

Dear Councilman Howland:

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

You have raised the following questions concerning the Freedom of Information Law and the Open Meetings Law:

> "1. If the Town of Henrietta is having a Public Works Committee Meeting, what requirements for 'Notice of Meetings' must be followed if the whole meeting will be conducted under executive session?
>
> 2. If a discussion of a publically funded Drainage Report can be taken into 'executive session' at a public works committee meeting just because a number of residents have filed a notice of claim against the Town due to flood damages, suffered by them. The drainage study was a direct result and response to the flooding that occurred.
>
> 3. Can the general observations and recommendations part of the report and the report itself be denied under the Freedom of Information Act?"

In addition, you have sought and opinion concerning public access to a management study prepared for the Town of Henrietta by a

consultant, and the extent to which the study can be discussed in executive session.

In this regard, I offer the following comments.

First, in my opinion, notice must be given prior to a meeting of a public body even if the entire substance of the meeting may be conducted in executive session. I believe that every meeting must be convened as an open meeting, for §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.

Further, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 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 in 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 your second question, 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 a public body discusses its litigation strategy, it does not appear that §105(1)(d) could justifiably be cited to conduct an executive session. Even though notices of claim might have been filed, a discussion of the report that does not include consideration of the Town's litigation strategy relating to those claims would not in my opinion qualify for entry into executive session.

Third, with regard to access to the reports to which you referred, it is noted initially that, as a general matter, the

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

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 that you cited, 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 standard 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 their contents. Insofar as the reports in question consist of statistical or factual information, for example, they would be available under §87(2)(g)(i); insofar as they consist of opinions or recommendations they may be withheld.

I emphasize that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the

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

Consequently, even if it is determined that a record may be withheld under §87(2)(g), for example, an agency would have the authority to disclose the record.

It is also emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session 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 the case of the management study, even though some aspects of the study might be deniable under the Freedom of Information Law, to comply with the Open Meetings Law, the Board may be required to discuss most aspects of the study in public, for there may be no applicable basis for conducting an executive session. Further, if a discussion of the study must occur in public, there may be little reason for withholding the study.

While the study apparently deals with personnel-related issues, it is noted that 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 relates to "personnel". For example, if a discussion involves staff functions or the duties inherent in a position or job title, the issue in my view would involve matters of policy. 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).

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7684

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

May 3, 1993

Mr. Ken Hoch
[redacted]

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

Dear Mr. Hoch:

I have received your letter of April 14 in which you sought assistance in acquiring information from the Peekskill School District.

According to your letter, at the District's recent budget hearing, in consideration of your assumption that "it would be normal to review staff and occasionally terminate unsatisfactory employees", you asked the Board "[h]ow many teachers have you fired in recent years." You did not inquire as to their names or why they were dismissed. You wrote that the Superintendent refused to answer and indicated that "he was prohibited by law from revealing such data."

In this regard, I offer the following comments.

First, although questions may be raised by those who attend public hearings, I know of no requirement that school district officials must answer those questions.

Second, it is suggested that you seek the data under the Freedom of Information Law. 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 the District has not developed figures or statistics concerning the number of teachers that have been dismissed, it would not be required to create new records on your behalf. Rather than seeking the data by raising a question, it is suggested that you request existing records pertaining to the firing or dismissal of teachers during a particular period. In a related vein, §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.

Third, although I am not an expert with respect to the Education Law, I believe that teachers may be dismissed or "fired" pursuant to a limited number of mechanisms. Probationary teachers, those without tenure, may be dismissed during or at the end of a period of probation. Tenured teachers may be dismissed or in accordance with disciplinary proceedings commenced under §3020-a of the Education Law. Further, in some instances, rather than engaging in disciplinary proceedings or completing those proceedings, teachers and school districts may engage in settlement agreements the results of which might be dismissals of teachers. In addition, due to financial or budget constraints, teachers may be "excessed" or laid off. In my opinion, in each of those instances, records reflective of dismissals of teachers, including their names, must be disclosed under the Freedom of Information Law.

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

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 concerning personnel records 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, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In one of the decisions cited above, Gannett, the State's highest court found that the names of employees who had been terminated due to budgetary action were accessible to the public.

Another 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. Insofar as a request involves final agency determinations, i.e., determinations to terminate teachers, 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].

Similarly, 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 §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)].

It is my view that the terms of a 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, 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).

Based upon the foregoing, it is clear in my opinion that records indicating dismissals of teachers, including their names, must be disclosed under the Freedom of Information Law. Moreover, I would conjecture that Board actions regarding dismissals of teachers would appear in minutes of meetings 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

Robert J. Freeman
Executive Director

RJF:pb

cc: Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7685

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

May 3, 1993

Mr. Stephen Taylor
[redacted]

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

Dear Mr. Taylor:

I have received your letter of April 20 and the materials attached to it. In brief, having requested personnel records pertaining to a retired police officer formerly employed by the New York City Police Department, you were informed that the records were "exempt from disclosure under the provisions of Civil Rights Law section 50(a)."

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 (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 §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)].

From my perspective, if the person who is the subject of your request continued to be employed as a police officer, some of the personnel records in question would fall within the coverage of §50-a of the Civil Rights Law and, therefore, would be exempted from disclosure pursuant to that statute. Nevertheless, since the subject of the records has retired and is no longer a police officer, I do not believe that §50-a would be applicable. Further, the rationale for the confidentiality accorded by that provision would no longer be present.

Nevertheless, aside from §50-a, other grounds for denial appearing in the Freedom of Information Law are pertinent to an analysis of rights of access.

For instance, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although 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 interpretations of the Freedom of Information Law, 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, 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, supra]. 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].

Another 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 likely consist of intra-agency materials. However, insofar as your request involves

statistical or factual information, such as attendance or assignment records, or final agency determinations, I believe that those records 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).

In sum, in my opinion, §50-a of the Civil Rights Law would not serve as a basis for withholding the records in question. Rather, I believe that the records in question are subject to rights conferred by the Freedom of Information Law and should be disclosed in conjunction with the preceding analysis.

Copies of this opinion will be sent to the Department's records access and appeals officers.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan R. Rosenberg, Assistant Commissioner
Sgt. William J. Matusiak, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7686

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

May 3, 1993

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

You may recall that on March 30, I prepared an advisory opinion addressed to you concerning the propriety of a fee of fifty dollars assessed by the NYS Department of Transportation in response to a request for data relating to accidents occurring at a particular location. It was suggested in the opinion that the fee was likely inconsistent with the Freedom of Information Law. However, my response was based upon inaccurate assumptions. Consequently, a representative of the Department asked that I provide "a clarification" of the matter.

In this regard, as you may be aware, §89(3) of the Freedom of Information Law states in part that an agency need not create a record in response to a request, and the primary assumption was that the Department had provided an existing record. In such a circumstance and as indicated in the correspondence of March 30, the fee for reproducing an existing record would be based on §87(1)(b)(iii) of the Freedom of Information Law, unless a statute other than the Freedom of Information Law authorizes a different fee. Under the cited provision of the Freedom of Information Law, an agency may charge a maximum of twenty-five cents per photocopy up to nine by inches, or the actual cost of reproducing other records, i.e., those that cannot be photocopied.

Nevertheless, with respect to the kind of report that you request, the Department does not maintain the reports in a readily retrievable manner; rather, I was informed that, in response to those "who have a genuine and serious need", it will produce "custom-generated" reports on a "user-fee basis." Stated differently, Department engages in computer programming in order to create a new record in situations such as that relating to your request.

When information is maintained electronically, in a computer, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved

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)].

If an agency engages in reprogramming or the development of new programs in order to create a new record or records, in my opinion, it would be acting above and beyond the requirements of the Freedom of Information Law. In that event, I do not believe that the provisions in the Freedom of Information Law pertaining to fees would be applicable or serve as a limitation on the fee that could be charged. From my perspective, the "user-fee" charged by the Department in response to your request appears to have been appropriate, for the fee need not have been based on the Freedom of Information Law, and because the fee appears to have been reasonable in view of the effort needed to generate the report.

I hope that the foregoing serves to clarify the matter. If you have questions concerning the issue, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Peter B. Shawhan, Assistant Counsel
James DelPrincipe, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1687

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

May 4, 1993

Mr. Arthur J. Gleason
Trustee
Cohoes City School District
Administrative Offices
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. Gleason:

I have received your letter of April 22, as well as the correspondence attached to it.

In your capacity as a member of the Cohoes City School District Board of Education, you wrote that the Board asked the District Clerk to write to other school districts to request copies of their current superintendents' contracts. You added that the Cohoes City School District is involved in a search for a new superintendent, and that the Board believes that it would be beneficial to review contracts applicable in districts in the vicinity of Cohoes. Although, eleven of the twelve districts in receipt of the request readily disclosed the contracts, "no written response of any kind" was provided by the Troy City School District. Moreover, you indicated that the Troy Superintendent recently telephone your current Superintendent and informed him that he would not provide the District with a copy of his contract.

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

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

Second, contracts, bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments

made to an agency's staff must generally be disclosed, for none of the grounds for denial could appropriately be asserted to withhold those kinds of records. Likewise, in my opinion, a contract between an administrator, such as a superintendent, and a school district or board of education clearly must be disclosed under the Freedom of Information Law. It is noted that there is nothing in the statute 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, I believe that 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.

Lastly, since you indicated that no official of the Troy City School District responded in writing to the request, 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Mario Scalzi, Superintendent
Board of Education, Troy City School District
Records Access Officer, Troy City School District
Sharon Billings, Cohoes District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7688

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

May 4, 1993

Ms. Aimee J. Fitzgerald,
President, TAG
c/o 55 Ridge Terrace
Central Valley, NY 10917

Mr. Terrence L. Olivo
Superintendent of Schools
Monroe-Woodbury Central School District
Education Center
Central Valley, NY 10917

The staff of the Committee on Open 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 and Mr. Olivo:

I have received your letters, which are respectively dated April 21 and April 30. Both deal with a request by Ms. Fitzgerald on behalf of the TAG/Taxpayers Action Group for records indicating "accrued unused sick days" of employees of the Monroe-Woodbury Central School District. Mr. Olivo's correspondence includes a determination to affirm an initial denial of the request on the ground that disclosure would constitute "an unwarranted invasion of personal privacy", and that, therefore, the District is "precluded from releasing such information to a third party."

Ms. Fitzgerald has sought an advisory opinion on the matter, and, in this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more 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 involving the use of leave time, based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

In addition to the provisions dealing with the protection of privacy, also significant to an analysis of rights of access 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 records could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning the use of leave time or absences or the time that employees arrive at or leave work would constitute "statistical or factual" information accessible under §87(2)(g)(i).

As indicated in Mr. Olivo's denial, also relevant 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." The 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)].

In a decision affirmed by the State's highest court dealing with attendance records, specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In that case, 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.

Moreover, 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, including those concerning the use or accrual of sick leave, must be disclosed under the Freedom of Information Law.

Lastly, even when the District may properly withhold records or portions of records because disclosure would result in an unwarranted invasion of personal privacy, which I do not believe to be so in this instance, it would not be "precluded from releasing such information" as Mr. Olivo suggested. While an agency may withhold records in certain circumstances, it is not obliged to do so, for the Freedom of Information Law is permissive. The Court of Appeals has held that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, although an agency may in appropriate circumstances withhold records, I do not believe that it is obliged to do so.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

PPPL-AO 145
FO.2-AO 7689

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

May 5, 1993

Mr. Don Stepka
[redacted]

Dear Mr. Stepka:

I have received your letter of April 23 in which you referred to a request for an advisory opinion made by John Manning Regan of the Monroe County Department of Law concerning pistol permit records.

Although this office has received no such request, according to your letter, Mr. Regan has apparently contended that the Personal Privacy Protection Law "may be construed to deny general access to pistol permit applications." Despite the absence of receipt of a request for an opinion on the matter from him, I offer the following comments.

First, the Personal Privacy Protection Law is applicable only to state agencies. For purposes of that statute, §92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based on the foregoing, the Personal Privacy Protection Law excludes from its coverage "any unit of local government", such as Monroe County. Consequently, the Personal Privacy Protection Law would not be applicable or serve as a barrier to disclosure of records maintained by a unit of local government.

Second, 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 noted that in a dissenting opinion, 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)]. Further, even if the Personal Privacy Protection Law pertained to Monroe County, I point out that one of the situations in which that Law permits disclosure involves cases in which disclosure is "specifically authorized by statute..." [i.e., Penal Law, §400.00(5)].

In sum, it is my view that approved pistol license applications are clearly public records, and that the Personal Privacy Protection Law has no impact upon public rights of access to those records.

For purposes of offering clarification of the matter, a copy of this letter will be sent to Mr. Regan.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: John Manning Regan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7690

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

May 5, 1993

Mr. Thomas M. Lowe
92-B-1720
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. Lowe:

I have received your letter of April 19 and the correspondence attached to it. As you requested, the correspondence will be returned to you.

In brief, as I understand the matter, you allege that you are the victim of a beating that occurred in the Broome County Jail. In conjunction with a notice of claim, you requested records from the Office of the County Attorney, including "incident reports, medical records, photos, and any statements made by individuals who were interviewed by any other agency" that are in possession of the County Attorney's office. Your requests were denied on the basis of §87(2)(e)(i) of the Freedom of Information Law. Further, although your most recent request was appealed on January 18, you had received no determination of the appeal as of the date of your letter to this office.

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

First, with respect to a failure to respond to an 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, who shall within ten business days of the receipt of 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, it has been held that 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, 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 §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. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential relevance is the first ground for denial, §87(2)(a), which 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 §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).

Also of possible §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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Joseph J. Slocum, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7691

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

May 6, 1993

Ms. Patricia Carroll
[redacted]

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

Dear Ms. Carroll:

I have received your letter of April 23 in which you sought advice concerning the Freedom of Information Law.

According to your letter, having made a request for records of the Bayport Blue Point School District on April 12, the District Clerk orally confirmed that she received the request the following day and "put it on the Superintendent's desk for his perusal." You added that "[h]e was to return on April 16th, on the same day she would begin vacation." On April 22 and 23, you contacted the District to question the status of the request, and you were told that it remained on the Superintendent's desk and that "he'd be in touch." You indicated that you "never received a written acknowledgement or a decision about whether it [the request] would be granted or denied..." In addition, you wrote that the District's rules adopted under the Freedom of Information Law indicate that the business administrator is the records access officer, and that that person has apparently had no involvement in the matter.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny

> such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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, in my opinion, either the District Clerk or the Superintendent should have responded in accordance with previous commentary or forwarded your request to the business administrator in that person's capacity as records access officer.

Section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a board of education, to adopt rules and regulations consistent with the Law and the Committee's regulations.

Relevant to your inquiry is §1401.2 of the regulations, which provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records

> access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests. As such, in my opinion, either the records access officer or some other person should have responded to your request in a manner consistent with the Freedom of Information Law.

In an effort to assist you, copies of this opinion will be forwarded to School District officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent
District Clerk
Business Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7695

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

May 6, 1993

Mr. Donald Stepka
[redacted]

The staff of the Committee 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. Stepka:

I have received your letter of April 26 in which you sought an advisory opinion concerning the Freedom of Information Law.

Your inquiry concerns a request for certain "crime reports" maintained by the City of Rochester Police Department. Specifically, you requested "all Rochester Police Department crime reports dealing with the display, threatening use, and discharge of rifles, handguns, and shotguns within the City during the period 1/1/80 to the present". Although the City's records access officer wrote that the "request is not reasonably described", you contend that related correspondence indicates that the Department "understands exactly what records are sought." Your contention appears to be based upon a portion of a memorandum referring to a "report relative to weapons used in crimes" that includes reference to 1,352 such reports "for 1992 alone."

To obtain additional information concerning the matter, I contacted Jeffrey Eichner of the Office of Corporation Counsel. Based upon the materials that you sent as well as the information provided by Mr. Eichner, I offer the following comments.

First, although there may be a mechanism for locating some of the reports in which you are interested, there may be no method, other than a record by record search, for locating others. Further, while recent reports falling within the scope of your request may in some instances be found, since the records requested include reports dating to 1980, many apparently cannot be located based upon the terms of your request.

In this regard, 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 [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. To the extent that City officials have the ability to locate and identify the records in which you are interested, I believe that you would have met the requirement that the requested records be reasonably described. That would appear to be so with respect to some of the more recent reports that you requested. It is my understanding that for each weapon that is confiscated or turned over to the City, the property clerk prepares a report. On the basis of those reports, certain crime reports involving the use of a weapon can be located. Insofar as your request involves those reports, I believe that you would have reasonably described the records. However, there are also instances in which weapons may have been used or allegedly used in which the weapons have not come into the custody of the City. In those situations, I was informed that there is no mechanism of locating the reports. Further, with respect to older reports that are not maintained in the same manner as the more current records, I was informed that there may be no way of locating the records in question.

Second, to the extent that the City can locate the 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 §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. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential relevance is the initial ground for denial, §87(2)(a), which enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute is §160.50 of the Criminal Procedure Law, which pertains to situations in which charges against an accused are dismissed in favor of the accused. In those cases, that statute generally requires that the charges and records relating to the charges and the arrest, including the kinds of reports in which you are interested, be sealed and confidential.

Also of possible relevance 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 victim, 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.

Lastly, since you referred in your request to the possibility of a waiver of fees, I point out that the New York Freedom of Information Law, to be distinguished from the federal Freedom of Information Act, contains no provision regarding fee waivers. Even in a case in which an applicant may be indigent, it has been held that an agency may assess a fee for the reproduction of records [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)]. Further, when an agency may properly delete portions of a record prior to disclosure, I do not believe that an applicant would have the right to inspect the record. In such a case, the agency could make a copy of the record for which the appropriate fee may be charged. Additionally, it has been held that an agency may require payment in advance of duplicating records [Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Jeffrey Eichner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2212
FOIL-AO 7693

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

May 10, 1993

Ms. Katherine Better
[redacted]

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

Dear Ms. Better:

I have received your letter of April 27. In your capacity as a member of the Ichabod Crane School District Board of Education, you have requested an advisory opinion concerning issues described in the correspondence attached to your letter.

Your initial concern is expressed as follows:

> "Unless of a highly confidential matters (such as a student's or employee's record) should we not as a Board be provided with any and all necessary information regarding a motion for Executive Session before voting? Then, on the basis of the information (as opposed to an 'idea' which is what we currently receive) we as a Board can make a public decision as to where the matter should be discussed (publicly or privately)."

The District's attorney, Melvin H. Osterman, wrote that the distribution of "confidential information" to Board members prior to meetings would increase the likelihood of an "inadvertent disclosure". He added, however, that "[c]ertainly the Board should be given at least enough information before each meeting to understand why a particular matter is being referred to Executive Session" and suggested that "the Board could adopt guidelines for what matters will be considered in Executive Session."

In this regard, as a general matter, in conjunction with the broad grant of powers and duties conferred upon boards of education by §1709 of the Education Law, I believe that a board of education

has the authority to acquire information needed to carry out its official duties.

Among those duties is compliance with the requirements of the Open Meetings Law. From my perspective, members of a board of education, as well as the public generally, have the right to know whether an executive session will be properly held under the Open Meetings Law.

I point out that, 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 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. 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 on its agenda.

In my opinion, information distributed prior to meetings and motions to enter into executive session should be sufficiently detailed to enable Board members, and, later, the public, to know that the subject matter intended to be discussed in an executive session falls within one or more of the grounds for entry into an executive session. Based upon the language of the Open Meetings Law and its judicial interpretation, motions to conduct executive sessions citing the subjects to be considered as "personnel", "litigation" or "negotiations", for example, without additional detail are inadequate. The use of those kinds of terms alone do not provide members of public bodies or members of the public who attend meetings with enough information to know whether a proposed executive session will indeed be properly held.

For instance, although it is used frequently, the term "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. By way of background, 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 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 §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, or when the issue bears upon a group of employees, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel".

Moreover, 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 [see <u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, July 21, 1981; also <u>Becker v. Town of Roxbury</u>,

Supreme Court, Chemung County, April 1, 1983]. 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.

Another ground for entry into executive session frequently cited relates to "litigation". Again, that kind of minimal description of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is §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 legal matters or 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.

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].

Similarly, with respect to "negotiations", the only ground for entry into executive session that mentions that term is §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, §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 §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into executive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle, supra].

In sum, I believe that Board members should acquire information prior to a meeting sufficient to have the capacity to comply with the Open Meetings Law, and that a motion to enter into an executive session must be sufficiently detailed to enable Board members and the public to know that the Board is acting in compliance with the Law. Further, while I am in general agreement with Mr. Osterman's commentary, I disagree with his suggestion that the Board might adopt "guidelines for what matters will be considered" during executive sessions. As indicated earlier, the grounds for entry into executive session are fixed by the Open Meetings Law. Consequently, any "guidelines" or policy that is more restrictive with respect to openness would be void and superseded by the Open Meetings Law [see Open Meetings Law, §110(1)]. Perhaps guidelines or standards could be developed regarding the nature or amount of material that should be distributed to members of the Board prior to its meetings to ensure that it can effectively carry out its duties in general and to ensure compliance with the Open Meetings Law.

The second area of concern relates to a letter that you addressed to the Superintendent in which you asked that he provide you and each member of the Board "with the total amount of money currently owed to [him] by the District", and a "complete breakdown of the accumulated costs." In your letter to the Superintendent, you indicated that you requested the information several times beginning in February and that the data would be useful in consideration of the budget.

It is unclear whether your letter constitutes a request made under the Freedom of Information Law or whether it was made individually or on behalf of an at the direction of the Board as a whole. In this regard, 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.

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 75 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, 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, §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.

Further, 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 breakdown of costs exists, the Freedom

of Information Law would not require that the Superintendent prepare such a record on your behalf.

I would conjecture, however, that the Superintendent and other employees routinely prepare records for the Board, particularly in the budget process, in order to enable the Board to carry out its duties. Even if no breakdown exists, as a service to the Board, it appears unlikely that the preparation of the records in question would represent a significant burden. Moreover, while the "total" or "breakdown" that you requested might not exist in a single record, presumably other records exist that could be used to prepare those records. In my view, those records would be accessible under the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Based upon your description of the information, none of the grounds for denial could appropriately be cited to withhold the records. Once in receipt of the records, you or others could independently prepare a total or breakdown.

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: Melvin H. Osterman
Jerome F. Callahan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7694

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 10, 1993

Mr. Jonathan Odom
#92-T-0387
Sing Sing Correctional Facility
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. Odom:

I have received your letter of April 24 in which you sought assistance.

According to your letter, the Superintendent at your facility is "refusing to answer or respond to a Freedom of Information request" addressed to him on April 15 concerning decisions relating to disciplinary hearings. You added that you have written to him several times "about receiving a decision in this matter."

In this regard, I offer the following comments.

First, it is unclear whether the decisions in which you are interested have been prepared or rendered. 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 decision has been prepared or rendered, there would be no record, and Freedom of Information Law would be inapplicable.

Second, even if the records sought do not exist, in my opinion, a response to that effect should have been given. 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)].

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: John P. Keane, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7695

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 10, 1993

Mr. Brandon M. Stickney
Lockport Union-Sun Journal
459 S. Transit Street
Lockport, N.Y. 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 April 27 in which you raised issues concerning both the Freedom of Information Law and the Open Meetings Law.

With respect to the former, having requested records from the Lockport School District concerning a retired teacher's lawsuit against the District, you were informed that "further litigation" could be pending and therefore the school district's attorney denied the...request for the suing retiree's name, etc."

In this regard, 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 §§87(2)(a) through (i) of the Law.

It is possible that some of the records fall within the scope of the attorney-client privilege. Here I point out that the first basis for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For nearly a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1989); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client

relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, material prepared for litigation may be confidential under §3101 of the Civil Practice Law and Rules.

Nevertheless, legal papers filed against the District would not have been prepared by the District, its officials or its agents. As such, in my opinion, those papers would not be subject to the attorney-client privilege. For similiar reasons, the answers prepared by the District in response to a petition or legal papers, once served upon a plaintiff or legal adversary, would be outside the scope of the attorney-client privilege. As soon as those papers are made available to the District's adversary, I believe that they become a matter of public record. Moreover, although the Freedom of Information Law does not apply to the courts and court records, such records are generally available under other provisions of law [see e.g., Judiciary Law, §255]. From my perspective, if the records sought are publicly available from a court, they would also be available under the Freedom of Information Law from the District. In short, papers submitted by plaintiffs to the District and the District's responses thereto could not in my opinion be characterized as privileged or confidential, for they would have been communicated between or among persons other than District officials and their legal counsel.

The issue pertaining to the Open Meetings Law relates to the procedure for entry into executive session to discuss litigation. As you are aware, prior to entry into executive session, §105(1) of the Open Meetings Law requires that a motion to conduct an executive session be made during an open meeting, and that the motion indicate the subject or subjects to be considered.

The provision that deals with litigation is §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 legal matters or 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.

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].

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: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7696

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 10, 1993

Ms. Dolores A. Monahan
[redacted]

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

Dear Ms. Monahan:

I have received your letter of April 23 and the materials attached to it.

Your inquiry relates to a request directed to the State Department of Audit and Control. Although several aspects of the request were satisfied, the final portion of the request involved "copies of any and all reinstatements, or recalculations, and any and all settlements and orders of persons to the pension system, especially those of MALE persons" (emphasis yours). In response to both your initial request and your appeal, you were informed that that aspect of the request did not reasonably describe the records. Specifically, the Department's Records Access Officer indicated that the "membership records of the Retirement System are indexed by name, registration number and Social Security number only." As such, absent those kinds of identifiers, there is apparently no means of retrieving the records in which you are interested.

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

As indicated in the correspondence, §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. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

According to the responses by officials of the Department of Audit and Control, its record-keeping system is not designed in a manner that enables staff to locate particular records falling within the scope of your request, unless the request includes the kinds of personal identifiers described earlier. Consequently, there appears to be no way of either locating or effectively requesting the records in question without use of those identifiers. That being so, I believe that the responses to your requests were proper and consistent with the requirements of the Freedom of Information Law.

I regret that I cannot be of greater assistance in the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Robert R. Hinckley, Records Access Officer
James Kalteux, Records Appeal Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7697

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 10, 1993

Mr. Sean VanBuren
#92-A-0020
135 State Street
Auburn, N.Y. 13021-9000

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

Dear Mr. VanBuren:

I have received your recent letter in which you sought assistance in obtaining records.

According to your letter, having requested records from the Nassau County Appeals Bureau, you were informed that the records could not be found. In this regard, I offer the following comments.

First, since I am unfamiliar with any agency known as the Nassau County Appeals Bureau, I point out that a request made under the Freedom of Information Law should be made to the "records access officer" at the agency that maintains the records in which you are interested. The records access officer has the duty of coordinating the agency's response to requests. As such, if, for example, the records are maintained by the Nassau County Police Department and the Office of the District Attorney, requests should be directed to the records access officers at those agencies.

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, although the courts are not subject to the Freedom of Information Law, court records are often available under the other provisions of law (see e.g., Judiciary Law, §255). To seek court records, a request should be made to the clerk of the appropriate court, again, with sufficient detail to enable court personnel to ocate the records.

Insofar as records can be located, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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 law enforcement agency and communicated within that 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

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7698

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 11, 1993

Mr. Kirkland E. Smith
83-A-4548
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

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

Dear Mr. Smith:

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

As I understand the correspondence, you requested the "registration certificates" of three medical personnel who work at the Mid-Orange Correctional Facility. Because some of the information contained on those certificates could be withheld either as an unwarranted invasion of personal privacy or because disclosure could endanger the lives or safety of those identified, rather than photocopying the certificates and making appropriate deletions, you were given a memorandum that included the full names of those involved and their registration numbers. You appealed, contending that you have the right to see an "actual certificate", even if other information on the certificate, such as a home address or a birthdate, is deleted. In response to the appeal, Counsel to the Department of Correctional Services determined that you are "entitled to copies of the requested documents including certain information which is to be redacted." However, he affirmed the initial response to the request because, "in essence, the disclosable information was provided" to you.

In this regard, §87(2) of the Freedom of Information Law requires that all records be made available, except to the extent that records or portions thereof fall within certain grounds for denial of access. Therefore, although portions of records may be withheld in appropriate circumstances, the remainder of those records must be disclosed. Further, under §89(3) of the Law, copies of records or portions thereof must be made available upon payment of the requisite fees. Consequently, if you are willing

and able to pay those fees, I believe that photocopies should be made. Under the circumstances, however, since accessible information derived from the certificates has been disclosed to you, from my perspective, preparing photocopies would appear to be a largely superfluous activity.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci, Counsel
Mrs. R. Snow, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7699

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

May 11, 1993

Mrs. Lorenzo Troni
[redacted]

The staff of the Committee on 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. Troni:

I have received your letter of April 22 and the materials attached to it.

Your correspondence relates to "sex ed. movies" prepared in 1988 by a member of the Mamaroneck Union Free School District Board of Education and the principal of a middle school. In relation to the foregoing, on February 18, you requested the following records from the Superintendent of Schools:

> "1. copies of permits for children to appear in HRM Video sex ed movies shot on Hommocks school premises spring 1988. (including but not limited to [redacted] and [redacted])
>
> 2. copies of HRM Video application or its insurance carrier to use the Hommocks premises for commercial sex ed films.
>
> 3. Copy of your approval to HRM Video for illegal use of the premises
>
> 4. Copy of contract between HRM Video and Mamaroneck School District for use of the premises."

You have asked for assistance in obtaining the records sought.

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.

With respect to the first aspect of your request, it appears that the first ground for denial, §87(2)(a), is relevant. That provision authorizes agencies to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Rights and Privacy Act (FERPA; 20 USC §1232g), which pertains to records identifiable to students.

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. Therefore, insofar as the permits that you requested would, if disclosed, identify students, I believe that they would be exempted from disclosure pursuant to a federal statute.

With regard to items 2 and 4 of your request, assuming that those records are maintained by the District, I believe that they would be available under the Freedom of Information Law, for none of the grounds for denial would be applicable.

Item 3 relates to the Superintendent's "approval to HRM Video for illegal use of the premises." I would conjecture that there is no record that confers an approval referring to an "illegal use". However, if there is a record reflective of the Superintendent's approval to HRM Video for use of the premises, such a record in my view would be available, for final agency determinations are accessible under §87(2)(g)(iii) of the Freedom of Information Law.

Lastly, in view of the delay in response to your request, 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)].

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Norman Colb, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1700

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 12, 1993

Mr. Eugene Forman
#91-A-8549
Clinton Correctional Facility
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. Forman:

I have received your letter of April 29 in which you asked whether you can request attorney's fees as part of the relief sought in an Article 78 proceeding brought under the Freedom of Information Law.

In this regard, 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 point out that there is a decision in which the issue was whether a person representing himself who was not an attorney was eligible for an award of attorney's fees. 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).

Enclosed are copies of the advisory opinions that you requested.

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 7701

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 12, 1993

Mr. Paul Ertelt
The Post-Star
P.O. Box 2157
Glens Falls, NY 12801-0012

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

Dear Mr. Ertelt:

I have received your letter of April 29 and the correspondence attached to it.

According to the materials, having requested records from the Town of Lake Luzerne, the Town Clerk acknowledged receipt of your request and indicated that the records sought, if available, would be furnished within 30 days of the date of the letter of acknowledgement. When you contacted the Clerk concerning her response, she "refused to give [you] an approximate date for filing the request and merely repeated that it would be "within 30 days". It is your belief that "it is the policy of the town to wait 30 days before responding to an FOI request."

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

From my perspective, if, as a matter of practice or policy, the Town Clerk acknowledges the receipt of requests by stating that requests will be granted or denied within thirty days, irrespective of the nature, volume or search needed to respond, such a practice would be inconsistent with both the language and the intent of the Law.

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

> available to the person requesting it, deny such request in writing or furnish 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 agencies, in the case of routine requests, should ordinarily have the ability to grant or deny access to records within five business days. If more than that period is needed, due to the possibility that other requests have been received, that other duties preclude a quick response, or because of the volume of a request, the need for consultation, the search techniques needed to locate records, or the need to review records to determine which portions should be disclosed or denied, the estimated date for granting or denying a request indicated in an acknowledgement should reflect those factors. Those kinds of considerations may often be present, particularly in large agencies that may have several units or perhaps regional offices. However, in the case of a small municipality, such as the Town of Lake Luzerne, I would conjecture that in most instances, the town clerk, as the legal custodian of Town records and its records management officer, has the ability to locate records readily and determine rights of access quickly. Further, I believe that, to comply with the Law, the indication of an estimated date when records will be granted or denied should be as accurate an estimate as possible. While an estimate of 30 days may be valid or realistic in rare situations, it would not likely be so in most others.

I point out that there is no reference in the Freedom of Information Law to a 30 day limitation or period before or within which a request must be honored. The only reference in the Law to a 30 day period appears in §89(4)(a), which states that a person denied access to records may appeal within 30 days of the denial.

Lastly, it is noted that the legislative declaration appearing at the beginning of the Freedom of Information Law (§84) states in part that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible."

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Joan K. Hall, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7702

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 13, 1993

Ms. Carole Chambers
[redacted]

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

Dear Ms. Chambers:

I have received your letter of April 28 and the correspondence attached to it.

Having requested the "names and corresponding gross income figures on all Internal Revenue Service W-2 forms and 1099 forms issued by the Bayport-Blue Point School District for the year 1992", the Superintendent made certain claims in response to your request. Specifically, although he wrote that names and gross wages would be disclosed, he indicated that individual W-2 forms must be copied and "altered" prior to disclosure, a labor intensive task that precludes the District from responding "in the minimum 30-day response period." You contend that the data is "computerized, readily available to him and simply require being printed out." You added that it is your belief that the local BOCES would be willing to provide district with a "computer print-out of the information [you] want." Further, you indicated to the Superintendent that you are "entitled to receive that information within ten day (not 30 days...) of the date of [your] request."

You have requested a clarification of the issues. In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law pertains to agency records, and the §86(4) of the Law defines the term "record" expansively to include:

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

Based upon the 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. Since §89(3) of the Freedom of Information Law states that an agency need not 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 short, if the data in question is "computerized" and the District has the ability to prepare a printout, rather than manually preparing photocopies of W-2 forms, I believe that it would be obliged to do so. That process would likely be less costly to you and less costly to the District, particularly in view of the clerical time and effort needed to make redacted copies of W-2 forms. Further, if a BOCES maintains the data, it may be worthwhile to contact that agency to ascertain whether a request might more appropriately made there.

Second, it appears that both you and the Superintendent may be misinformed with respect to the time within which an agency must respond to a request. Section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based upon the foregoing, I believe that agencies, in the case of requests for records that can be readily found or, as in the case of electronic information that can be readily generated, should ordinarily have the ability to grant or deny access to records within five business days. If more than that period is needed, due to the possibility that other requests have been received, that other duties preclude a quick response, or because of the volume of a request, the need for consultation, the search techniques needed to locate records, or the need to review records to determine which portions should be disclosed or denied, the estimated date for granting or denying a request indicated in an acknowledgement should reflect those factors.

I point out that there is no reference in the Freedom of Information Law to a thirty day limitation or period before or within which a request must be honored. The only reference in the Law to a 30 day period appears in §89(4)(a), which states that a person denied access to records may appeal within thirty days of the denial. Similarly, the only reference to ten days also appears in §89(4)(a), which provides that an agency must respond to an appeal of a denial within ten business days of the receipt of an appeal.

Lastly, it is noted that the legislative declaration appearing at the beginning of the Freedom of Information Law (§84) states in part that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible."

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Richard W. Curtis, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7703

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 14, 1993

Mr. Herman G. Brunelle Sr.
Mrs. Audrey J. Brunelle
[redacted]

The staff of the Committee on Open 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 Mrs. Brunelle:

I have received your letter of May 3 which pertains to request for records directed to the New York State Division of Equalization and Assessment. On the basis of your letter, it appears that the request was not answered within the appropriate 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 Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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:pb

cc: Robert L. Beebe, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7704

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 14, 1993

Ms. Kathleen J. Cochran
Mr. Nelson Broecker
Concerned Taxpayers of North
Tonawanda, Inc.
462 Adelaide Place
North Tonawanda, N.Y. 14120

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

Dear Ms. Cochran and Mr. Broecker:

I have received your letter of April 30 and the materials attached to it. They deal in great measure with requests for records to the North Tonawanda and Niagara Wheatfield School Districts.

Although the records sought appear to have been made available, you raised the following questions:

> "1. If it is illegal to have a FUND BALANCE of the amounts shown in Exhibit H what steps can we legally take to correct this?
> 2. The vouchers look like we purchased $100,000.00 insurance policies for four (4) administrators or even if it is eighteen, Why at taxpayers expense?
> 3. Why do taxpayers of New York State have to abide by the freedom of information act when it seems that the North Tonawanda school administrators feel that they are above the law?"

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The first two questions do not deal with access to records and are beyond the scope of the jurisdiction or expertise of this office. It is suggested that you raise those issues with the State Education Department. With respect to third question, taxpayers do not have abide by the Freedom of Information Law; rather, agencies subject it that statute are obliged to comply with its provisions.

However, having reviewed the correspondence, I offer the following comments.

First, since one of the issues appears to involve the timeliness of responses to requests, I point out that §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, §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 brief, 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, a copy of certain policies apparently adopted by the Niagara Wheatfield School District was enclosed. The first, Policy 3300, states generally that access to District records shall be conferred in a manner consistent with the Freedom of Information Law and the regulations promulgated by the Committee on Open Government. The second, Policy 3310, is entitled "Confidentiality of Computerized Information" and states that:

> "The development of centralized computer banks of educational data gives rise to the question of the maintenance of confidentiality of such

> data. There are legitimate concerns that central files of information and other data be maintained at the highest level of security. The safeguarding of the data from inappropriate use is essential to the success of the District's operation.
>
> "Therefore, it shall be the policy of the District to release computerized data only to authorized personnel of the School District to which the data belong or to others as directed by the Superintendent.
>
> "Furthermore, such information shall be treated as confidential data by all School District employees. It shall be a violation of the district's policy to release computerized data to any unauthorized person or agency. Any employee who releases or otherwise makes improper use of such computerized data shall be subject to disciplinary action."

With respect to the foregoing, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. 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 §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, computerized information maintained by an agency is subject to the requirements of the Freedom of Information Law in a manner analogous to traditional paper records.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Dr. John George
Dr. Joel J. Raden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7705

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 14, 1993

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, unless otherwise indicated.

Dear Mr. Luebbert:

I have received your letter of April 28 in which you raised questions relating to a request for records of the Town of Newburgh. Due to the receipt of related materials sent by Doris M. Greene, Town Clerk, I discussed the matter with her.

In brief, you were informed by Ms. Greene that certain records that you requested would not be made available or photocopied until she could forward them to the Town Attorney for review. Although you suggested that the records were part of "the public file" containing SEQRA material accessible to the public, Ms. Greene indicated that was not so with respect to the records in question. Further, she acknowledged the receipt of your request, which was made on April 16, in a letter of April 21 and confirmed that your request had been forwarded to the Town Attorney to determine rights of access to the records.

You have raised the following questions:

> "1. were copies of records requested wrongfully not made available?
>
> 2. was access to the file wrongfully withheld when [you] asked to reinspect the file to reference the documents for a written FOIL as requested by the Town Clerk?
>
> 3. was response to [your] written FOIL request properly answered by the forwarding to the town attorney for an opinion?

> 4. was a response to [your] foil properly responded to as requested as per the FOIL law?"

In this regard, agency officials are not required to respond to requests instantly. Section 89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Therefore, for example, if agency officials need more than five business days to locate records or review records to determine the extent to which they are accessible or deniable, an agency may acknowledge the receipt of the request in writing within that period and extend the time for granting or denying access. Nothing in the law precludes the recipient of a request from seeking advice or consultation from others, and I believe that the Clerk acted appropriately by forwarding your request and the records to the Town Attorney in an effort to ascertain rights of access.

The only aspect of the response that was inconsistent with the requirements of the Freedom of Information Law in my opinion involves the absence of a "statement of the estimated date when [the] request will be granted or denied..." I believe that such a statement should have been included in the acknowledgement of the receipt of your request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Doris M. Greene, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 2706

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 17, 1993

Mr. Jonathan Bryant
#77-A-2816
P.O. Box 700
Wallkill, N.Y. 12509

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

Dear Mr. Bryant:

I have received your letter of April 27, which reached this office on May 5.

As in the case of your recent previous correspondence, the issue involves a request directed to John R. Patterson Jr., who currently serves as an attorney for the Department of Correctional Services but who had been your trial counsel prior to his employment with that agency. At the time of your earlier inquiry, it was unclear whether you were seeking records from Mr. Patterson in his capacity as an attorney for the Department or as your former private attorney. You have made clear that "this F.O.I.L. request was/is for Mr. Patterson (as [your] 'former' attorney)", and that the request "has nothing to do" with the Department of Correctional Services.

That being so, I emphasize that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines that term "agency" to mean:

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

Based upon the foregoing, the Freedom of Information Law applies to records of governmental entities. While records maintained by the

Department of Correctional Services or by Mr. Patterson in his capacity as an employee of the Department would fall within the scope of the Freedom of Information Law, records maintained by Mr. Patterson in his capacity as a private attorney would fall outside the coverage of that statute. Stated differently, insofar as you are seeking records from Mr. Patterson as your former attorney, the Freedom of Information Law would be inapplicable.

Having contacted Mr. Patterson to discuss the matter, I was informed that you may communicate with him in his capacity as your former attorney by writing to him at 1 Washington Street, Cambridge, NY 12816.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: John R. Patterson, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7707

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 17, 1993

Mr. Al DiLorenzo
#86-A-3282
Great Meadow Corr. 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. DiLorenzo:

I have received your letter of April 30. You have asked whether records relating to your trial attorney's disbarment accessible, and if so, which agency would have such records.

In this regard, 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."

Based upon the foregoing, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute.

To obtain records concerning a proceeding against an attorney, it is suggested that you contact the grievance committee for the judicial district attorney where such proceeding occurred or the Office of Court Administration at 270 Broadway, New York, N.Y. 10017.

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 7708

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 17, 1993

Mr. Lee E. Brothers
#78-D-0143
Washington Correctional Facility
P.O. Box 180, Lock 11 Road
Comstock, N.Y. 12821-0180

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

Dear Mr. Brothers:

I have received your letter of May 3 and the correspondence attached to it. You have complained that a request for records at your facility made on April 19 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 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)].

For your information, the person designated by the Department of Correctional Services to determine appeals is Counsel to the Department. Further, you cannot initiate an Article 78 proceeding until you have exhausted your administrative remedies. Stated differently, there must be an actual or constructive denial of an appeal before such a proceeding may be initiated. In addition, as indicated in my letter to you of April 30, the Inmate Records Coordinator may not be the person designated to deal generally with requests made under the Freedom of Information Law.

Lastly, since the basis of your request involved the citation of the federal Freedom of Information and Privacy Acts, I point out that those statutes apply only to federal agencies. The vehicle for seeking the records in question is the New York Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: L. Hunt, Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7709

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 18, 1993

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 May 5 in which you requested an advisory opinion concerning the Freedom of Information Law.

You wrote that "[i]n the Town of Rotterdam, there is the question of how many of its employees are receiving a family plan health insurance coverage at public expense who are also covered by a spouse's family health insurance plan, also at public expense." Further, the problem that you have encountered with respect to Schenectady County and the Mohonasen School District involves the inability "to secure names of their employees who are receiving health insurance, so that comparisons can be made as to how many, and who are those receiving double family coverage at public expense." One of the items attached to your letter includes a denial of a request to Schenectady County for "the names of persons currently covered under the CSEA contract."

In this regard, I offer the following comments.

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

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 concerning the information in question 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, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

It is noted that in Matter of Wool, the applicant requested a list of employees of a town "whose salaries were subject to deduction for union membership dues payable to Civil Service Employees Association...". In determining the issue, the Court held that:

> "...the Legislature has established a scale to be used by a governmental body subject to the 'Freedom of Information Law' and to be utilized as well by the Court in reviewing the granting or denial of access to records of each governmental body. At one extreme lies records which are 'relevant or essential to the ordinary work of the agency or municipality' and in such event, regardless of

> their personal nature or contents, must be disclosed in toto. At the other extremity are those records which are not 'relevant or essential' - which contain personal matters wherein the right of the public to know must be delicately balanced against the right of the individual to privacy and confidentiality.
>
> "The facts before this Court clearly are weighted in favor of individual rights. Membership or non-membership of a municipal employee in the CSEA is hardly necessary or essential to the ordinary work of a municipality. 'Public employees have the right to form, join and participate in, or to refrain from forming, joining or participating in any employee organization of their choosing.' Membership in the CSEA has no relevance to an employee's on-the-job performance or to the functioning of his or her employer."

Consequently, it was held that portions of records indicating membership in a union could be withheld as an unwarranted invasion of personal privacy. From my perspective, based on the Wool decision and the judicial interpretation of the Freedom of Information Law regarding the privacy of public employees, it is likely that records indicating the names of employees, coupled with information indicating whether they are covered by a health insurance plan, the nature of their coverage (i.e., individual or family coverage), or whether a spouse is also a public employee covered by an insurance plan, could be withheld as an unwarranted invasion of personal privacy. In short, whether a public employee is covered by such a plan or has a spouse who is also covered have no relevance to the performance of those persons' official duties.

Second, if an agency has developed statistics or tabulations containing the information in which you are interested, without names, or from which identifying details could be details, I believe that those records, would be available. In the alternative, while I am unfamiliar with the manner in which the records in which you are interested are maintained, it is possible that you might be able to obtain copies of records, following the deletion of identifying details, in order that you could prepare statistics or figures useful to you.

Lastly, even when an agency may properly withhold records or portions of records because disclosure would result in an unwarranted invasion of personal privacy, it would not be precluded from releasing the records. While an agency may withhold records in certain circumstances, it is not obliged to do so, for the Freedom of Information Law is permissive. The Court of Appeals has held that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, although an agency may in appropriate circumstances withhold records, I do not believe that it is obliged to do so.

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

cc: Joseph Parillo, Jr. Clerk and Records Access Officer
Frederick A. Betschen, Superintendent
James A. Constantino, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7710

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 18, 1993

Mr. Andrew Nemeth
[redacted]

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

Dear Mr. Nemeth:

I have received your letter of May 3 and the correspondence attached to it. You have sought assistance in obtaining records from the Village of Ossining.

According to your letter, as of the date of your communication with this office, you had not received responses to your requests. The requests involve copies of correspondence between Village officials and a Mr. Kennedy concerning the Village Armory, W-2 forms pertaining to a particular employee, a list of village vehicles and the drivers licensed to operate them, records indicating "what Village documents must be kept, and which ones can be tossed out", and any employment contracts or agreements between the Village and a certain Village employee.

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, the Freedom of Information Law pertains to existing records, and §89(3) of the Law also states in part that an agency need not create records in response to requests. Therefore, if, for example, there is no "list" of vehicles or employment contract, the Village would not be obliged to prepare new records on your behalf.

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

With respect to item 1 of your request of March 26 concerning correspondence with Mr. Kennedy relating to the Armory, I am unaware of who Mr. Kennedy is or what his relation to the Village might be. Consequently, I cannot offer specific guidance regarding access to the correspondence in question other than that it is presumptively available under the Law.

Item 4 involves a retention schedule developed by the State Archives and Records Administration, which is part of the State Education Department. In brief, the schedule is based on regulations indicating the minimum retention periods concerning records maintained by municipalities, such as villages. The schedule should be obtainable from the Village Clerk, who also serves as the records management officer, or from the State Archives and Records Administration by calling (518) 474-6926.

An employment contract or agreement, as well as W-2 forms, with certain deletions made from those forms, would in my opinion

be available under the Freedom of Information Law. It is noted that there is nothing in the statute 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, I believe that an employee'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.

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).

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Gennaro G. Faiella

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7711

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 18, 1993

Mr. Edgar English
#89-T-1809
Groveland Correctional Facility
P.O. Box 104
Sonyea, N.Y. 14556-0001

Dear Mr. English:

I have received your correspondence of May 14 in which you appealed denials of access to records of the Bellevue Hospital Center and the New York City Department of Mental Health, Mental Retardation and Alcoholism Services.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning Freedom of Information Law. The Committee does not have custody or control of records of an agency and it cannot compel an agency to grant or deny access to records. Further, this office is not empowered to determine appeals.

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

As such, appeals should be directed to the heads of the agencies in question or the persons designated to determine appeals.

I point out that the Bellevue Hospital Center is part of the New York City Health and Hospitals Corporation. I believe that the person designated to determine appeals at the Corporation is Edna

Wells-Handy, whose office is located at 125 Worth Street, New York, N.Y. 10013.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 7712

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 18, 1993

[redacted]

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

Dear [redacted]:

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

According to the correspondence, you have requested from the Dutchess County Department of Social Services case files pertaining to yourself and to another person. In response to the request, you were informed that under §136 of the Social Services Law, "you cannot access another person's case record", but that you have "complete and unrestricted access to your own case files," except those maintained by the "Special Investigation Unit."

In this regard, I offer the following comments.

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

Second, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §136 of the Social Services Law which provides, in brief, that records concerning an applicant for or recipient of public assistance are confidential. That statute and the regulations promulgated thereunder by the Department of Social Services prescribe the narrow conditions in which the records in question may be disclosed. In my view, because the records are exempted from disclosure to the public, the Freedom of Information Law does not govern rights of access to them; rather, any rights of access would be conferred by the Social Services Law and applicable regulations.

With respect to access by the subject of case files, state regulations 18 NYCRR §357.3, provide in relevant part that:

> "(c) Disclosure to applicant, recipient, or persons acting in his behalf. (1) The case record shall be available for examination at any reasonable time by the applicant or recipient or his authorized representative upon reasonable notice to the local district. The only exceptions to access are:
>
> (i) those materials to which access is governed by separate statutes, such as child welfare, foster case, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Services;
>
> (ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and
>
> (iii) the county attorney or welfare attorney's files.
>
> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

Based upon the foregoing, subject to the restrictions described above, I believe that you have rights of access to your case files. However, in my opinion, §136 of the Social Services Law would prohibit disclosure of case files pertaining to a person other than yourself, even if your name appears on those records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Albert J. Carlson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7713

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 18, 1993

Mr. G. Allen Randolph
Ms. Jere Williamson
Columbia University in the City
of New York
Graduate School of Journalism
Journalism Building
New York, NY 10027

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

Dear Mr. Randolph and Ms. Williamson:

As you are aware, I have received your letter of April 2.

In brief, according to your letter and the correspondence attached to it, you requested records from the Office of the New York County Public Administrator but received no response. Due to the failure to respond, you submitted an appeal to the Office of the New York City Corporation Counsel. However, you wrote that "some sectors believe the Public Administrator is a New York City agency", while others "believe it is under the auspices of the State of New York". You have asked where, in my view, an appeal should be filed, and you seek any additional input that I might provide.

In this regard, in an effort to assist you, I have engaged in telephone conversations involving New York City, New York State and Surrogate's Court officials. As you know, Public Administrators are appointed by the Surrogate in their respective counties, and their salaries are paid by New York City (see Surrogate's Court Procedure Act, §§1102, 1108). Further, §1110(1) of the Surrogate's Court Procedure Act states that:

> "The City of New York shall be answerable for the faithful execution by the public administrator of all the duties of his office and for the application by him of all moneys and property received by him and for all

> moneys and securities and the interest, earnings and dividends actually received by him or which he should have collected or received."

Nevertheless, a representative of the Office of Corporation Counsel expressed the opinion that the Office of Public Administrator is not a City agency, for the City government has no general authority to oversee the operations of the Public Administrator or compel the Public Administrator to carry out his or her duties. Similarly, it was advised that Corporation Counsel has no jurisdiction over the Public Administrator concerning the implementation of the Freedom of Information Law. Having discussed the matter with an attorney for the Office of Court Administration, it was contended that the Office of Public Administrator is something of a hybrid, and that it is not an extension or an arm of that agency.

Based upon a review of the law and the discussions described earlier, in my opinion, the Office of Public Administrator is not clearly an agency of either New York City or New York State, but rather is *sui generis*, a unique entity unto itself. Moreover, I believe that it is an "agency" with an independent responsibility to give effect to the Freedom of Information Law.

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 or other governmental 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 are not subject to the Freedom of Information Law. By means of analogy, however, I point out that it has been held that the Office of Court Administration is an "agency" required to comply with the Freedom of Information Law. The initial decision on the subject, which cited an advisory opinion prepared by this office, included the following discussion of the matter:

> "The court must look to the intent of the legislature to determine whether the Office of Court Administration, in the exercise of a

> purely administrative and personnel function, is to be excluded from the applicable provisions of the Freedom of Information Law. Public Officers Law §84 states in part 'The people's right to know the process of governmental decisionmaking and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.'
>
> "In view of the legislative purpose to promote open government, the court is inclined to construe narrowly any section that would tend to exclude offices of government from the law. Public Officers Law §86 specifically refer to courts when it defines 'Judiciary.' The legislature did not include the administrative arm of the court. The Office of Court Administration does not exercise a judicial function, conduct civil or criminal trials, or determine pre-trial motions. Respondent is not a 'court.'
>
> "It is significant to note that respondent refers to several sections of the Judiciary Law that regulate access to judicial records and allegedly perform a function similar to that of the Freedom of Information Law. None of the sections specified would address access to the information sought by petitioner pertaining to personnel and salaries exclusively.
>
> "Accordingly, the court rejects respondent's contention that it is in all respects exempt from the provisions of the Freedom of Information Law." [Babigian v. Evans, 427 NYS 2d 688, 689 (1980) aff'd 97 Ad 2d 992 (1983); Quirk v. Evans, 455 NYS 2d 918, 97 Ad 2d 992 (1983)].

Like the Office of Court Administration, which administers the court system and is an agency subject to the Freedom of Information Law, the Office of Public Administrator, as its title suggests, performs administrative functions relative to Surrogates' Courts in New York City. Further, the information sought would not constitute court records or pertain to judicial proceedings; on the contrary, it pertains to records involving administrative functions.

Assuming that the Office of Public Administrator is an agency subject to the Freedom of Information Law, it would be required to carry out its duties in accordance with certain procedural rules and regulations. 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) of the Law requires each agency to promulgate rules and regulations consistent with the Law and the Committee's regulations.

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."

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.

In addition, §1401.7 of the Committee's regulations provide in part that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records

> access officer shall not be the appeals officer."

I point out, too, that 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)].

In sum, as the head of an agency subject to the Freedom of Information Law, the Public Administrator is in my opinion required to promulgate rules for the procedural implementation of that statute, which would include the designation of a records access officer, as well as an appeals officer. The appeals officer would be the Public Administrator or a person designated to determine appeals by the Public Administrator.

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

The records that you requested involved those reflective of the "identity of any consultant or consultants and vendor or vendors who provided computer consultation services or equipment to the Office of the Public Administrator, County of New York in the years 1989 through 1993." In my opinion, insofar as the records sought are maintained by the Office of Public Administrator and can be found, they would be available. In short, none of the grounds for denial could properly be asserted to withhold the kinds of records that fall within the scope of your request, such as contracts, bills, vouchers, purchase orders and the like.

Moreover, although you may be students or non-residents, those factors are irrelevant to your rights under the Freedom of Information Law as members of the public. 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)].

Finally, 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)].

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, copies of this opinion will be forwarded to the Public Administrator, as well as 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

Robert J. Freeman
Executive Director

RJF:pb

cc: Ethel J. Griffin, Public Adminstrator
Hon. Renee R. Roth, Surrogate
Steven Gulden, Assistant Corporation Counsel
Clarence Orsland, Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7714

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 19, 1993

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:

As you are aware I have received your letter of May 4 and the materials attached to it. You have raised a series of questions concerning a request of January 5 addressed to George J. Colwell, the Records Access Officer at Community School District 24.

As I understand your comments, you received a letter in 1987 from Mary A. Cummins, President of the School Board, in which she referred to certain phrases, and on the basis of those phrases, you requested records. Specifically, the request involves "Mary A. Cummins' files of 'soul-stirring' correspondence," "Mary A. Cummins' files of correspondence that '[brightens her] drab existence,'" "Mary A. Cummins' files of correspondence with individuals whom she '[hopes] to never hear from...again,'" and "the rest of Mary A. Cummins' correspondence files." Mr. Colwell indicated that he was "unable to ascertain what records you are requesting." I would conjecture that the phrases used by Ms. Cummins might have been employed somewhat flippantly or jocularly, and that there are no files or file headings that specifically deal with or are reflective of correspondence described by those phrases. The issue, on the basis of your commentary, is whether those aspects of your request reasonably described the records, a matter that was considered exhaustively in my letter to you of April 6.

A second question involves a recent request for records initially sought in 1983 and the response thereto in May of that year by Stanley Kaliakos. That request involved:

> "1) All personnel files from September 1977 - May 1983 for each junior high school and intermediate school.
>
> 2) All personnel files of teachers currently working in District 24 who received U-ratings.

3) All personnel files of former teachers who received U-ratings, were discontinued, or who were denied tenure.

4) Virginia Morrissey's personnel file.

5) Files located in George Colwell's office.

6) Files located in Community School Board office.

7) OP 152B at J.930."

Mr. Kaliakos wrote that he would meet with you at particular time "to inspect personnel files," and you expressed the belief that "it may be fairly inferred...that he fully intended to grant access to the items [you] had been requesting at that time." Consequently, you questioned the propriety of Mr. Colwell's recent denial of access to the same or equivalent records. Despite Mr. Kakalios' statement, in my opinion, in view of the volume of the records and their nature, it could hardly be inferred that all such records were intended to be made available. Further, access to personnel files, particularly those relating to U-ratings, have been the subject of numerous opinions prepared over the course of years at your request, and I do not believe that there is any need to reiterate points previously made.

Your third question is whether "§100.2(o)(1,2) of the Regulations of the Commissioner of Education expand[s] upon rights of access granted by FOIL in connection with accessing the **item q** records". Item q involves a request for "Community School District 24's procedures and criteria concerning the evaluation of professional staff and the community superintendent..." promulgated to comply with the Commissioner's regulations. Although those regulations state in part that the procedures required to be developed shall be "available for review by an individual no later than August 1st of each year", I do not believe that the regulations expand upon rights conferred by the Freedom of Information Law. In my view, the procedures envisioned by the regulations, which involve performance review and criteria, would be available under the Freedom of Information Law even in the absence of the specific direction provided in the regulations. In short, the records in question would in my opinion constitute either instructions to staff that affect the public available under §87(2)(g)(ii) of the Freedom of Information Law or final agency policies available under §87(2)(g)(iii). As such, I believe that a denial of access to those records would be inappropriate.

Lastly, you referred to a denial of access to the records sought in item s of your request, "the Community School District's and Board's Commissioner of Education appeals files and Court litigation files." In this regard, it is possible that some of the records fall within the scope of the attorney-client privilege. Here I point out that the first basis for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are

"specifically exempted from disclosure by state or federal statute." For nearly a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1989); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, material prepared for litigation may be confidential under §3101 of the Civil Practice Law and Rules.

Nevertheless, legal papers filed against the District would not have been prepared by the District, its officials or its agents. As such, in my opinion, those papers would not be subject to the attorney-client privilege. For similar reasons, the answers prepared by the District in response to a petition or legal papers, once served upon a plaintiff or legal adversary, would be outside the scope of the attorney-client privilege. In general, when those papers are made available to the District's adversary, I believe that they become a matter of public record. Moreover, although the Freedom of Information Law does not apply to the courts and court records, such records are generally available under other provisions of law [see e.g., Judiciary Law, §255]. From my perspective, if the records sought are publicly available from a court or another agency (i.e., the State Education Department), they would also be available under the Freedom of Information Law from the District.

As you requested, copies of the advisory opinion of April 6 will be forwarded to the persons identified in your letter.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: George J. Colwell, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7715

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 19, 1993

Mr. Milton Goldin, President
The Milton Goldin Company
266 Crest Drive
Tarrytown, N.Y. 10591-4328

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

Dear Mr. Goldin:

I have received your letter of May 5 in which you sought advice concerning the acknowledgement of the receipt of a request prepared by the records access officer for the New York City Department of Environmental Protection, Ms. Marie Dooley.

You referred to a portion of the Committee's brochure explaining the Freedom of Information Law, "Your Right to Know," stating that the acknowledgement of the receipt of a request by an agency must include a statement "of the approximate date when the request will be granted or denied." Ms. Dooley provided the appropriate statement and indicated that your request would be "granted or denied in approximately two weeks." By so stating, if I understand your complaint, it is your view that she failed to comply with law because she did not specify whether the request was approved or denied.

In my opinion, the acknowledgement of the receipt of a request need not state that a request has been approved or denied. The purpose of the provision in question, §89(3) of the Freedom of Information Law, is to enable agencies, when they cannot grant or deny access to records within five business days, to reasonably extend the time for determining rights of access. Stated differently, agencies must locate and review requested records to ascertain which records or portions thereof must be disclosed or may be withheld. An acknowledgement of the receipt of a request may be prepared before the records sought have been located or reviewed. Consequently, an agency may be unable to inform a applicant whether a request has been approved or denied, in whole or in part, when it acknowledges that a request has been received. Consequently, I do not believe that Ms. Dooley's response was in

any way improper, for she might not have had the ability to indicate with certainty that your request would be granted or denied at the time the receipt of your request was acknowledged.

I point out that if neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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: Marie Dooley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7716

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 19, 1993

Mr. Jonathan Bryant
#77-A-2816
P.O. Box 700
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. Bryant:

I have received your letter of May 3 in which you sought assistance concerning a request for records directed to the Department of State.

According to your letter, in response to a request, Edward Rook indicated that he was able to locate eleven pages, which would be photocopied and made available to you upon payment of a fee of $5.50. You wrote that you have no money and do not know when you will obtain sufficient funds to pay the fee. For that reason, and "in the interest of justice," you asked that the fee be "waived and/or credited until [you] can pay for the documents at a later date."

In this regard, I offer the following comments.

First, although the Committee on Open Government is a unit of the Department of State, this office does not have custody or control of Department records generally, such as those that you requested. Consequently, I have no authority to waive a fee for Department records or agree to make the records available until you can pay for copies.

Second, pursuant to §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute." In this instance, §96 of the Executive provides that:

> "...the department of state shall collect the following fees...

> For a copy of any paper or record not required to be certified or otherwise authenticated, fifty cents per page..."

As such, a fee of $5.50 for copies of eleven pages would be proper.

Third, there is nothing in the Freedom of Information Law that pertains to the waiver of fees. Further, it has been held that an agency is not required to waive fees, even when a request is made by an indigent inmate [see. Whitehead v. Morgenthau, 552 NY 2d 518 (1990)].

Despite the foregoing, I will forward a copy of your letter to Mr. Rook for his reconsideration.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Edward Rook

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7717

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 19, 1993

Mr. David L. Jones
Deputy Town Attorney
Town of Tonawanda
22 Victoria Blvd.
Kenmore, N.Y. 14217

The staff of the Committee on Open 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 May 3 and the correspondence attached to it. You have sought an advisory opinion concerning the propriety of a denial of access to records.

According to the correspondence, the Town of Tonawanda received a request for records pertaining to all employees who have retired since January 1, 1987, including their names, addresses and phone numbers. You denied the request on the basis of §89(7) of the Freedom of Information Law.

In my opinion, although the names of retirees should be disclosed, their home addresses and telephone numbers could properly be withheld. In this regard, I offer the following comments.

First, with respect to home addresses of present or former public employees, §89(7) states in relevant part that "Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system." As such, it is clear that the portion of the request pertaining to retirees' home addresses could justifiably be denied.

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 tangential to your inquiry, 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, records identifying public employees have long been available. That being so, I believe that the names of retirees must be disclosed. Since the fact of one's public employment would have been public when that person was so employed, a record

indicating a person's previous public employment would be accessible.

I note that, in response to the request, you highlighted a clause in §89(7) stating that the Freedom of Information Law does not require the disclosure of "the name or home address of a beneficiary of a public employees' retirement system." In my view, the name of a retiree is not the same as the name of the person designated by a retiree as a beneficiary. The beneficiary would be a spouse, a relative or some other person, and that person's name, unlike that of the retiree, could be withheld.

Lastly, I believe that home phone numbers of either present or former public employees could be withheld as an unwarranted invasion of personal privacy. From my perspective, those persons' home telephone numbers are irrelevant to the performance of their current or prior duties. Further, it is my view that disclosure of one's telephone number, particularly that of a retiree, would be more intrusive and more of an invasion of privacy than the disclosure of that person's home address. Since the home address can clearly be withheld, I believe that a home telephone number could also properly 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 7718

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 20, 1993

Mr. Edwin Arthur
#90-A-8635
Box F (4F-20)
Fishkill, N.Y. 12524

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

Dear Mr. Arthur:

I have received your letter of April 26 in which you sought assistance concerning the use of the Freedom of Information Law.

According to your letter, following your arrest, upon the arrival at the precinct, you noticed that the detective had to "sign a Log-book." Having reviewed the police department's "master index," there was no reference to a log book. As such, you have asked for the guidance concerning "the procedure to obtain information from hand written Log-books."

In this regard, §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 record. If a request includes reference to the event and its location, the date, your name and other identifying information, as well as the placement and nature of the record in question, I would conjecture that you would meet the requirement of reasonably describing the record.

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 7719

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 20, 1993

Mr. Charles Wright
#80-A-2724
Clinton Correctional Facility
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. Wright:

I have received your letter of May 17.

You wrote that you appealed to Counsel to the Department of Correctional Services on March 29 following a constructive denial of request by the Superintendent of the Bare Hill Correctional Facility. You asked whether Counsel has forwarded a copy of a determination of the appeal to the Committee on Open Government.

Having reviewed our files of appeals, this office has not yet received a copy of the determination pursuant to §89(4)(a) of the Freedom of Information Law. As you may be aware, that provision states in relevant part that:

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Anthony Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7720

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 21, 1993

Herbert W. Reilly, Jr.
Supervisor
Town of New Scotland
Town Hall
R.D.
Slingerlands, NY 12159

The staff of the Committee 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 Supervisor Reilly:

As you are aware, I have received your correspondence of May 12 addressed to Richard P. Law, III, Sole Assessor of the Town of New Scotland, and related materials.

In your letter, you wrote that it had come to your attention that taxpayers had been informed by Mr. Law that they could not review "CLT data", data prepared by the Town by a firm hired to conduct a revaluation, "in order to prepare for the upcoming Board of Assessment Review hearings. You added that the "alleged reason for the refusal, is that the Town still owes them [CLT] money." Nevertheless, you indicated that the contract with CLT provides that the data should have been turned over to the Assessor prior to September 15, and that you "see nothing in the contract that indicates that its' use as a deliverable is contingent upon final payment." In addition, the contract states in part that "Data collected is the property of the Municipality." You also informed me by phone that the records in question are in the Town's possession, that taxpayers are being denied access to "comparables", and that the parcels are cross-referenced in a manner that permits ready retrieval of records of interest to taxpayers.

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

First, although the records in question may be in the physical possession of Mr. Law, I point out that §30(1) of the Town Law

states in part that the town clerk "Shall have the custody of all the records, books and papers of the town." As such, I believe that the records are in the legal custody of the clerk, rather than the assessor.

Second, in a related vein, as you are aware, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force of law, require that the governing body of a public corporation, in this instance the Town Board, designate one or more "records access officers". You informed me that the Town Clerk is the records access officer. That being so, I point out that the records access officer has the duty of coordinating an agency's response to requests. Consequently, when a request for records is made, I believe that the Clerk as records access officer has the duty of making an initial determination to grant or deny access to records.

Third, the Freedom of Information Law pertains to agency records and §86(4) of the Law defines the term "record" broadly to mean:

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

Therefore, irrespective of whether a contract has been fully carried out or whether moneys have been paid to a contractor, documents "kept, held, filed, produced or reproduced by, with or for an agency" would constitute records subject to rights of access conferred by the Freedom of Information Law. In this instance the records were produced for and are maintained by the Town. Consequently, I believe that they clearly fall within the scope of the Freedom of Information Law.

Lastly, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could be asserted to withhold the records in question. 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).

Further, data used for purposes of comparing property, such as 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)].

In short, I believe that the Town and its Assessor are required to disclose the records that you 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
Executive Director

RJF:jm

cc: Richard P. Law, III, Sole Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7721

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 21, 1993

Mr. Abdullah Y. Salahuddin
#78-A-1148
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, N.Y. 12733

Dear Mr. Salahuddin:

I have received your letter of May 19 in which you requested various records relating to an indictment.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not have possession or control of the records in which you are interested, and it is not empowered to compel an agency to grant or deny access to records.

A request for records should be directed to the "records access officer" at the agency that maintains the records you seek. The records access officer has the duty of coordinating an agency's response to requests. Further, since §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought, a request should include sufficient detail to enable agency staff to locate and identify the records.

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-7722

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 24, 1993

Mr. John J. Brennan
S. & A. Concrete Co. Inc.
1144 Zerega Avenue
Bronx, NY 10462

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

Dear Mr. Brennan:

I have received your letter of May 5. You indicated that you made a request on April 15 to the New York City Transit Authority, but that as of the date of your letter to this office, your request had been neither granted nor denied.

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

First, on the basis of the correspondence attached to your letter, I note that your request was simply sent to the New York City Transit Authority. For future reference, 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. As such, to ensure prompt response to requests, it is suggested that requests be directed to the records access officer at the agency that maintains 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, as indicated above, §89(3) of the 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, since I am unfamiliar with the records that you requested, I cannot offer specific guidance concerning the availability of the records. However, 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.

Enclosed are copies of the Freedom of Information Law and an explanatory brochure that may be useful to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7723

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 25, 1993

Mr. Peter L. Carr
84-C-0596
Scotch Settlement Road
P.O. Box 480
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. Carr:

I have received your letter of May 5.

"Based upon the idea of the 'Psycho-Drama'," you asked how you might obtain records "to support [your] suspicions that [you were] utilized as the 'subject' in a similar procedure conducted by one of the intelligence agencies (Ex. C.I.A., F.B.I., B.C.I...) from the date of [your] birth to the present."

In this regard, I offer the following comments.

First, since you referred to several agencies, I point out that more than one access statute would be relevant to your inquiry. The federal Freedom of Information Act (5 U.S.C. 552) is applicable to records maintained by federal agencies. The New York Freedom of Information Law applies to records maintained by entities of state and local government in New York.

Second, under the federal Act, requests should be made to the freedom of information officers at the agencies that you believe would maintain records of interest. In New York, requests should be made to the records access officers at the agencies of interest. Those persons have the duty of coordinating agencies' response to requests.

Third, under both the federal and the New York statutes, an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail (i.e., names, dates, descriptions of events, file designations, etc.) to enable agency staff 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-7724

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 25, 1993

Ms. Dolores A. Monahan
[redacted]

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

Dear Ms. Monahan:

I have received your correspondence of May 6 and May 8, as well as related materials.

The issue pertains to the calculation of your pension benefits and a request made to the Tonawanda City School District for a record involving a "telephone conference" between the District's attorney and the "New York State Employment Retirement System regarding possible increase of retirement benefits; calculated various options regarding same." You wrote that it is your "understanding that all telephone conferences are taped or written, and therefore a matter of public record." In response to the request, the Superintendent wrote that the District "is not obligated to provide records of non-final agency action or documents which were used in the preparation of a litigated matter." He indicated further that "to the extent that this request was to create a record from a telephone conversation, when that record does not presently exist, it was proper for the District to deny your request." You wrote, however, that the litigation between yourself and the District is final.

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.

Of likely relevance is §87(2)(a), the first ground for denial, which pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §3101

of the Civil Practice Law and Rules, which exempts from disclosure the work product of an attorney in subdivision (c) and material prepared for litigation in subdivision (d). If the record sought existed, it would appears that those provisions would authorize the District to withhold the record.

Second, since you expressed the view that the contents of telephone conferences are routinely "taped or written", I am unfamiliar with such a practice, and I would conjecture that such a practice is not routine. Further, 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 the record sought does not exist, the District would not be obliged to create or prepare a new record containing the information you seek in response to a request under the Freedom of Information Law.

Lastly, if you have not already done so, it is suggested that you discuss the matter of your pension benefits with a representative of the Retirement System.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carl P. Mangee, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7725

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 25, 1993

Mr. Thomas Bertolone
[redacted]

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

Dear Mr. Bertolone:

I have received your letter of May 6, 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 Lake Placid Central School District. Specifically, you requested records "indicating proof of employment" by the District concerning certain individuals that you named. In denying the request, the Superintendent wrote that "personal records" are not available.

Assuming that the individuals that you named are employed by the District, I believe that records indicating proof of their employment must be disclosed. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is noted that there is nothing in the statute 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, §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 the alternative, another record that would provide proof of employment is a W-2 form. 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).

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Gerald L. Blair, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7726

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 26, 1993

Ms. Maureen Kendrick
[redacted]

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

Dear Ms. Kendrick:

I have received your letter of May 4 in which you expressed concern with respect to the "integrity of all of the municipal records" of the Village of Airmont.

According to the correspondence attached to your letter, the Village Clerk/Treasurer refused reappointment to that position on April 13, and on April 15, "the Deputy Clerk left and the remaining staff resigned." Consequently, you wrote that the "Village Hall and its records of government was staffed by individuals with no authorization from the Village Board," and that those individuals "continue to have access to records." You added that the situation is particularly disturbing because the Village "is presently defending itself against a lawsuit that calls for its dissolution" and that as the former Mayor, you are a defendant in the suit.

In this regard, it does not appear that the Freedom of Information Law is clearly at issue, for the matter likely does not involve requests for records made under that statute or disclosure made in response to such requests. Nevertheless, statutes other than Freedom of Information Law provide direction concerning the custody, security, 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 authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

As such, local officers, such as members of the Village Board of Trustees, must in my view "adequately protect" Village records. Further, 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.

In addition, I point out that §805(1)(b) of the General Municipal Law states that: "No municipal officer or employee shall...disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests."

As indicated to you by phone, it is suggested that, under the circumstances, you confer with your attorney, as well as 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

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7727

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 26, 1993

Mr. Charles Washington
89-A-3251
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. Washington:

I have received your letter of May 10 in which you sought assistance in obtaining records concerning your arrest and the proceedings that followed from the Office of the Kings County District Attorney.

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 the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Since you referred to various grand jury related records, it is my view that those records could be withheld if requested under the Freedom of Information Law. 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, "subdivision three" of §190.25 includes specific reference to the district attorney. As such, grand jury minutes and related records 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.

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 an 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 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 found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Matthew S. Greenberg, Records Access Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7728

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 26, 1993

Mr. Patrick Horan
92-A-8205
Suite A-29-B
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. Horan:

I have received your letter of May 6. You wrote that you are interested in requesting the "tax statement for a facility" of the Department of Correctional Services and "tax audits" for the Department and a specific facility in order "to find out where all the money this facility gets is spent and what person would have such records."

In this regard, as I understand the terms that you used, "tax statement" and "tax audit", I believe that they generally refer to records prepared to determine whether taxes have been appropriately paid. It is doubtful in my view that those kinds of records exist in view of the Department's status as a governmental entity. However, there may be periodic audits conducted to examine the books of account and similar records of the Department. Audits of state agencies are generally conducted by the State Department of Audit and Control or internally by the staff of an agency.

While I am unaware of whether any such audits have been conducted, I point out that the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a correctional facility may be made to the facility superintendent or his designee; a request for records maintained at the Department's central offices in Albany may be made to the Deputy Commissioner for Administration.

Assuming such records exist, 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.

Relevant to an analysis of rights of access would be §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 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.

If an audit is prepared by persons not employed by the Department, it would be available under §87(2)(g)(iv), except to the extent that the contents could be withheld under a different ground for denial. If an audit is prepared by Department staff, it could be characterized as "intra-agency material". As indicated above, insofar as such material consists of staff opinions, recommendations and the like, I believe that those portions could be withheld under §87(2)(g).

In view of the nature of the Department and its facilities, §87(2)(f) may also be pertinent. That provision enables an agency to withhold records insofar as disclosure would "endanger the life or safety of any person." There may be portions of such records that deal with activities involving the security of a facility that could be withheld under §87(2)(f).

Lastly, since I am unaware of the existence or contents of the records in which you are interested, it is emphasized that the preceding commentary should be viewed as general and solely advisory. If such records exist, it is possible that grounds for

denial other than those specifically referenced above may be relevant.

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-7729

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 26, 1993

Mrs. E. Jane Layo
[redacted]

The staff of the Committee on 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. Layo:

I have received your letter of May 10 in which you referred to an advisory opinion prepared on April 9 at the request of Ms. Winifred Veitch.

As I understand your comments, although you requested and received from Madrid Waddington Central School District certain records, you asked whether you can be required to sign the certification appearing on the District's application for public access to records. The records sought by Ms. Veitch and apparently by yourself involved a list including the name, public office address, title and salary of all District employees that must be maintained, pursuant to §87(3)(b) of the Freedom of Information Law. The certification appearing on the District form provides as follows:

> "I certify that the only purpose of the records inspection is for my information, and that it will not be used for any private, commercial, fund raising, or other purpose."

In my opinion, a person cannot be required to sign the statement quoted above. Further, that aspect of the District's form is, in my view, inconsistent with the Freedom of Information Law and its judicial interpretation.

It is emphasized at the outset that, 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 right 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 §87(2) of the Law, the use of the records, including the potential for private or commercial use, is in my opinion irrelevant; when records are accessible, the recipient may do with the records as he or she sees fit.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §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, §89(2)(b) includes examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [section 89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the Law. As 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 §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 judgement for that of the respondents" (id.).

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses. That situation, however, represents the only case under the Freedom of Information Law in which an agency may inquire as to the purpose for which a request is made, or in which the intended use of the record has a bearing upon rights of access.

Nevertheless, as indicated in the opinion sent to Ms. Veitch, I do not believe that an agency may properly inquire as to the use

of the payroll record that you requested or withhold that record, even if it is requested for a commercial or fund-raising purpose. Section 89(6) of the Freedom of Information Law states that:

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

Therefore, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since payroll information was found to be available prior to the enactment of the Freedom of Information Law [see Winston V. Mangan, 338 NYS 2d 654 (1972)], I believe that it must be disclosed, regardless of the intended use of the records. Consequently, in my view the payroll record required to be maintained should be disclosed to any person, irrespective of its intended use, and that it should be unnecessary to sign the certification on the District's form.

Lastly, you asked where you can obtain information concerning the requirements applicable to your District "as to number of administrative personnel, etc." If such requirements exist, I would conjecture that records describing them would be maintained either by the District or the State Education Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2219
FOIL-AO-7730

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 27, 1993

Mr. Richard L. Taczkowski
[redacted]

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

Dear Mr. Taczkowski:

I have received your letter of May 10. In your capacity as a member of the Board of Trustees of the Village of North Collins, you have raised a series of issues relating to the Freedom of Information and Open Meetings Laws.

Your first area of inquiry is whether a mayor of a village is "required to make readily available to the Board of Trustees correspondence he receives in [his] capacity as Chairman of the Board or as administrative head of the village government."

In this regard, I am unaware of any statute that deals specifically with the issue. However, the Village Law, §4-402(a) states in part that the Village Clerk shall "have custody of the corporate seal, books, records, and papers of the village..." Therefore, the clerk is the official custodian of village records. Further, §4-412 of the Village Law, which pertains to boards of trustees, provides in subdivision (1) that such boards "shall have management of village property and finances, may take all measures and do all acts...which shall be deemed expedient or desirable for the good government of the village, its management and business..." Based upon the foregoing, in general, when correspondence maintained by a mayor falls within the purview of the powers and duties of a board of trustees, it would appear that members of the Board should have the ability to review those records.

Second, if a regular Board meeting is adjourned to the next day, you asked whether "the requirements of posting meeting notices and notifying the public [must] still be met". In my view, both the statement of intent appearing at the beginning of the Open Meetings Law (§100) and the specific language the notice provisions (§104) require that notice be given in such a circumstance. I

believe that adjournment signifies the end of a meeting, and that any ensuing gathering of a public body for the purpose of conducting public business must be preceded by notice of the time and place given to the news media and by means of posting in one or more designated, conspicuous public locations. If the news media is present when the meeting is adjourned, notice can be given orally to the news media and by posting. If the news media is absent at that time, the notice requirements can be met by telephoning the media of the time and place of the upcoming meeting and by posting notice.

Third, you asked whether a reporter may use a "small cassette recorder" at an open meeting, whether Board approval must be sought to do so, whether a "small, unobtrusive video camera" may be used and whether "such recordings [are] construed as public records...available for reproduction on request."

The Open Meetings Law is silent with respect to the use of recording devices at open meetings, and there is no other law or rule that governs the use of recording devices at meetings. However, several judicial decisions have been rendered concerning the use of audio 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 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. Although there are no judicial decisions of which I am aware that deal with the use of camcorders at open meetings, a court in my opinion would likely determine that issue based upon the same principles as those considered regarding the use of tape recorders.

If a tape or video recorder is used by a member of the public, the tape would in my view be the private property of that person and would not be subject to the Freedom of Information Law. However, if a Village official records a meeting, the tape in my opinion would clearly fall within the scope of the Freedom of Information Law.

That statute 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."

When tape or video recordings are produced by a Village official in the performance of that person's official duties, 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)].

Further, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

Lastly, you requested a copy of a written opinion rendered by this office in which it was advised that using "the phrase 'to discuss personnel' was inadequate" as the sole basis for a motion to enter into an executive session. Enclosed is a copy of an opinion dealing with that issue.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7731

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 28, 1993

Mr. Joe DeStefano
[redacted]

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

Dear Mr. DeStefano:

I have received your letter of May 10 and the correspondence attached to it.

You have requested an advisory opinion concerning "the conditions the Orange County Board of Ethics has placed on [the] acquisition of government documents under the Freedom of Information Law." Specifically, having requested financial disclosure forms submitted by Orange County legislators, you were informed that the County's Ethics Code requires that an applicant for such records "state a legitimate purpose for the examination." You were also informed that "[d]ecisional law in the State has made it clear that no photocopies of the records need be provided nor may any be made during the examination."

You asked whether I "consider these two conditions legal." 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 right 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 §87(2) of the Freedom of Information Law, the purpose for which a request is made is in my opinion irrelevant. Based upon the foregoing and for reasons to be discussed later, I believe that a provision in a municipal code that conditions disclosure upon a finding that the reasons for a request is appropriate is inconsistent with law.

Second, the other "condition" relating to the ability to inspect but no right to photocopy involves complex issues relating to the Ethics in Government Act as well as the Freedom of Information Law. The provisions of the Act pertaining to municipalities, such as counties, are found in the General Municipal Law. It is noted that those provisions include references to the New York State Temporary Commission on Local Government Ethics ("the Commission"). Although the Commission no longer exists, various provisions concerning its former role are in my view relevant to an analysis of the issue. Further, while the advisory jurisdiction of this office involves the Freedom of Information Law, in this instance, in order to provide advice concerning your question, it is necessary to interpret certain provisions of the General Municipal Law.

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 under §87(2)(b)] or the relationship between the Freedom of Information Law and other statutes.

When a municipality elected to file financial disclosure statements with the Commission when it existed, §813 of the General Municipal Law in my view provided 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) governed rights of access to records of "the commission".

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 was 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. 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.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 had been governed by the Ethics in

Government Act [§813(18)(a)] but 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 nor a local enactment 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 were 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 maintained by a municipality 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.

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 County's regulations were required to be consistent with those of the Commission, the public could inspect but not seek photocopies of financial disclosure statements. It appears that the response to your request 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, 581 NYS 2d 882, 884; 178 AD 2d 56 (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, for the Freedom of Information Law states in §87(2) that accessible records must be made available for inspection and copying. Moreover, §89(3) requires that an agency prepare copies of records upon payment of the requisite fee.

In sum, based upon the preceding commentary, I believe a municipality must, on request and on payment of the appropriate fee, provide photocopies of financial disclosure statements.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael H. Donnelly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7732

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 28, 1993

Mr. Paul F. Carella
[redacted]

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

Dear Mr. Carella:

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

You have sought an advisory opinion concerning your effort to examine records of the City of Albany. By way of background, you resided at a home that was the site of a gas explosion in 1987. Although you had retained an attorney and initiated litigation against the City, you indicated that no attorney is currently representing you in the matter and that the case is "dead in the water". In a request of February 19 addressed to Ms. Stacy Kitt, Assistant Corporation Counsel, you wrote that your attorney no longer represents you and you asked to examine:

> "1. All correspondence between the City of Albany and Lewis B. Oliver regarding the matter of Paul F. Carella v. The City of Albany, Albany County Index No. 1152-92.
>
> 2. All documents relating to the discovery of methane gas, natural gas, swamp gas, or any other explosive gas on Frisbie Avenue in 1987 and all documents concerning activities or matters relating to and following such a discovery."

In response, Ms. Kitt wrote that the "items you request were all provided to Mr. Oliver and should be in his files", that you and your attorney are entitled to "possession of those files", and that recopying the records would be unnecessary costly. As such, she suggested you inform her when you retain new counsel. Soon thereafter, you wrote to Ms. Kitt, stating that your request had

not been withdrawn and that you are not seeking copies of records but rather the opportunity to examine them. Following the transmittal of that letter, you were informed by the City's records access officer that Ms. Kitt referred the matter to her, and "to avoid further confusion", you were asked to complete the City's request form and "describe as specifically as possible the records you wish to examine." Following your objection to completing the form, the Records Access Officer indicated that you could review the correspondence between the City and your former attorney. However, she wrote that the remainder of your request did not reasonably describe the records. It is your view that the request adequately describes the records. Further, you indicated that you have received no further response or any response to an appeal made on April 13.

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 right 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. As such, the fact that you are or may have been a litigant has no effect upon your rights as a member of the public under the Freedom of Information Law.

Second, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must

be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. 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 this instance, I am unaware of the means by which the City maintains records "relating to the discovery of" gas in 1987 or other records "concerning activities on matters relating to and following such a discovery". If the City maintains all such records in a file or group of files that are retrievable on the basis of the terms of your request, I believe that you have met the requirements that the records be reasonably described. On the other hand, however, due to the nature of the event, it is possible that the City maintains records falling within the scope of your request in a number of locations or departments and by means of different filing systems within those departments. In addition to records relating to the matter that are in possession of the Office of Corporation Counsel, it is possible that your request may involve records of the City Comptroller, the Police and Fire Departments, as well as the Departments of Engineering, Housing and Community Renewal, Public Works, Traffic Engineering, Water and Water Supply, and perhaps others. If indeed the records sought are kept by a variety of agencies and by means of a variety of filing methods, it is likely

in my opinion that the second aspect of the request would not have reasonably described the records.

It is noted that, pursuant to regulations promulgated by the Committee on Open Government that pertain to the procedural implementation of the Freedom of Information Law (21 NYCRR Part 1401), an agency's records access officer "is responsible for assuring that agency personnel...Assist the requester in identifying requested records, if necessary" [§1401.2(b)(2)]. Therefore, it is suggested that you contact the records access officer to discuss the matter in an effort to enable you to reasonably describe the records sought.

Lastly, in view of the absence of further responses to your request by the City, I point out that the Freedom of Information Law provides direction concerning the time within which an agency must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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: Pamela Primomo Alley, Records Access Officer
Stacy Kitt, Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1733

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 1, 1993

Mr. Francis Read
89-C-1510
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. Read:

I have received your letter of May 13 and the materials attached to it. You have sought my views concerning unanswered requests for records directed to the Clerk of the Syracuse City Court.

In this regard, it is emphasized that the Freedom of Information Law pertains to agency records. Section 86(3) of the Freedom of Information Law defines the term "agency" to include:

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

In turn, §86(1) of the Law defines "judiciary" to mean:

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts or court records, and the procedural provisions of that statute, such as those involving the time within which a response must be given and the right to an administrative appeal, are inapplicable.

While the Freedom of Information Law excludes the courts from its coverage, other statutes often grant access to court records (see e.g., Judiciary Law, §255). As such, it is suggested that you resubmit a request citing an appropriate provision of law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Christina M. Pezzulo
Laura M. Del Vecchio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1734

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 1, 1993

Ms. Judith Laurence
Field Representative
NYSUT/Elmsford Regional Office
570 Taxter Road
Elmsford, N.Y. 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 Ms. Laurence:

I have received your letter of May 11 in which you raised a question concerning the Freedom of Information Law.

According to your letter, a request was recently made to the Pleasantville Union Free School District for a copy of the "Application for Employment of an Uncertified Teacher" that was filed with the State Education Department on behalf of a particular teacher. Although you indicated in the request a recognition that certain personal information in the application might properly be withheld, the District denied access to the entire application "on the basis that it was a personnel matter." You questioned the propriety of the District's denial of the application, and you enclosed a blank copy of the application for review.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In addition, it is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" in accordance with the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record may contain both accessible and deniable information, and that agency officials are obliged to review records sought in their entirety to determine which portions, if any, may justifiably be deleted.

Following any such deletions, the remainder of the records must be disclosed.

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.

Of primary relevance in this instance is §87(2)(b) of the Freedom of Information Law, 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 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.

Similarly, in the case of the application in question, under the heading of "Moral Character Determination," while some response would in my view be accessible, other could be withheld. Insofar as the responses deal with one's private sector employment, I believe that disclosure would constitute an unwarranted invasion of personal privacy. Further, as you are aware, if charges in a proceeding brought under §3020-a of the Education are dismissed, that statute states that the charges are to be expunged from the teacher's record. In that circumstance, reference to a response to that effect could in my view be deleted. If however, charges were sustained, those records and a determination would be available. Therefore, reference to §3020-a proceedings where the charges were sustained would in my view be public.

In sum, while some aspects of the application could in my view be withheld, I believe that others would be available and that a denial of the application in its entirely was inappropriate and inconsistent with the Freedom of Information Law.

I hope that I have been of some 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 7735

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 1, 1993

Mr. Gary L. Rhodes
Superintendent
County of Jefferson
Board of Supervisors
RR1, Box 668
Henderson, N.Y. 13650

The staff of the Committee on 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 Rhodes:

I have received your letter of May 18 and the correspondence attached to it.

You referred to requests by a resident that are "repetitious and redundant," and you indicated the Town has honored the requests in great measure. The requests relate to issues concerning a Town playground, and that the individual requesting the records had been a member of the Recreation Commission. When the members of the Commission resigned, they were asked by yourself and your attorneys to return Commission records to the Town's records management officer; however, they have refused to do so. In addition you question whether communications with your attorneys must be disclosed.

In this regard, I offer the following comments.

First, with respect to repeated requests for the same record, it is suggested that you inform the applicant such requests will not be honored unless it can be demonstrated that records previously made available no longer are in her possession [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)].

Second, records maintained by the Recreation Commission are in my view the property of the Town, not the individuals who had served on the Commission. While the Freedom of Information Law does not deal directly with issues involving the custody and security of records, other provisions particularly the "Local Government Records Law" (Article 57-A, Arts and Cultural Affairs Law) are pertinent.

For purpose of the Local Government Records Law, §57.17(4) of the Arts and Cultural Affairs Law states in relevant part that:

> "'Record' means any book, paper, map, photograph, or other information - recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by an local government or officer thereof pursuant to law or in connection with the transaction of public business."

In addition, §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, local officers, must in my view "adequately protect" local government records. Moreover, it is clear in my opinion that records in possession of former members of the Town Recreation Commission, although in their physical custody, are in the legal custody of the Town. Consequently, I believe that those records constituting Town property should be returned to the Town.

Lastly, you referred to access to "attorney mail." Although you did not describe those records, I point out that the first basis 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." For nearly a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1989); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, material prepared for litigation may be confidential under §3101 of the Civil Practice Law and Rules.

However, if, for example, legal papers were filed against the Town, they would not have been prepared by the Town, its officials or its agents. As such, in my opinion, those papers would not be subject to the attorney-client privilege. For similar reasons, the answers prepared by the Town in response to a petition or legal papers, once served upon a plaintiff or legal adversary, would be outside the scope of the attorney-client privilege. As soon as those papers are made available to the Town's adversary, I believe that they become a matter of public record. Moreover, although the Freedom of Information Law does not apply to the courts and court records, such records are generally available under other provisions of law [see e.g., Judiciary Law, §255]. From my perspective, if the records sought are publicly available from a court, they would also be available under the Freedom of Information Law from the Town.

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-1736

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 2, 1993

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 May 19. As in the case of your most recent previous correspondence, the issue relates to the receipt of health insurance benefits by public employees.

You enclosed materials sent to you by Robert L. Schulz, President of the All-County Taxpayers Association, which pertain to a related but, in my view, somewhat different issue. He referred to a case in which a municipality made a "payment of cash to some of the town's employees in-lieu-of health insurance payments."

As suggested in the advisory opinion addressed to you on May 18, when records are requested that indicate which employees participate in a health insurance plan, it is likely that disclosure of the identities of those employees would constitute an unwarranted invasion of personal privacy. However, as I understand the matter described by Mr. Schulz, employees could choose either to participate in the plan or not to do so, and if they choose not to participate, they receive payment. While the manner in which the employees receive payment is not stated, it is clear in my view that records reflective of payments made to public employees by their employers, through salary, overtime or otherwise, are public. As an aside, it is noted that one of the few instances in the Freedom of Information Law in which an agency is required to maintain a record involves what may be characterized as payroll information. Specifically, §87(3)(b) requires that each agency shall maintain "a record setting forth the name, public office address, title and salary of every officer or employee of the agency." When payment, in whatever form, is made to public employees, records of such payments would in my opinion be relevant to the work of the employee as well as the agency. Therefore, I believe that records indicating payment would, if disclosed,

constitute a permissible rather than an unwarranted invasion of personal privacy.

Further, the examples of unwarranted invasions of personal privacy appearing in §89(2)(b) that are most pertinent to the issue suggest that disclosure would not constitute an unwarranted invasion of personal privacy in the case of payments made to employees. Those provisions state that an unwarranted invasion of personal privacy includes:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintained it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

While information regarding payment may be of a somewhat "personal nature", I believe that records reflective of the expenditure of public monies payable to individual employees are clearly relevant to the work of the agency and should be made available under the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO 737

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 2, 1993

Mr. Felix 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 letter of May 22 and the correspondence attached to it.

You wrote that the City of Dunkirk Board of Education was accused by a candidate for the Board of spending money in defense against "frivolous grievances" by the teachers' union. You requested records indicating legal expenses incurred "with each situation". Although the superintendent provided an approximate figure involving total expenses, you requested more detailed records involving payments made to the District's attorney.

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: Terry L. Wolfenden, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AC 2222
FOIL-AO 7738

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 2, 1993

Mr. William R. Buell
[redacted]

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

Dear Mr. Buell:

I have received your letter of May 19 in which you requested assistance concerning certain practices of the Adirondack Central School District.

First, you wrote that minutes of meetings "are not available until they have been approved by the Board and only after completing a 'Freedom of Information' form."

In this regard, §106 of the Open Meetings Law pertains to minutes of meetings and 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.

Moreover, 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.

In addition, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §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. That is particularly so in the case of a request for minutes. To reiterate, the Open Meetings Law states that minutes must be made available "within two weeks from the date of such meetings."

Lastly, you referred to limitations upon the public's ability to speak or ask questions at meetings. Although 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), 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 (Education Law, §1709), 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.

In an effort to enhance compliance with and understanding of the Open Meetings Law and 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:pb

cc: Board of Education

State of New York
Department of State
Committee on Open Government

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http://www.dos.ny.gov/coog/

June 4, 1993

FOIL AO 7739

James Briscoe West
Attorney at Law
Suite 1800
15 Maiden Lane
New York, NY 10038-4098

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

Dear Mr. West:

I have received your letter of May 24 and the correspondence attached to it.

In brief, according to your letter, you made requests to the New York City Department of Buildings on two occasions in April. However, as of the date of your letter to this office, you indicated that you have "received no response from them either granting or denying [your] request." You have sought assistance in the matter, and in this regard, I offer the following comments.

First, pursuant to the procedural rules and 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 for records, and requests should ordinarily be directed to that person. In this instance, I believe that the person in receipt of your request should have responded or forwarded the request to the records access officer. It is suggested that you contact Mr. Charles Sturcken, the records access officer for the Department of Buildings, to explain the situation

and attempt to ascertain the status of your request. Mr. Sturcken can be reached at 312-8130.

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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles Sturcken

State of New York
Department of State
Committee on Open Government

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June 4, 1993

FOIL AO 7740

Mr. Marvin L. Schwartz
Attorney and Counsellor at Law
52 South Main Street
Spring Valley, NY 10977

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

Dear Mr. Schwartz:

I have received your letter of May 20 in which you seek an advisory opinion concerning the Freedom of Information Law. It is your view that the Town of Ramapo Assessor "does not want [you] to examine the file of the Holland House Condominium and is purposely stonewalling [you] in order to make [you] desist."

According to your request directed to the Town Clerk concerning the Holland House Condominium, you asked that she "Supply the documents used by the Assessor in order to assign tax lot numbers to the condominium units", as well as "correspondence to and from the Assessor with the sponsor's attorney or agent relevant to the assigning of tax lot numbers to the units." In response to that and similar aspects of your request, the Town Attorney denied access "because you are requiring information as to a determination made and the basis for that determination" and added that "[t]hese determinations are summarized in our tax roll which is available for your review."

In ensuing portions of your request, you sought records indicating the number of condominium units in the Town, the name of each project and its location, as well as instructions to staff concerning the assignment of tax lot numbers to condominium units. The Town Attorney wrote that there is no list or compilation of

condominium units containing the information and that departmental instructions could be withheld.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, insofar as your request involves records that do not exist or have not been prepared, the Freedom of Information Law, in my view, would be inapplicable.

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 his denial, the Town Attorney cited no provision of the Freedom of Information Law as the basis for denial. In my opinion, one of the grounds for denial is particularly relevant with respect to your requests for records pertaining to the Holland House Condominium and the instructions to staff to which reference was made earlier. However, due to the structure of that provision, it often requires disclosure.

Specifically, §87(2)(g) pertains to inter-agency and intra-agency materials, those records that are prepared by agency staff and used or communicated within an agency or communicated to officials of other agencies. 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 ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

As suggested earlier, the contents of materials falling 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" (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.

Communications between town officials and a sponsor's attorney or agency would not fall within the scope of §87(2)(g), for the sponsor, that person's attorney or agent would not be agency staff. As such, I do not believe that any ground for denial could be asserted to withhold those records.

Lastly, §87(2)(g)(ii) requires that intra-agency materials consisting of "instructions to staff that affect the public" be disclosed. Insofar as your request included those kinds of records, they must in my opinion be disclosed.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alan M. Simon, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1741

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 4, 1993

[redacted]
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. Meehan:

I have received your letter of May 19.

According to your letter, through your attorney you requested an evaluation by a psychologist, a copy of which is maintained by the court. You have asked whether you have a right to the record.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the office, 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."

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

This not to suggest, however, that court records are confidential, for various statutes often require disclosure of court records (see e.g., Judiciary Law, §255). It is recommended that you seek the record from the clerk of the court that maintains the record, citing an appropriate provision of law as the basis for your request.

Enclosed as requested is a copy of the regulations promulgated by the Committee on Open Government pursuant to the Freedom of Information Law. You also asked how you can obtain the directory of systems of records. The directory was prepared pursuant to the Personal Privacy Protection Law and refers to systems of records maintained by state agencies from which personal information may be retrieved by means of a name or other identifier. The directory consists of approximately 2,000 pages. Due to its volume, rather than making a directory available in its entirely, portions of the directory pertaining to specifically identified state agencies are made available on request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7742
PPPL-AO-147

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 9, 1993

Mr. Stephen T. Shannon
[redacted]

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

Dear Mr. Shannon:

I have received your letter of May 25 in which you sought assistance in obtaining information from the Williamsville Central School District under the Freedom of Information Law and the Personal Privacy Protection Law.

Enclosed as requested are the brochures concerning those statutes. However, before dealing with the issues that you raised, I point out that the Personal Privacy Protection Law applies only to state agencies. The coverage of that statute is determined in part by its definition of "agency". 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 governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Since the definition specifically excludes units of local government, the Personal Privacy Protection Law would not apply to a school district.

The Freedom of Information Law, §86(3), defines the term "agency" more expansively to include:

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

Based upon the foregoing, a school district is clearly required to comply with the Freedom of Information Law.

You referred to delays and hesitancy on the part of District officials to answer your inquiries. Further, having read the brochure concerning the Freedom of Information Law, you wrote that "it appeared that external audit results of the examination of school district records would be included within the scope of information that must be provided to a district taxpayer." You have asked whether your contention is accurate.

In this regard, I offer the following comments.

First, since I am unfamiliar with the inquiries directed to the District, 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, an agency is not required to provide information by responding to questions; rather, an agency must disclose existing records to the extent required by law.

Second, with respect to its procedural implementation, 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 body of a public corporation, the Board of Education, 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 Board of Education is required 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.

It is also noted 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)].

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.

On the basis of your letter, it appears that you requested an audit performed by a person who is not a District employee, or by an auditing firm. If that is so, such a record in my opinion would be accessible. Relevant to an analysis of rights of access to external audits is §87(2)(g). Although that provision is one of the grounds for denial, due to its structure, it often requires disclosure. Section 87(2)(g) states that an agency may withhold records that:

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

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

respect to or for a school district would in my opinion be accessible under §87(2)(g)(iv) of the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: President, Board of Education
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1743

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 8, 1993

Mr. Francis S. Keough, Jr.
ACTA County Chairman
1611 Avenue A
Schenectady, N.Y. 12308

Dear Mr. Keough:

As you are aware, I have received your letter of May 26 in which you referred to an advisory opinion prepared recently at the request of Ms. Elizabeth Lynch.

In brief, the issue involves the ability to ascertain which public employees are engaging in what you characterized as "double-dipping" with respect to health insurance coverage. It was advised, based upon judicial decisions concerning the privacy of public employees, that it is likely in my view that the information in question, insofar as it identifies public employees, could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. As indicated in that opinion, it has been held in a variety of situations that records relevant to the performance of a public employees duties are available, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. On the other hand, insofar as records are irrelevant to the performance of a public employee's duties, it has been found that such information may be withheld as an unwarranted invasion of personal privacy. From my perspective, whether an employee has health insurance coverage, or whether an employee has family or individual coverage, for example, is largely unrelated to the performance of that person's duties.

The foregoing was explained during our conversation of June 2. Since I understand your goal of uncovering "double dipping", several suggestions were offered, and you asked that I reiterate them here.

First, although various judicial decisions reflect the principles described above, none have dealt with the issue that you and Ms. Lynch have specifically raised. That being so, you or anyone else, after being denied access to the records in question and exhausting your administrative remedies, could challenge a denial of access in court by initiating a proceeding under Article

78 of the Civil Practice Law and Rules. Despite the direction of the case law, it is possible that a court would find the records to be available.

Second, the head or governing body of an agency could be approached and asked to conduct a review of its records in an effort to ascertain whether there may be employees engaged in double dipping and to disclose the results of its review, without identifying particular employees. Similarly, depending upon the manner in which records are kept, it may be possible to disclose records relating to health insurance coverage without personally identifying details. Further, you could encourage an agency to establish a policy or engage in whatever means are legally available to prohibit the practice that is the subject of your complaint.

Third, an agency could be encouraged to disclose records concerning health insurance coverage, with names. As indicated in the opinion addressed to Ms. Lynch on May 18, the Freedom of Information Law is permissive. Stated differently, even though an agency might have the ability to withhold the records in question, it would not be obliged to do so by the Freedom of Information Law; rather, the agency would have the ability to choose to disclose.

Fourth, contact could be made with state or local legislators in an effort to gain the enactment of laws that would deal with the matter to your satisfaction.

Lastly, if you are dissatisfied with the manner in which your elected representatives represent you, you could attempt to elect others who might better reflect your views.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Elizabeth Lynch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2226
FOIL-AO 1744

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June 8, 1993

Mr. Eric F. Coppolino
[redacted]

Dear Mr. Coppolino:

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

By way of background, as a reporter and presumably as a citizen, you have engaged in a variety of activities in an attempt to learn as much as possible in relation to an accident that occurred in December of 1991 on the SUNY College at New Paltz campus resulting in an explosion and PCB contamination. According to a letter sent to you on May 6 by the College's Associate Vice President for Student Affairs, "[d]ue to your inability to conduct yourself in a manner consistent with College policies, specifically, the State University Trustees' Rules for the Maintenance of Public Order, you are hereby declared PERSONA NON GRATA from the grounds and facilities of the College at New Paltz" (emphasis by the author). That letter indicates that you "are prohibited from entering onto the campus at any time, for any reason, without specific authorization..." The letter also states that "[s]hould you fail to comply with the terms of this directive, you will be considered a trespasser and will be subject to arrest, a fine and/or possible incarceration."

You have requested "a general opinion on the ban, plus specific opinions on how it affects [your] rights under FOIL & Sunshine Act (in the context of being a reporter & citizen)." In this regard, as you may be aware, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information and Open Meetings Laws. Consequently, my comments will pertain only to those statutes.

First, attached to your letter is a decision rendered by the Court of Appeals that also involved a "persona non grata letter" issued by another SUNY institution [People v. Leonard, 62 NY 2d 404 (1984)]. Citing §6450(1) of the Education Law, which states in part that the SUNY Board of Trustees may "adopt rules and regulations for the maintenance of public order on college campuses

promulgated to "prevent abuse of the rights of others and to maintain...public order appropriate to a college or university campus" and that the SUNY administration clearly has "the general power to exclude from the campus persons who do not abide by the rules of conduct" (id., 408, 409). However, the Court also held that:

> "...when the public enjoys broad license to utilize certain property, State trespass laws may not be enforced solely to exclude persons from exercising First Amendment or other protected conduct in a manner consistent with the use of property...Therefore, a decision to exclude that is predicated on or impermissibly inhibits a constitutionally or a statutorily protected activity will not be lawful" (id. 410-411).

As you may be aware, under §89(3) of the Freedom of Information Law, an agency may require that request may be made in writing, and that an applicant may inspect and copy records available under that statute [see §87(2)]. Having spoken with attorneys for the State University, it is clear that University officials are aware of the Leonard decision and statutory rights that you enjoy as a member of the public under open government laws. Further, I have received a copy of a letter addressed to you by the Associate Vice President for Student Affairs in response to a request for records. In brief, you were granted permission to visit a particular site on campus for reviewing records during a specific time. As such, so long as you seek permission to invoke your statutory right to review records sought under the Freedom of Information Law, it appears that the College is willing to grant that right. Should you seek to observe a meeting of the College Council, for example, held pursuant to the Open Meetings Law, it is assumed that by following the procedure and seeking permission to attend, you would have the ability to do so.

In sum, under the circumstances, it appears that the College is enabling you to assert your statutory rights under open government statutes in accordance with the Leonard decision and the procedures described in the letter to you in conjunction with your status as persona non grata.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: L. David Eaton
Carolyn Pasley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 8, 1993

Ms. Shira P. White
Community Representative
South Cairo
H.C. #1, Box 311C
Leeds, NY 12451

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

Dear Ms. White:

I have received your letter of May 23, as well as correspondence relating to it.

Your commentary focuses on your efforts to acquire information concerning a proposed development under SEQR review in the Town of Cairo. Requests for records of the Town Board and the Planning Board have not been answered, and the chairman of the Planning Board wrote that its files are open only at its monthly meetings. Further, you indicated that the Planning Board "continues to hold meetings without informing or inviting the public and without keeping minutes or records."

You have asked that I prepare an advisory opinion informing those boards of their duties under the Freedom of Information Law and the Open Meetings Law and the possibility of recovering attorney's fees should you prevail in court under those statutes. In this regard, I offer the following comments.

First, I do not believe that the Planning Board can restrict the ability to view or copy its records only to those times when the Board meets. 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 body of a public corporation, the Cairo Town 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, §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, §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. In most towns, the records access officer is the town clerk, for that person, under §30 of the Town Law, is the legal custodian of all town records. Therefore, even if records are in the physical possession of the Planning Board, I believe that they are in the legal custody of the town clerk, and that the records access officer has the duty to coordinate the response to requests for Town records.

It is also important to note 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)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent 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, although I am not an expert with respect to SEQR, I believe that SEQR and the regulations promulgated thereunder provide broad rights of access that may exceed rights ordinarily conferred by the Freedom of Information Law.

Second, with regard to the Open Meetings Law, 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)].

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, when 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.

Further, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §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.

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.

Section 106 of the Open Meetings Law pertains to minutes of meetings and 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.

Moreover, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. 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, with respect to attorney's fees, §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."

In addition, subdivisions (2) and (3) of that statute provide that:

> "2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party.
>
> 3. The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public."

Under the Freedom of Information Law, if a request is denied 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, 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."

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, and to attempt

to negate the need to initiate litigation, copies of this opinion will be forwarded to the officials identified in your letter, as well as others.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Phoenix, Chairman
John Caiazzo
Richard Paolino
James Keefe, Supervisor
Linda Larsen
J. Henry McManus
Town Board
Town Clerk

STATE OF NEW YORK
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June 9, 1993

Ms. Wreathea E. O'Hara
[redacted]

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

Dear Ms. O'Hara:

As you are aware, your letters of May 12 and May 17 addressed to Secretary of State Shaffer have been forwarded to the Committee on Open Government. Enclosed with your letters is a series of materials involving a zoning controversy in which you have faced difficulties in the Town of Mentz.

You focused on problems relating particularly to access to records. For instance, in response to a request for papers prepared by a property owner's attorney, you were informed by the Town Clerk that she would not let you see them, and that she would "remove the papers before she let [you] see the file." The Clerk also said that you could only come into the office and request records once a month, and that the requests must be "specific". In addition, you faced delays and responses to the effect that records would be disclosed "as soon as possible". Further, it appears that minutes of Planning Board meetings were not prepared on a timely basis.

In this regard, I offer the following comments.

First, there is no provision of law that restricts a member of the public from seeking records more often than once a month. On the contrary, the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law, state that "Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business" [21 NYCRR §1401.4(a)].

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, a request for records need not be "specific". By way of background, when the Freedom of Information Law was enacted in 1974, its original provisions required that applicants seek "identifiable" records. That standard resulted in problems when members of the public could not name or identify a particular record. When the revised Freedom of Information Law became effective in 1978, the standard imposed on the public for requesting records was altered. Since that time, §89(3) of the Law has required that an applicant "reasonably describe" the records sought. Therefore, a request need not be "specific" or identify records with particularity; rather, to reasonably describe records, an applicant need only provide sufficient detail to enable agency officials to locate the records.

Fourth, the Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" expansively to mean:

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

Therefore, as soon as documents come into the custody of a town, for example, they constitute "records" subject to rights of access, even if the transaction to which they relate may be incomplete.

Further, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, records submitted by or on behalf of an applicant for a building permit or zoning change, for example, would be available under the Freedom of Information Law. In short, none of the grounds for denial could justifiably be asserted to withhold such records, including those submitted by an applicant's attorney.

Lastly, with respect to the preparation and availability of minutes, I direct your attention to the Open Meetings Law. Section 106 of that statutes 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, 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.

Moreover, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. 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. Again, I believe that the language of §106(3) is clear, for it states that minutes shall be available "within two weeks from the date of such meetings."

Since issues involving the Freedom of Information Law and the Open Meetings Law are tangential to your primary concerns, it is suggested that you discuss those concerns with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frances Butler, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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162 Washington Avenue, Albany, New York 12231
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June 10, 1993

Ms. June P. Shearer
[redacted]

The staff of the Committee 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. Shearer:

I have received your letter of May 25, as well as related materials concerning the implementation of the Freedom of Information Law and the Open Meetings Law by the Town of Hornellsville.

According to the correspondence, it appears that some people who request records are required to do so in writing by completing a request form, while others are not. You also wrote that certain records do not exist, such as procedures pertaining to implementation of the Freedom of Information Law, a subject matter list, and minutes relating to executive sessions of the Assessment Board of Review. In addition, as I understand your comments, meetings scheduled less than a week in advance are not preceded by posting. Further, you referred in a conversation to a closed meeting held by three members of the Town Board without prior public notice.

You have asked for a review of the issues described above. In this regard, I offer the following comments.

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 body of a public corporation, the Town 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, §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, §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. In most towns, the records access officer is the town clerk, for that person, under §30 of the Town Law, is the legal custodian of all town records.

Although an agency may require that a request may be made in writing, it may accept oral requests [see Freedom of Information Law, §89(3); regulations, §1401.5(a)]. In my view, agencies should be consistent in treatment of requests. If a request for certain records is required to be made in writing by one person, others, in my opinion, should be required to do the same. However, when a request is routine and requires no search, an agency can waive the requirement of submitting a written request. For instance, if a clerk's minute book is kept close at hand, and a person asks to inspect the minutes, there may be no reason for making or requiring a written request. In short, I believe that the treatment of requests should be consistent.

It is also important to note 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)].

Further, 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, §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.

With respect to the subject matter list, §87(3) of the Freedom of Information Law states in relevant part that:

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

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 town 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.

With regard to the Open Meetings Law, 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)].

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, when 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.

Further, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §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.

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 sessions.

The Open Meetings Law also includes direction concerning minutes of meetings. 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.

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.

Lastly, while meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409, 418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting and be referenced in minutes.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: John Clifford, Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7748

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 10, 1993

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 May 21 in which you sought an advisory opinion concerning a request made under the Freedom of Information Law.

According to the correspondence attached to your letter, you submitted a request to the Department of Correctional Service in which you asked "to inspect or copy (or both) the State Wide Alphabetical listing of all inmates currently in Department of Correctional Service custody, showing facility of incarceration and DIN numbers."

In this regard, I am unaware of whether the Department maintains the kind of alphabetical listing in which you are interested. Assuming that such a list exists, while I believe that inmates' names, facilities of incarceration and DIN numbers would in most cases be available under the Freedom of Information Law, there may be certain portions of such a list that could be withheld. For instance, some inmates may have been adjucated as youthful offenders, in which case their identities would, in my view, be exempted from disclosure by statute [see Criminal Procedure Law, §720.35(2), FOIL §87(2)]. I am unaware of how frequently such a list may be updated, and it is possible that the list refers to persons whose charges may have been dismissed. I believe that reference to those persons would be confidential under §160.50 of the Criminal Procedure Law. It is possible, too, that a Department database includes other items that could be withheld, such as reference to medical conditions.

Further, 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 §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 such a list exists, and if the Department has the ability to segregate those portions that are available under the Freedom of Information Law from others that could properly be withheld, the accessible portions should in my opinion be disclosed upon payment of the requisite fee. However, if reprogramming would be required to extract data that would otherwise be public, I do not believe that the Department would be obliged to take that kind of action.

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 7749

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 10, 1993

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 May 26 and the materials attached to it.

According to the correspondence, on April 4 you wrote to Richard Hogan, Superintendent of the City of Watervliet School District and indicated that you "spent a total of $238.64 in Freedom of Information Act requests obtaining the teacher contract of local districts." You added that "[t]his was done for the good of the taxpayers in the City of Watervliet to make comparisons of just what salaries and benefits are paid by other districts." Consequently, you requested a "refund" of that amount from the District. Although a motion was made to reimburse you for the cost of obtaining the records, the motion was not seconded, and you were "denied a refund."

You expressed the view that you are "entitled to a full refund," and you requested a "clarification of this matter."

In this regard, notwithstanding your motivation and desire to engage an activity beneficial to the taxpayers, it does not appear that the issue involves the Freedom of Information Law. If you expended money as an employee or an agent of the District, or pursuant to a contract with the District, perhaps you could make a valid claim for reimbursement. However, if you obtained and paid for the records in your capacity as a citizen, albeit a well-intentioned citizen, I do not believe that there would be a basis for your claim under the Freedom of Information Law or any other provision of law which I am aware.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Richard P. Hogan, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7750

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 10, 1993

Ms. Dale Joan Young
Property Tax Savers, Inc.
117 Grand Boulevard
Scarsdale, NY 10583

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

Dear Ms. Young:

I have received your letter of May 24 and the materials attached to it. You have sought an advisory opinion concerning a "policy" adopted by the Division of Equalization and Assessment applicable to access to certain records.

Specifically, you recently requested from the Division "various assessment rolls on computer disks, a request [you] previously made and was granted." In response to that request, William Crotty, Director of the Bureau of Equalization Rates, wrote that:

> "...the agency has reviewed its policy in regard to assessment roll and inventory data. The information you are interested in obtaining is created by local municipal governments and, as such, is considered a local government record. The agency feels that, since the municipality is responsible for the creation and maintenance of its assessment administration files, and since the municipality is governed by the Freedom of Information Law to comply with requests for this data, it is most appropriate to refer requests for such data back to the original source. The latest and most up-to-date versions of these files are maintained by local government agencies. We require you make your freedom of information request to the jurisdiction which is responsible for the information.

> "We realize that, in the past, we have provided this type of data when you have requested it. However, since we have developed a new policy regarding this data we would appreciate your understanding and cooperation in this matter."

You wrote that it is your understanding that under the Freedom of Information Law, "if a governmental agency has public records, independently of how they are received, they must make them accessible to the public", and that "[t]he fact that one agency has them doesn't preclude another from the responsibility of providing them."

In this regard, it appears that the Division's change in policy may be based in part upon an intent to enable a requester to obtain the most up to date, complete and accurate information. The source of that information would be a municipality. Nevertheless, under the terms of the Freedom of Information Law, if an agency maintains a record, even though it may not be the creator of the record, but rather is a secondary repository or source, I do not believe that it may "require" the requestor to seek or obtain it from the agency that created or otherwise maintains the record.

Key to an analysis of the issue in my view is §86(4) of the Freedom of Information Law, which 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 agency 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, information maintained on computer tapes or disks by the Division would in my opinion constitute "records" of the Division subject to rights of access conferred by the Freedom of Information Law, irrespective of its origin. Consequently, if an applicant does not want to seek equivalent records from a municipality, I believe that the Division would be obliged to disclose the records in question in conjunction

with rights of access conferred by the §87(2) of the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Crotty
David Gaskell
Steven Harrison

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7751

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 11, 1993

Ms. Martha L. Weale
[redacted]

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

Dear Ms. Weale:

As you are aware, I have received your correspondence of May 24.

You have sought advice concerning access to "the gross payroll amount for Village employees for the period June 1, 1992 - present," and you asked how "information for overtime, reimbursement for whatever, and other payments to Village employees/officials [may] be secured."

Although I believe that the information in question has been supplied by the Village of Addison, I offer the following comments.

First, except in rare instances, the Freedom of Information Law does not require that agencies maintain or create records [see §89(3)]. Therefore, if there are no records indicating employees' gross pay during the period that you specified, the Village would not be obliged to create records on your behalf reflective of the total gross wages paid during that period. However, a review of a series of records involving that period would enable you to prepare figures reflective of total gross wages paid to employees. For instance, although there may be no single figure relating to an employee's gross wages during the period in question, W-2 forms would include employees' gross wages, including overtime and other payments, during a calendar year.

With certain qualifications, I believe that W-2 forms or other records including gross wages 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 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 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 or similar records 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). In a given municipality, there may be many W-2 forms from which portions could be deleted, but employers, i.e., the Village, might 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 Village, for it would be more efficient and less burdensome to disclose a single listing than many forms.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Mary Lou Hanrahan, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7752

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 11, 1993

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 May 26 and the correspondence attached to it. In brief, you have complained that a request for a record of the City of Amsterdam has been ignored, and you seek assistance in the matter.

In this regard, I offer the following comments.

First, the request, which was directed to the Chief of Police on March 16, was made pursuant to the "Federal Freedom of Information Act." It is noted that the federal Act pertains only to records maintained by federal agencies. Each state, however, has enacted its own statute pertaining to access to government records. The applicable statute in this instance is the New York Freedom of Information Law, which pertains generally to records of entities of state and local government in New York.

Second, pursuant to the Freedom of Information Law [§87(1)] and the regulations promulgated by Committee on Open Government (21NYCR Part 1401), the governing body of a public corporation, i.e., the City Council of the City of Amsterdam, must adopt procedures concerning the implementation of the Freedom of Information Law. One aspect of those procedures must include the designation of one or more "records access officers." The records access officer has the duty of coordinating the agency's response to requests, and a request should ordinarily be directed to that person. I am unaware of whether the Chief of Police has been designated as records access officer for records of the Police Department. If he has been so designated, I believe that he should have ensured that your request was appropriately answered. If he is not so designated, he should have forwarded your request to or consulted with the records access officer. It is suggested that

you contact the City Clerk to ascertain the identity of the records access officer, as well as the status of your request.

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)].

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: City Clerk
Chief of Police
Mario Villa, Mayor
Felix Catena, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7753

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 14, 1993

Mr. Philip St. Louis
90-D-0142
Adirondack Correctional Facility
P.O. Box 110
Raybrook, NY 12977

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

Dear Mr. St. Louis:

I have received your letter of May 25 in which you sought assistance concerning a request made under the Freedom of Information Law to the Division of State Police.

In brief, having requested various records on May 11 apparently relating to your arrest and conviction, you received no response. Consequently, you appealed to the Superintendent on May 25. As of the date of your letter to this office, you had received no response to the appeal. It is your understanding that the Committee on Open Government "follows up" on requests.

In this regard, I offer the following comments.

First, the Committee is authorized to provide advice concerning the Freedom of Information Law. This office cannot obtain records on behalf of applicants or enforce 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 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 believe that Francis A. DeFrancesco, Chief Inspector, has been designated by the Superintendent to determine appeals under the Freedom of Information Law.

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 §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. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential relevance 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.

Lastly, of potential significance is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)]. With respect to access to the kinds of records used in a public proceeding, the Court in Moore noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

While you may not have possession of the records sought, it is possible that the records at issue were disclosed to your trial counsel. As such, it is suggested that you contact that attorney to obtain the records or to ascertain whether he or she maintains the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Raymond G. Dutcher, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1754

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 14, 1993

Mr. Alan L. Honorof
Office Of The City Attorney
126 Glen Street
Glen Cove, N.Y. 11542

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

Dear Mr. Honorof:

I have received your letter of May 26 concerning a request for records by the Glen Cove Taxpayers' Association.

The request, which pertains to the Glen Cove Civic Center, involves a contract with the architect, approved architectural drawings and a site plan, and "original approved architecture plans and site plan." You indicated that, as the City's Freedom of Information Officer, you denied the request, that soon after, "an appeal of [your] determination was made again to [your] office, the designated Appeals Bureau," and that you "determined that [your] original denial shall stand."

In this regard, I offer the following comments.

First, as you may be aware, §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 City Council, 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.

Section 1401.2 of the regulations requires the designation of at least one "records access officer," and §1401.7, which pertains to denials of access and the right to appeal, states in relevant part that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

Based upon the foregoing and my understanding of your commentary, you serve as both the records access officer and the appeals officer. If that is so, I believe that the City's procedures are inconsistent with the Committee's regulations.

Second, since the correspondence does not indicate any rationale for the denial, 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. From my perspective, it is unlikely that the records in question, as I understand the matter, could properly be withheld.

In my opinion, a contract between an agency and an architect or architectural firm would clearly be available. In short, I do not believe that any of the grounds for denial could appropriately be asserted to withheld such a record.

With respect to the remainder of the request, I point out that the Freedom of Information Law pertains to agency records, and that §86(4) of the Law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to,

> reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

As such, architects' plans and similar or related documents maintained by or produced for an agency in my view clearly constitute "records" subject to rights conferred by the Freedom of Information Law.

Access to plans and surveys that are marked with the seal of an architect or engineer, for example, has been the subject of several questions and substantial research. Professional engineers and architects are licensed by the Board of Regents (see respectively, Articles 145 and 147 of the Education Law,). While §7307 of the Education Law requires that an architect have a seal, and that state and local officials charged with the enforcement of provisions relating to the construction or alteration of buildings cannot accept plans or specifications that do not bear such a seal, I am unaware of any statute that would prohibit the inspection of such records under the Freedom of Information Law. Some have contended that an architect's seal, for example, represents the equivalent of a copyright. Having discussed the matter with numerous officials, including officials of the appropriate licensing boards, the seal does not serve as a copyright, nor does it restrict the right to inspect and copy.

Additional considerations become relevant if the records in question bear a copyright, and the question, in my view, involves the effect of a copyright appearing on a document. In order to offer an appropriate response, I have discussed the matter with a representative of the U.S. Copyright Office and the Office of Information and Privacy at the U.S. Department of Justice, which advises federal agencies regarding the federal Freedom of Information Act (5 U.S.C. §552), the federal counterpart of the New York Freedom of Information Law.

It is noted that the Federal Copyright Act, 17 U.S.C. §101 et seq., appears to have supplanted the early case law concerning the Act prior to its amendment in 1976. Further, I am unaware of any judicial decisions rendered in New York concerning the relationship between the Copyright Act and the New York Freedom of Information Law.

Useful to the inquiry is a federal court decision in which the history of copyright protection was discussed, and in which reference was made to notes of House Committee on the Judiciary (Report No. 94-1476) referring to the scope and intent of the revised Act. Specifically, it was stated by the court that:

> "The power to provide copyright protection is delegated to the Congress by the United States Constitution. Article 1, section 8, clause 8,

of the Constitution grants to Congress the power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'

Copyright did not exist at common law but was created by statute enacted pursuant to this Constitutional authority. See Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460, 98 L.ed. 630 (1954); see also MCA, Inc., v. Wilson, 425 F.Supp. 443, 455 (S.D.N.Y. 1976); Mura v. Columbia Broadcasting System, Inc., 245 F.Supp. 587, 589 (S.D.N.Y. 1965), and cases cited therein.

Prior to January 1, 1978, the effective date of the revised Copyright Act of 1976, there existed a dual system of copyright protection which had been in effect since the first federal copyright statute in 1790. Under this dual system, unpublished works enjoyed perpetual copyright protection under state common law, while published works were copyrightable under the prevailing federal statute. The new Act was intended to accomplish 'a fundamental and significant change in the present law by adopting a single system of Federal statutory copyright... (to replace the) anachronistic, uncertain, impractical, and highly complicated dual system.' H.R. Rep. No. 94-1476; 94th Cong. 2d Sess. 129-130, reprinted in [1976] 5 U.S. Code Cong. & Ad. News 5745. This goal was effectuated through the bed-rock provision of 17 U.S.C. subsection 301, which brought unpublished works within the scope of federal copyright law and preempted state statutory and common law rights equivalent to copyright. Id. at 5745-47. Thus, under subsection 301(a), Congress provided that Title 17 of the United States Code, the Federal Copyright Act, preempts all state and common law rights pertaining to all causes of action which arise subsequent to the effective date of the 1976 Act, i.e., January 1, 1978:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified

> in sections 102 and 103, whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." [Meltzer v. Zoller, 520 F.Supp. 847, 853 (1981)]

Based upon the foregoing, "common law" copyright appears to be a concept that has been rejected and replaced with the current statutory scheme embodied in the revised Federal Copyright Act.

In view of the language of the Copyright Act, case law and discussions with a representative of the Copyright Office, it is clear in my opinion that architectural plans and similar documents may be copyrighted.

To be copyrighted, 17 U.S.C. §401(b) states that a work must bear a "notice", which:

> "shall consist of the following three elements:
>
> (1) the symbol c (the letter C in a circle), or the word 'Copyright,' or the abbreviation 'Copr.'; and
>
> (2) the year of the first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of the first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and
>
> (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner."

If those elements do not appear on a work, I do not believe that it would be copyrighted, and that it could be reproduced in response to a request made under the Freedom of Information Law.

Assuming that a work is subject to copyright protection, such a work that includes the notice described above is copyrighted. It is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. §408(a)] be registered with the Copyright Office. No action for copyright infringement can be initiated

until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work would be available for copying under the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Norman Dorf

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7755

162 Washington Avenue, Albany, New York 12231
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June 14, 1993

Mr. Fred Jahne, Editor
The Waddington Reporter
P.O. Box 7
Chase Mills, N.Y. 13621

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

Dear Mr. Jayne:

I have received your letter of May 28 concerning a question relating to a practice of the Madrid Waddington School District.

In brief, in response to a request for a record listing teachers' salaries, the District requires that a document be signed indicating that you "certify that the only purpose of the records inspection is for [your] information, and that it will not be used for any private, commercial, fund raising or any other purposes."

You have sought a "ruling" concerning the propriety of such a requirement. 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. As such, this office cannot issue a "ruling" that is binding. It is my hope, however, that the advice rendered herein is viewed as educational and persuasive.

Second, my opinion, a person cannot be required to sign the statement referenced above. Further, that aspect of the District's form is, in my view, inconsistent with the Freedom of Information Law and its judicial interpretation.

It is emphasized at the outset that, 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 right 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 §87(2) of the Law, the use of the records, including the potential for private or commercial use, is in my opinion irrelevant; when records are accessible, the recipient may do with the records as he or she sees fit.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §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, §89(2)(b) includes examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [section 89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the Law. As 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 §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 judgement for that of the respondents" (id.).

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses. That situation, however, represents the only case under the Freedom of Information Law in which an agency may inquire as to the purpose for which a request is made, or in which the intended use of the record has a bearing upon rights of access.

Nevertheless, as indicated in an opinion sent to another person who requested the same record, I do not believe that an agency may properly inquire as to the use of the payroll record that you have apparently requested or withhold that record, even if it is requested for a commercial or fund-raising purpose. Section 89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right

of access at law or in equity to any party to records."

Therefore, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since payroll information was found to be available prior to the enactment of the Freedom of Information Law [see Winston V. Mangan, 338 NYS 2d 654 (1972)], I believe that it must be disclosed, regardless of the intended use of the records. Consequently, in my view the payroll record required to be maintained should be disclosed to any person, irrespective of its intended use, and that it should be unnecessary to sign the certification on the District's form. Moreover, I do not believe that a request made by a newspaper for news gathering purposes could be characterized as a commercial or fund-raising activity.

I hope that 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 7756

162 Washington Avenue, Albany, New York 12231
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June 14, 1993

Mr. Peter W. Sluys
Managing Editor
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, unless otherwise indicated.

Dear Mr. Sluys:

I have received your letter of May 26 in which you requested an advisory opinion concerning the Freedom of Information Law.

By way of background, you wrote that the category of patients treated at the Rockland Psychiatric Center in Orangetown has changed within recent years, and that there is an increasing number of "leave without consent [escapes]" that impact upon the surrounding community. Although information concerning those incidents had been routinely made available on an ongoing basis, you wrote that recently "the public relations director has taken the position that since the number of weekly escapes are not formally compiled as such, they no longer have to be reported to the media, but are retained in quarterly summaries which will be released to the media three months after the event has occurred." You added, however, that "there are daily memoranda to the direction advising the number of escapes, and...blotter entries of the security forces advising of the number of escapes." You have asked whether the Center may "unilaterally declare that they will no longer supply this information the media, even though the information is known and collected by the director of public information and provided to the director."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Therefore, if, for example, records are not prepared

providing compilations or figures until the end of a quarterly period, an agency in my opinion would not be required to prepare records containing figures or compilations before the end of such period.

Second, in a related vein, the Freedom of Information Law does not impose an obligation to disclose information or records on its own initiative. While agencies must respond to requests for records and disclose existing records to the extent required by the Freedom of Information Law, that statute does not require that agencies disclose records, on an ongoing basis or as the records are prepared, absent requests for records. Similarly, there is no requirement in the Freedom of Information Law that agency officials interpret or explain the contents of records, highlight aspects of records that may be considered newsworthy, or condense or shorten lengthy records.

Lastly, having spoken with Ms. Kistler, the Director of Public Affairs, I was informed that safety logs containing the information in which you are interested are disclosed to you on a weekly basis. If that is so, it appears that the Center is acting in compliance with the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Heidi Kistler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7757

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 14, 1993

Mr. Eugene Forman
91-A-8549
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. Forman:

I have received your letter of May 26.

According to the correspondence attached to your letter, which is enclosed as you asked, your request to the Division of Criminal Justice Services for the indictment number of a person arrested in 1991 was denied on the basis of §837 of the Executive Law. Since that information may be available from other public sources, you questioned the propriety of the denial by that agency.

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". 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 public disclosure pursuant to §87(2)(a) of the Freedom of Information Law (see enclosed, 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.

Lastly, in view of your initial remarks, it is noted that I began preparing advisory opinions for the Committee on Open Government late in 1974.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AC 2234
FOIL-AO 7758

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 15, 1993

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 May 28, as well as the materials attached to it. In brief, you have sought assistance in obtaining records from the Saratoga County Sewer District. Although three requests were made, you received no response. Further, you wrote that you were informed that the records should be requested through the County Attorney.

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 body of a public corporation, the Board of the Sewer District, 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 Sewer District Board is required 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. In addition, the Board is required to determine appeals following denials of access to records, or designate a person or body to determine appeals on its behalf.

Second, it is also important to note 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)].

Third, with respect to your request, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Insofar as the records requested exist, I believe that, with one exception, they must be disclosed, for none of the grounds for denial would apply.

The one aspect of the request in which I believe that the District could withhold portions of the records involves complaints made to the District. When complaints are made to an agency by a member of the public, it has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §§87(2)(b) and 89(2)]. I point out that §89(2)(b) of the Freedom of Information Law states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

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

In my view, what is relevant to the work of an agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency. As such, I believe that disclosure of the identifying details pertaining to the complainants would constitute an unwarranted invasion of personal privacy and could be withheld or deleted.

Lastly, the final aspect of your request pertains to a request for "the time, date and place of the next Sewer District's Commissioners Meeting." Here I direct your attention to the Open Meetings Law. That statute is applicable to meetings of public bodies, and §106(2) of the Open Meetings Law defines the phrase "public body" to include:

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

Based upon the foregoing, a board of sewer commissioners, which is a public corporation as defined in §66 of the General Municipal Law, is a public body required to comply with the Open Meetings Law.

It is emphasized that the definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

With regard to notice of meetings, §104 of the Open Meetings Law pertains to notice and requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place 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.

I hope that I have 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 Beaudoin
Board of Commissioners, Saratoga County Sewer District
Courtenay Hall, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2235
FOIL-AO 7759

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 15, 1993

Mr. Claude Phillips
[redacted]

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

Dear Mr. Phillips:

I have received your letter of June 1 and various related materials. You have sought an advisory opinion concerning a variety of issues involving the Troy City School District.

By way of background, you referred to meeting of the Board of Education held on May 19, 1992. The minutes of the meeting describe the Board's activities and indicate that the only subject discussed during an executive session dealt with "an employee disciplinary matter." Nevertheless, in a letter prepared by James A. P. McCarthy, an attorney with the firm retained by the District, to Charles A. Morse, the Assistant Superintendent for Business, Mr. McCarthy wrote that "[a]s directed by the Board of Education on Tuesday May 19, 1992," he had engaged Mr. Charles S. Webb to review an option contract and title report and to advise him concerning the "Provost Property." According to the minutes, Mr. McCarthy was not present at the meeting, and there was neither discussion of nor action taken at the meeting concerning the "Provost Property, eminent domain or any legal research or action to be taken in that regard." Based on a copy of check made out to Mr. Webb in June of 1992, it appears that he is an attorney in New York City. Having requested a copy of any Board of Education resolution authorizing District officials or its attorney to engage in research concerning the Provost property or to retain Mr. Webb, you were informed that no such resolution exists.

It is your view that the "Open Meetings Law has been violated," for you asked somewhat rhetorically: "How is it possible for Mr. McCarthy to be directed by the Board of Education to hire Mr. Charles S. Webb when Mr. McCarthy was not present at the Board

of Education meeting? How is it possible that the minutes of that meeting do not reflect any discussion or action with regard to Mr. Webb, eminent domain, Provost property, preliminary fees of $2,500.00 or other authorizations with regard to the Provost property?" Similarly, you wrote that "it appears that the $2,500.00 preliminary fee to Mr. Webb was appropriated in some type of non-public session" and that there is "no record of the appropriation being made during the public session of the meeting," despite Mr. McCarthy's indication of receipt of "Board of Education approval on that night."

From my perspective, assuming that only the Board of Education would have had the power to authorize Mr. McCarthy to seek the services of Mr. Webb, I believe that any such action should have occurred during an open meeting, and that minutes should have been prepared indicating the nature of the action taken and the vote of the members. In this regard, I offer the following comments.

First, 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, when 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.

When the Board discussed the matter that you described or directed Mr. McCarthy to take action on its behalf is, on the basis of the materials, unknown. If the Board, considered the issue as a body and provided direction to Mr. McCarthy. I believe that such activities should have occurred during a meeting held in accordance with the Open Meetings Law.

Also relevant in my view, is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. Specifically, 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 board of education 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.

Third, action taken by a public body must be memorialized in minutes, and §106 of the Open Meetings Law provides that:

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must include reference to action taken by a public body.

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.

In sum, I believe that the authorization given to Mr. McCarthy could only have been made at a meeting of the Board, and that reference to any such action must appear in minutes of the meeting.

Moreover, even if the matter could properly have been considered during an executive session, reference to any such discussion should have been made in a motion to enter into executive session, and any appropriation could properly have been made only during an open meeting. Section 105(1) of the Open Meetings Law states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Another issue involves your reference that the "Provost property" was discussed in executive session, and attached to your letter is a copy of an agreement between the Rensselaer Polytechnic Institute and the District signed in May of 1990 involving a proposed exchange of property by those entities. Since the agreement has "been the subject of numerous media reports and the contract is readily available under the FOIL," it is your view that the matter could not have been validly discussed in an executive session.

In my opinion, the only ground for entry into executive session apparently relevant to the matter would have been §105(1)(h). That provision permits a public body to enter into 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."

Based on the foregoing, not all discussions relating to real property transactions may be considered in executive session; rather, §105(1)(h) permits executive sessions to be held "only when publicity would substantially affect the value" of the property. Since the sites of the properties had been known to the public, it is difficult to envision how publicity might have affected its value or, therefore, how an executive session might have been justified under §105(1)(h).

Lastly, having sought copies of reports "completed by a Mr. Webb and submitted to anyone in the school district", you were denied access on the basis of "attorney/client privilege." As indicated earlier, Mr. Webb appears to be an attorney who was retained to provide opinions and advice. Assuming that he was retained to provide legal advice, a denial of access to the records in question may have been proper.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

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 it has been stressed judicially 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7760

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 15, 1993

Mr. Hugh Burnett
87-C-0107
Wallkill Correctional Facility
P.O. Box G
Wallkill, NY 12589

Dear Mr. Burnett:

I have received your letter of June 12 in which you requested various 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 or acquire records on behalf of individuals seeking records. In short, I cannot provide the records that you have requested because this office does not possess them. However, in an effort to provide guidance, I offer the following comments.

First, requests should be made to the agency or agencies that you believe maintain the records in which you are interested.

Second, every agency must, according to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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 that person.

Third, §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 you seek.

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-1761

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 18, 1993

Mr. Arsenio Diaz
90-A-6973
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011

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

Dear Mr. Diaz:

I have received your letter of May 28 and the materials attached to it. In brief, you wrote that a request for records was made on May 6 to the Correctional Institute for Men, but that, as of the date of your letter to this office, you had received no response. Consequently, you have sought assistance in the matter.

In this regard, I offer the following comments.

First, pursuant to the Freedom of Information Law [§87(1)] and the regulations promulgated by Committee on Open Government (21NYCRR Part 1401), an agency must designate one or more "records access officers." The records access officer has the duty of coordinating the agency's response to requests, and a request should ordinarily be directed to that person. Since the facility to which your request was made is part of the New York City Department of Correction, it is suggested that you resubmit your request to the Department's records access officer, Ms. Ruby Ryles, Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

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)].

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-7762

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 21, 1993

Mr. Leslie J. Kyser
86-C-0109
354 Hunter Street
Ossining, NY 110562-5442

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. Kyser:

I have received your letter of May 31, which reached this office on June 7.

You have sought an advisory opinion concerning the reduction of fees for copies of records on the basis of indigency. Attached to your letter is correspondence from the Office of the Erie County Clerk in which it was stated that the fees charged by that office "are not negotiable."

In this regard, 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)]. Further, I believe that a county clerk is required to charge fees based on provisions of the Civil Practice Law and Rules (see §8020).

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 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 7763

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 18, 1993

Mr. Paul Lewis, Chairman
Community Board No. 3
34-33 Junction Blvd.
Jackson Heights, N.Y. 11373

<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. Lewis:

I have received your letter of June 2, as well as related materials. You have sought an advisory opinion concerning a denial of your request for a copy of a proposed lease between New York City and the United States Tennis Association (USTA) by the New York City Department of Parks & Recreation.

According to the Department's Chief of Planning, the proposed action involves a disposition of City owned land by lease "for the limited purposes of operating a public recreational facility and conducting events, primarily the U.S. Open tournament." He indicated that the project has been discussed "publicly for almost two years" and that "public review and participation on the project has been, and continues to be, indispensable in shaping this proposal to benefit the park, the surrounding Queens communities, and the City." In addition, General Counsel to the Department wrote that you have been furnished with "a 22-page package of materials, including a [sic] summaries of the proposed lease terms and the anticipated economic effects of the project, as well as a full presentation about the USTA expansion plan by knowledgeable City and USTA representatives."

Both you and Department attorneys are familiar with and have cited and relied upon judicial decisions and opinions rendered by this office, all of which focus on §87(2)(c) of the Freedom of Information Law. That provision, as you are aware, permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards..."

General Counsel to the Department appears to rely heavily on an advisory opinion prepared in 1988 in which it was advised that a draft lease, according to the facts of that controversy, could be withheld. However, as she pointed out, the draft leases in that situation "were but one part of a larger project involving possible negotiations with other developers concerning other sites within the geographic boundaries of the larger project and disclosure would give such developers an advantage by allowing them to become familiar, not only with the terms of the proposed leases, but also the negotiating strategy implemented by UDC." This situation, as I understand the facts, is different from that described in the 1988 opinion. In that earlier case, the agency was or would potentially have been involved with a variety of contracting parties. As such, disclosure of one among many elements of the project would have impaired the agency's ability to engage in optimal agreements with others. In this case, while the process may be lengthy and complex, as I understand the facts, the City is negotiating only with USTA, and disclosure of the record in question would not provide any advantage to other developers or contracting parties, because there are none.

Counsel also wrote that:

> "Although agreement has been reached on some terms, many others remain subject to revision and negotiation between City representatives and USTA. Public disclosure of this document at this point, would compromise the City's ability to arrive at an integrated resolution, in the City's best interest, of those issues which have yet to be solved. In addition, disclosure of the draft lease would expose the City's negotiation strategy to other organizations, cities and municipal governments that have expressed interest in luring the USTA from the City and could very well lead such entities to develop competing facilities and events or bid against the City to persuade the USTA to locate the U.S. Open elsewhere. Any of these developments would clearly impair the negotiations of the lease agreement in the sense contemplated by Section 87(2)(c)."

Nevertheless, you informed me that the USTA has not negotiated with any other municipality or organization concerning the subject at issue and that it is not seeking or accepting "bids" from other sources. If your information is accurate, using the language of §87(2)(c), there is no "present or imminent" competition regarding the citing of a USTA facility. If that is so, claims that

disclosure would jeopardize the City's position vis-a-vis other municipalities would appear to be without merit.

As indicated earlier, a variety of materials concerning the project, including summaries of the proposed leased terms, have been disclosed. I am unaware of how much information has been publicly disclosed in relation to the records that have been withheld. However, to the extent that information has been made available, equivalent information contained within the records sought should in my opinion be made available, for the prior disclosure would negate any "impairment" envisioned by §87(2)(c).

Further, the introductory language of §87(2) of the Freedom of Information Law 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, even within a single record, some portions may be available under the Law while others may be deniable. 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 and to disclose the remainder.

From my perspective, if the City is involved in negotiations with the USTA which are not interwoven with other contract negotiations, and if there is little or no likelihood of "competition" from other municipalities, it would be difficult to justify a denial of access to the records in question. Moreover, due to the disclosures already made, a blanket denial would in my view be inappropriate. At the very least, it would appear that those portions of the records sought reflective of information that has been disclosed in substance must be made available.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Marjorie A. Cadogan, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1764

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 21, 1993

Hon. Gary L. Rhodes
Supervisor
Town of Henderson
RR 1, Box 668
Henderson, NY 13650

The staff of the Committee on 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 Rhodes:

I have received your letter of June 2, as well as the correspondence attached to it.

Your inquiry concerns the status of the Town of Henderson's assessors' files, which are "kept at the town office in filing cabinets used by the assessors." You wrote that, presently, "no one have [sic] access to these files except through the assessors, not even [y]our town clerk who is [y]our assigned RMO and RAO." It is your view that "these records are public info and that...[y]our RMO and RAO should be the person in charge of these records."

In this regard, I offer the following comments.

First, under §30(1) of the Town Law, which concerns the "powers and duties" of the town clerk, the clerk "[s]hall have custody of all the records, books and papers of the town." Therefore, even though the town clerk may not have physical custody or possession of town records, that person in my view has legal custody of town records.

Second, with regard to procedures relating to the disclosure of records, §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 Town 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, §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 is required 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. Therefore, if the town clerk is designated as records access officer, that person has been given the responsibility to deal with requests for records by responding directly or by "coordinating" town officials' responses to requests.

Third, with respect to 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 section 87(2)(a) through (i) of the Law. While most records maintained or used by assessors would in my opinion be available to the public, some of those records could be withheld. For instance, the correspondence refers to "EA 5217" forms, which are confidential, "except for purposes of administrative or judicial review of assessments" [Real Property Tax Law, §574(5)], and personal financial information submitted in conjunction with requests for senior citizens exemptions that could be withheld as an

"unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. While those kinds of records may be withheld in appropriate circumstances, I believe that the duty of responding to requests for records lies with the records access officer. Again, the records access officer should in my view either respond to requests directly or ensure that agency officials respond properly and in accordance with law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thelma Schneider, Chair of Assessors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7765

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 21, 1993

Mr. Harold G. Otley
[redacted]

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

Dear Mr. Otley:

I have received your letter of June 2.

You indicated that, having been denied access to records by the Town of Ticonderoga records access officer:

> "In what [you] thought was proper procedures [you] wrote a letter on February 23, 1993 to all members of the town board (by name), the town clerk, the records access officer, and the town attorney in compliance with the provisions of Public Officers Law, Article 6, Section 89.4(a) appealing the denials."

As of the date of your letter, you had received "no responses from any town official."

You have asked what you can do concerning the matter and whether I have written any advisory opinions this year to the Town of Ticonderoga. 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 body of a public corporation, the Town 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.

Section 1401.2 of the regulations requires the designation of at least one "records access officer," and §1401.7, which pertains to denials of access and the right to appeal, states in relevant part that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

Based upon the foregoing, the Town Board is required to determine appeals or to designate a person or body to do so on its behalf.

Second, the provision pertaining to 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, who shall within ten business days of the receipt of such appeal 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."

It is noted 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)].

Lastly, no advisory opinions have been prepared during this calendar year until today specifically concerning the Town of Ticonderoga.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1766

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 21, 1993

Catherine Mayers, Esq.
Mayers & McElroen
12 Scott Circle
Purchase, NY 10577

Dear Ms. Mayers:

As required by §89(4)(a) of the Freedom of Information Law, the New York City Police Department has forwarded to this office a copy of a determination of your appeal under that statute dated May 23.

In brief, the Department determined, based upon a judicial decision, that DD-5's, also known as complaint follow-up reports, "are not disclosable" under the Freedom of Information Law, for they consist of "intra-agency materials which do not contain final agency policy or determinations, and therefore are exempt from disclosure." From my perspective, it appears that the Department has contended that complaint follow-up reports, generically, and irrespective of their specific contents, are deniable under the Freedom of Information Law. If that is so, I respectfully disagree. In this regard, I offer the following comments.

The case upon which the Department relied, Scott v. Slade [577 NYS 2d 861, Ad 2d (1992)], affirmed a decision upholding a denial of a request for a DD-5. While that decision might have been correct in that instance, another decision rendered by the same court, the Appellate Division, First Department, reached a different conclusion following an in camera inspection. In Mitchell v. Slade, it was found that:

> "[t]he Motion Court, after reviewing the documents in camera, declined to dismiss the petition and held that respondent had failed to meet its burden of proving exemption for the redacted DD-5 follow up report. The Motion Court held that the exceptions contained in Public Officers Law §87(2) did not apply in this factual context, citing *Cornell Univ. v. City of N.Y. Police Dept.* (153 Ad 2d 515), and ordered production of the DD-5 with appropriate redaction. On this

> record, after a careful review of the documents produced to the Motion Court, we are satisfied that the materials are not exempt under the law enforcement exemption (Public Officers Law §87[2][e] or the intra-agency (Public Officers Law §87[2][g])" [173 Ad 2d 226, 227 (1991)].

In my opinion, based upon Mitchell, it would be inappropriate to engage in denials of access to DD-5's in every instance in which they are requested. Rather, as suggested in that decision, the "factual context", the specific contents of the records, and the effects of their disclosure are the factors that must be considered in determining the extent to which those records may be withheld or, conversely, must be disclosed.

As you may be aware, §87(2)(e) 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."

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).

The other basis for denial, which was referenced in the determination, §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.

Again, I believe that the contents of the records and the effects of disclosure determine rights of access, and that a policy of denying requests for DD-5's in every instance is inconsistent with the requirements of the Freedom of Information 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: Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7767

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 22, 1993

Mr. Daniel Jenkins
[redacted]

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

Dear Mr. Jenkins:

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

According to the materials, you requested from the Town of LeRay "copies of recent correspondence between the Development Authority of the North Country and the Town concerning the possible supply of water to Town Water district #2." The request was denied initially and later, following an appeal, "because the disclosure would adversely effect contract negotiations covering those water rates." The response to your appeal also states "that certain communications that you have requested are actually communications between the Town and an authorized agent that has been engaged by the Town to negotiate water matters with the Development Authority of the North County, the City of Watertown, and others, and thus also exempt" under §87(2)(g) of the Freedom of Information Law.

I note that you contended that "the Town improperly personalized its denial by referring to a specific well that [you] developed." Having reviewed the correspondence, I see no reference to a well or any matter other than supplying water to the Town. Nevertheless, I offer the following comments.

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

Section 87(2)(c) states that an agency may withhold records to the extent that disclosure would "impair present or imminent contracts awards or collective bargaining negotiations." The proper assertion of that provision in my view is contingent upon

attendant facts and the effects of disclosure. Although you suggested in the correspondence that the records sought are "merely informational in nature" and that the communications do not apparently relation to any "present or imminent" contract, the Town Supervisor indicated that disclosure "would impair present contract negotiations between the Town and potential water suppliers..." On the basis of §87(2)(c), insofar as disclosure would impair the Town's capacity to engage in an optimal contractual arrangement on behalf of its residents or place the Town at a disadvantage in the negotiations process, I believe that the records could properly be withheld.

The other ground for denial of relevance, §87(2)(g), pertains to communications between agencies (i.e., between the Town and a city or public authority) or within an agency. Specifically, 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 ground for denial could appropriately be asserted [i.e., §87(2)(c)]. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Ronald C. Taylor, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 768

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 23, 1993

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 May 24, which reached this office on June 8.

You have asked for an advisory opinion concerning a request made to the Department of Motor Vehicles for alphabetical listings of all licensed drivers and registered vehicles on magnetic tape, floppy disk or hard copy.

In this regard, access to the data in question, as well as fees, is governed by the Vehicle and Traffic Law rather than the Freedom of Information Law. While license and registration records are generally available, in the case of license records, I believe that the Department may require that requests be may be made on the basis of a licensee's name or other identifier that would enable the Department to locate particular license records. Section 202(2)(d) of the Vehicle and Traffic Law states in part that "the commissioner shall prescribe the specifications and procedure for use of electronic media and may establish a minimum and/or a maximum number of searches which may be contained on any one such electronic medium submission." Further, the fee for copies of records, other than accident reports, "shall be one dollar per page" [Vehicle and Traffic Law, §202(2)(e). As such, it does not appear that the Department must reproduce an entire computerized list of licensees. Moreover, a fee for "hard copy", in view of the volume of names, would be millions of dollars.

With respect to a registration list, §202(4) of the Vehicle and Traffic Law states that the Commissioner has discretionary authority to furnish registration information concerning all registrations, by contract, to "the highest responsible bidder." As such, the Department is required to furnish the registration

As such, the Department is required to furnish the registration list in question only to the highest bidder, and such list, therefore, is not available, on request, to the public generally.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Patricia Adduci, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1769

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 23, 1993

Mr. Alfred Nordè
88-T-1317
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. Nordè:

I have received your letter of June 3 in which you sought assistance in relation to a request made under the Freedom of Information Law to the New York City Police Department.

Specifically, having requested "The starting date of employment and date of employment termination" of a particular police officer, the Department's Records Access Officer wrote that "the Freedom of Information Law allows access to documents, not answers to interrogatories." The other items that you requested were described as:

> "3. True and accurate copies of the contents of articles under NYPD property clerk's invoice voucher # C987154 (emphasis yours);
>
> 4. True and accurate copies of each page of the article 'address book' under NYPD property clerk's invoice voucher # C987155."

In response to those aspects of your request, the Records Access Officer wrote that "Items number 3 and 4 are not accessible under F.O.I.L. as they are not documents maintained by this Department."

In this regard, for purposes of clarification, it is emphasized that the Freedom of Information Law may be asserted to seek 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 agency officials may provide information in response to a question, the Freedom of Information Law does not require that they do so.

With respect to the first item sought, it is suggested that you rephrase the request and seek records indicating the officer's starting date of employment and the date of his termination from employment.

Item three involves "copies of the contents of articles" referenced in a property clerk's invoice voucher. Those articles would not likely constitute "records" as defined in §86(4) of the Freedom of Information Law, but rather physical items or evidence. If those items do not constitute "records", the Freedom of Information Law would not be applicable [see Allen v. Strojnowksi, 129 AD 2d 700 (1989)]. If you are interested in obtaining a copy of a property clerk's invoice voucher, a request should so state. Similarly, if the address book referenced in item four represents physical evidence rather than a record, the Freedom of Information Law in my view would not likely be applicable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. William J. Matusiak, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7770

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 23, 1993

Mr. Ernie 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 May 21, which, for reasons unknown, did not reach this office until June 9.

You wrote that you are attempting to assist your brother, who was convicted of a crime, by obtaining information relating to a homicide for which he was apparently convicted. Specifically, you requested from the Erie County District attorney a statement or statements made by a named individual to Assistant District Attorney Ernest Anstey and "through Defense Counsel" to Mr. Anstey. Attached to your letter is a copy of a police report indicating that Mr. Anstey informed a police detective that the person who you believe made the statements "has information on the homicide" and "wanted to give up a witness on said homicide, but from what Ansty knew at that time, possibly a participant but to what degree he didn't know." Despite the reference in the police report, your request was "denied with the inference that the materials [you] request do not exist."

You have sought assistance in the matter. 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 need not create a record in response to a request. Therefore, notwithstanding reference to a conversation, if no record or written account of a statement was prepared, the Freedom of Information Law would be inapplicable. It is noted that if you are informed that no such record exists, you may seek a written certification to that effect. In that circumstance, §89(3) also 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."

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. Assuming that the records in question exist, they would be accessible or deniable, in whole on in part, depending upon their contents and the effects of disclosure. Since I am unfamiliar with the contents of any such records that might exist, I can not provide specific guidance concerning rights of access. However, the following provisions would likely be relevant.

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 in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank J. Clark, III

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7771

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 24, 1993

Hon. Donna L. Conlin
Town Clerk
Town of Schodack
1777 Columbia Turnpike
Castleton, NY 12033

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

Dear Ms. Conlin:

I have received your letter of June 10 in which you requested an advisory opinion concerning access to "citizens complaints regarding zoning and building issues." It is your view that you cannot release the complainants' identities based upon either §87(2)(b) or (e)(iii) of the Freedom of Information Law.

In this regard, I offer the following comments.

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

When a complaint is made to an agency, as you suggested, §87(2)(b) of the Freedom of Information Law is often relevant. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

With respect to such complaints, it has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

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

In my view, what is relevant to the work of the 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, and in such circumstances, I believe that identifying details may be deleted.

Second, although §87(2)(b) may be applicable, it is unlikely in my view that §87(2)(e)(iii) could be asserted to withhold complainants' identities. That provision permits an agency to withhold records that:

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

It is unlikely that a complaint would relate to a criminal investigation. I point out, too, that it had been claimed under the Freedom of Information Law as originally enacted 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 Law, which at the time was not as expansive in terms of rights of access as the current statute, it was held that the files of a building code enforcement agency did not fall within the exception concerning law enforcement records [see Young v. Town of Huntington, 388 NYS 2d 978 (1976)].

Lastly, since you expressed the view that you "cannot release the complainant's identity", it is noted that the Freedom of Information Law is permissive. While an agency may withhold records in appropriate circumstances, it is not required to do so. As stated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying

details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, while I believe that identifying details pertaining to complainants may ordinarily be withheld, an agency is not prohibited from disclosing the records in question in their entirety.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7772

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 24, 1993

Mr. David Dumas
[redacted]

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

Dear Mr. Dumas:

I have received your letter of June 8 and the correspondence attached to it.

You have sought assistance concerning a request made to the Town of Kingsbury for records indicating "the names and dates of employment of all temporary and provisional employees of the Town." In response to the request, you were informed that the Town Attorney advised that the records in question "are exempted under the Freedom of Information Law.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is noted that there is nothing in the statute that deals specifically with personnel records or personnel files, and 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, §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 pertaining to public employees 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)]. 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. Further, records indicating employees' status as temporary or provisional would in my opinion be available. There is nothing intimate or personal about those kinds of classifications, and they are relevant to the work of an agency.

Third, with respect to dates of employment, it has been held that records reflective of days and dates of sick leave claimed by particular public employees are available [Capital Newspapers v. Burns, 109 AD 2d 92, aff'd 67 NY 2d 652 (1986)]. 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 upon the Capital Newspapers decision and the preceding analysis, it is clear in my view that records of a public employee's attendance, and, therefore, the dates of one's public employment, are accessible under the Freedom of Information Law.

Lastly, you requested copies of correspondence between this office and the Town of Kingsbury regarding the issue. To the best of my knowledge, there is none. However, 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: Holly E. Mabb, Town Clerk
Richard E. McLenithan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1773

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 29, 1993

Dr. George Silberman
[redacted]

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

Dear Dr. Silberman:

I have received your letter of May 28, which reached this office on June 10.

According to the correspondence attached to your letter, you wrote to the New York City Human Resources Administration in relation to action taken concerning the use of a list for hiring purposes, and by means of a request made under the Freedom of Information Law, you raised the following questions:

> "...under what law or authority this action was taken. What law or statute empowers the HRA Commissioner to stop a list because she does not like the race or gender of the candidates. What is the definition of 'senior ranks' and what law requires that the race and gender of candidates on a competitive civil service list be identical to the race and gender of 'senior ranks'."

Similarly, you asked whether a particular statement was "a true statement" and how the agency determines "the race and gender of staff."

You have sought my opinion as to whether the information sought is public.

In this regard, I do not believe that your request for information is the kind of request envisioned by or appropriately made under the Freedom of Information Law. I point out that 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. Similarly, 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 Agency does not maintain records indicating how it determines race or gender, I do not believe that staff would be required by the Freedom of Information Law to prepare new records on behalf of an applicant.

In the future, rather than seeking information via attempts to elicit answers to questions, it is suggested that you request existing records.

When an agency does maintain requested 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. Further, agencies' policies and similar records would in my view be available under §87(2)(g)(iii) of the Law.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7774

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 29, 1993

Mr. Jeff Selingo, Editorial Page Editor
The Ithacan - Ithaca College
Park School of Communications
953 Danby Road
Ithaca, N.Y. 14850-7258

The staff of the Committee 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. Selingo:

I have received your letter of June 2, which reached this office on June 10.

You have sought a clarification of an opinion rendered on January 7 of this year in which it was advised that Ithaca College is not subject to the Freedom of Information Law. Although you expressed general agreement with the opinion, you asked whether the same conclusion may be reached "when some sub-entity or contracted body of Ithaca College assumes control over some activity traditionally within the domain of a public body, such as the Ithaca College Office of Public Safety..." You wrote that "Ithaca College Safety Officers are deputized by the Tompkins County Sheriff's Office, have the authority to carry guns, power to arrest both on and office campus, and exclusive jurisdiction over the Ithaca College Campus." Further, it is your view that "the case of Westchester Rockland Newspapers, Inc. v. Kimball (1980) is very similar to the situation at Ithaca College", for it was found, in your view, "that a private body that performed a public function" was subject to the Freedom of Information Law.

In this regard, I have spoken with representatives of the Tompkins County Sheriff's Department, Ithaca College and the Division of Criminal Justice Services in order to acquire

additional information on the matter. It is true that the College safety officers are deputized by the County Sheriff. In addition, the officers receive municipal police training, and the Office of Campus Safety sends statistical crime reports to the Division of Criminal Justice Services. However, I have been informed that municipal police training is available to individuals in both government and private sector employment, and I do not believe that the College safety officers could be characterized as "peace officers" as that term is defined in §2.10 of the Criminal Procedure. Further based upon information provided to me, it appears that there is a "memorandum of understanding" that pertains to the relationship between the Office of Campus Safety and the County Sheriff's Office. Although campus safety officers may assist the Sheriff's Department, the Department maintains virtually no control over the Office of Campus Safety or its safety officers.

From my perspective, there are distinctions between the situation in Westchester Rockland Newspapers [50 NY 2d 575 (1980)], and that at issue here. Volunteer fire companies, although usually created as not-for-profit entities, would not exist but for their contractual relationships with local governments. Ithaca College, on the other hand, exists wholly independently of government. In a later decision, the court focused on the degree of control that a municipality maintains over a volunteer fire company and in its analysis of the issue found that:

> "Section 1402 of the Not-For-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having, by law, control over the prevention or extinguished of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (§1402). The plaintiff's contention that their relationship with the Town of Colonie is s o l e l y contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function...

> "This Court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service." (S.W. Pitts Hose Company v. Capital Newspapers, Supreme Court, Albany County, January 25, 1988).

Based upon the foregoing, a volunteer fire company, by law, performs its duties for a municipality and is essentially an extension of government. Neither Ithaca College nor its Office of Campus Safety, as I understand its functions and relationship with Tompkins County, would have any statutory connections with the County in terms of law enforcement activities. Moreover, the County apparently does not exercise control over the Office of Campus Safety. As such, the facts present in the decision relating to volunteer fire companies are in my view distinguishable from those present here.

Lastly, it is reiterated that the Freedom of Information Law pertains to agency records and that §86(3) of the Law defines "agency" to mean:

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

The Office of Public Safety in my opinion is not a state or municipal or other governmental entity. If that is so, the Freedom of Information Law in my opinion would not be applicable as a vehicle for seeking its records.

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 1775

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 29, 1993

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.

Dear Ms. Maxam:

I have received your letter of June 14 in which you sought advice concerning the Freedom of Information Law.

The initial issue involves delays in responding to requests for records of the Warren County Sheriff's Department. 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)].

A second issue involves fees, particularly pertaining to the inspection of records and concerning accident reports maintained by the State Police.

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 for accident reports in excess of twenty-five cents per photocopy that was invalidated.

In the context of the issues raised in your letter, assuming that records are available, no fee can be charged for inspection. With regard to accidents reports, municipal law enforcement agencies may in my view charge no more than twenty-five cents per photocopy. However, there are situations in which statutes authorize certain state agencies to charge different fees. I believe that the State Police may, pursuant to statute, charge fifteen dollars for copies of accident reports. Similarly, pursuant to the Vehicle and Traffic Law, the Department of Motor Vehicles may charge fees different from those ordinarily permitted under the Freedom of Information Law.

Lastly, you wrote that "the state police have required that in order to get the information requested, [you] have to provide the location, date, driver's name, and his date of birth, items [you] certainly wouldn't know." Here 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 information to enable agency staff to locate the records. If, for example, providing the date and location enables agency personnel to locate an accident report, a request including that information should suffice.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Lawrence Cleveland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7776

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 1, 1993

Mr. Wayne Conine
89-D-0023
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

Dear Mr. Conine:

I have received your letter of June 28. You referred to "negativity" at your facility by referring to "a high protein high calorie diet", and you requested a "manual" from this office concerning your diet.

In this regard, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information Law. The Committee does not maintain records generally, and we do not possess any manual relating to the subject of your inquiry. 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 sought. Further, I point out that the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law state that a request for records kept at a correctional facility may be made to the facility superintendent or his designee. A request for records kept at the Department's central offices in Albany may be made to the Deputy Commissioner for Administration.

Second, the Freedom of Information Law pertains to existing records. I am unaware of whether the kind of manual in which you are interested has been prepared. If there is no manual, the Freedom of Information Law would not apply.

Third, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. If the Department maintains the kind of manual that you are seeking, it is likely in my view that it would be available [see Freedom of Information Law, §87(2)(g)(iii)].

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-1777

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 2, 1993

Mr. Christopher DeSivo
#91-B-2425
Greene Correctional Facility
Box 975
Coxsackie, N.Y. 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. DeSivo:

I have received your letter of June 13 and the materials attached to it.

You have sought an advisory opinion concerning a partial denial of access by the Division of State Police pertaining to the investigation of your criminal case. The denial states in part that:

> "The records you seek were compiled for law enforcement purposes and, if disclosed, would interfere with law enforcement investigations, and reveal criminal investigative techniques and procedures. These records are also designated exempt from disclosure as intra-agency and inter-agency materials."

In this regard, 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, the following paragraphs will review the provisions upon which the denial is based.

First, §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.

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

It would appear that the investigation has ended and that disclosure would not at this juncture interfere with any investigation. If that is so, §87(2)(e)(i) would not appear to serve as a valid basis for denial.

Also relevant is §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.

I point out, too, that in recent decision, it was held that:

> "Petitioner is not entitled to disclosure of portions of the file relating to laboratory examinations of certain items of evidence seized from both the crime scene and elsewhere because scientific evidence, excluding ballistics and fingerprints tests...may properly be exempted from disclosure..." [Spencer v. New York State Police, 591 NYS 2d 207, 210; ___Ad 2d___(1992)].

As such, although records reflective of some criminal investigative techniques and procedures were found to be exempt from disclosure, ballistics and fingerprint test were found in Spencer to be available.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Francis A. DeFrancesco, Chief Inspector
Lt. Col. Raymond G. Dutcher, Assistant Deputy Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1778

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 2, 1993

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 June 15. You have sought my opinion concerning two issues involving requests for records of the Town of Ramapo.

With respect to the first, in response to a request, you were informed that the fee for copies would be approximately $1,000. You have inferred that the figure in question might be based in part upon the time needed to comply with the request, and you asked whether, under the Freedom Information Law, you may be charged for "time".

In this regard, 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 staff 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)].

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 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, if the proposed charge is based upon a fee of twenty-five cents per photocopy, it would be valid; otherwise, I do not believe that it would be. I note, too, that it has been held that in the case of voluminous requests, an agency may require payment in advance (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

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)].

The second issue involves a response to a request in which it was indicated that "[y]our request is currently being reviewed and we will inform you of our determination within fifteen days." You asked whether you are "being given the run around." 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Alan M. Simon, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2239
FOIL-AO-7779

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July 2, 1993

Mr. John P. Schamel
NEA/New York Field Representative
Elmira Service Center
Mark Twain Building 200
North Main and West Gray
Elmira, NY 14901

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

Dear Mr. Schamel:

I have received your letter of June 15 in which you requested an advisory opinion pertaining to the Open Meetings Law.

The issue relates to an improper practice hearing before the Public Employment Relations Board. You wrote that:

> "In cross-examining the superintendent of schools [you were] attempting to obtain information concerning the union which he had shared with the board of education in executive session. The district's representative objected to the testimony of the superintendent concerning what was or was not said in executive session stating that executive session had a certain confidentiality to it and that the superintendent could not be made to testify as to the remarks he made or board members made in executive session. The administrative law judge sustained the district's position and would not allow the superintendent to state what he had said to the board members in executive session."

It is your view that an "executive session is not protected by confidentiality", and you asked "whether or not information in general that is revealed in executive session and specifically the example [you] have set forth above has some type of protection from

being revealed in testimony before an administrative agency or before an arbitrator."

In this regard, I offer the following comments.

First, as you suggested, the Open Meetings Law is permissive. While that statute 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 can be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

Second, while information might have been obtained during an executive session properly held or from records characterized as "confidential", the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as a 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, absent the consent of the parents of a student, because a statute requires confidentiality. However, no statute of which I am aware would generally confer or require confidentiality with respect to the matters discussed during executive sessions.

In a situation similar to that described in your letter, in which the issue was "whether discussions had at an executive session of a school board are privileged and exempt from disclosure", 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 participant 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 short, unless a statute specifically prohibits disclosure of certain information or records, I do not believe that statements made during an executive session or information derived from an executive session could be characterized as "confidential" or that there would be a valid basis for sustaining a claim of confidentiality in the kind of hearing that you described.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Crotty, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 2, 1993

Mr. Jose Robles
89-T-1728
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Robles:

I have received your letter of June 14 in which you sought assistance in obtaining records from the New York City Medical Examiner and a district attorney concerning a case in which you were convicted. You added that you "can understand how and why these documents can be denied to the public, but to [your] conviction they should be open for [your] inspection and this should be done in good faith and in the interest of justice."

In this regard, I offer the following comments.

First, the Freedom of Information Law is a vehicle that confers rights of access upon the public generally. The disclosure provisions of the Civil Practice Law and Rules (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)].

Second, with respect to records of the medical examiner, such as autopsy reports, they are characterized as confidential under §557(g) of the New York City Charter. Here I point out that the initial 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". It has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of an administrative code or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute, in my opinion, would be an enactment of the State Legislature or Congress.

I believe that some provisions of the New York City Charter and Administrative Code are enactments of the State Legislature. If §557(g) of the New York City Charter was enacted by the State Legislature, I believe that it would constitute a statute that would exempt certain records of the Medical Examiner from disclosure in conjunction with §87(2)(a) of the Freedom of Information Law. If it was not enacted in that manner, it could not be characterized as a statute that exempts records from disclosure.

Third, with respect to records of the district attorney and rights of access to government records generally, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential relevance 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.

Lastly, of potential significance is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)]. With respect to access

to certain kinds of records used in a public proceeding, the Court in Moore noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

While you may not have possession of the records sought, it is possible that some of the records at issue were disclosed to your trial counsel. As such, it is suggested that you contact that attorney to obtain the records or to ascertain whether he or she maintains the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ellen Borakove

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2240
FOIL-AO-1781

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July 2, 1993

Ms. Kathleen Smuskiewicz
[redacted]

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

Dear Ms. Smuskiewicz:

I have received your letter of June 15 in which you raised a series of issues pertaining to the Salamanca Industrial Development Agency.

Having reviewed the materials attached to your letter, it is noted that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information and Open Meetings Laws. The Committee has neither the staff nor the resources to investigate, and it has no jurisdiction concerning matters involving "no-bid contracts", ethics or conflicts of interest. Further, you referred many times to an ethics committee. I an unaware of which ethics committee may be the subject of your commentary. Nevertheless, as the materials pertain to the Freedom of Information Law and the Open Meetings Law, I offer the following remarks.

First, the provisions concerning industrial development agencies are found in Article 18-A of the General Municipal Law, and §856(2) of the General Municipal Law states in part that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation". A public benefit corporation is a "public corporation" as that term is defined by §66(1) of the General Construction Law. Further, §856(3) of the General Municipal Law states that a majority of the members of an industrial development agency "shall constitute a quorum".

Second, the Open Meetings Law is applicable to meetings of public bodies, and §106(2) of the Open Meetings Law defines the phrase "public body" to include:

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

Based upon the foregoing, it is clear in my view that the members of an industrial development agency constitute a "public body" subject to the Open Meetings Law, for they perform a governmental function for a public corporation. Moreover, §890-e of the General Municipal Law established the City of Salamanca Industrial Development Agency and states that the agency is "a body corporate and politic", that its members "shall be appointed by the governing body of the City of Salamanca", and that it is governed by the provisions of Article 18-A of the General Municipal Law. Similarly, because it is a public corporation, the entity in question is an "agency" as that term is defined by the Freedom of Information Law [see Freedom of Information Law, §86(3)].

Third, 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, when a majority of the Agency gathers to discuss public business, in their capacities as Agency members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Moreover, §104 of the Open Meetings Law pertains to notice and requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place 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.

Also potentially relevant in my view may be §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. Specifically, 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 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.

Further, action taken by a public body must be memorialized in minutes, and §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not

> include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes of meetings must include reference to action taken by a public body.

It is noted 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 and made available to the extent required by the Freedom of Information Law 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.

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 to which you alluded, if the Agency reached a "consensus" reflective of its final determination

of an issue, I believe that minutes must be prepared that indicate the action taken and the manner in which each member voted.

Fourth, with respect to voting or taking action by phone, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone. However, a series of communications between individual members or telephone calls among the members which results in a decision or a meeting held by means of a telephone conference, would in my opinion be inconsistent with law.

As indicated earlier, the definition of "public body" [see Open Meetings Law, §102(2)] refers to entities that are required to conduct public business by means of a quorum as described in §41 of the General Construction Law, and it is my view that a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. As such, I believe that a public body has the capacity to carry out its duties only during duly convened meetings.

Moreover, §102(2) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business." In my opinion, the term "convening" means a physical coming together. Further, based upon an ordinary dictionary definition of "convene", that term means:

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

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

Additionally, I direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

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

In short, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they could validly conduct meetings by means of telephone conferences or make collective determinations by means of a series

of "one on one" conversations or by means of telephonic communications.

Fifth, the ability of a public body to engage in executive session is limited. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify the subjects that may properly be considered during an executive session. In the context of the materials that you forwarded, it appears that two of the grounds for entry into executive session might have been relevant. 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..."

Therefore, insofar as an industrial development agency considers the financial or credit history of a particular person or corporation, for example, I believe that §105(1)(f) could properly be asserted. The other provision of potential significance, §105(1)(h), permits a public body to enter into an executive session to discuss:

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

Based upon the language quoted above, not all real estate transactions may be considered in private; only to the extent that publicity would "substantially affect" the value of the property could §105(1)(h) be asserted. Further, in view of the general intent and goals of the Open Meetings Law, I believe that §105(1)(h) would apply only when a public body seeks to engage in the acquisition, sale or lease of real property.

Lastly, since you referred to the relationship between the Freedom of Information Law and the Open Meetings Law, it is emphasized that the grounds for entry into executive session appearing in §105(1) of the Open Meetings Law are not necessarily consistent with the grounds for denial of access to records appearing in §87(2) of the Freedom of Information Law. In some instances, although the discussion of a particular topic might justifiably be conducted during an executive session, records related to that topic would not necessarily fall within any ground for denial in the Freedom of Information Law, and vice versa. For instance, when the Agency considers the credit history of a particular firm, an executive session could be held under §105(1)(f). However, there may be various records accessible to

the public dealing with the same or related subject matter, i.e., corporate annual reports, Dun & Bradstreet records, and filings under the Uniform Commercial Code.

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

Of potential significance to the duties of industrial development agencies is §87(2)(d) which authorizes an agency to withhold records that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Further, if financial records pertain to an individual, for example, as opposed to a corporation or similar business entity, it is possible that disclosure would constitute "an unwarranted invasion of personal privacy" under §87(2)(b) of the Freedom of Information Law.

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, a copy of this opinion will be forwarded to the City of Salamanca Industrial Development Agency.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: City of Salamanca Industrial Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7782

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 6, 1993

Mr. Vincent D. Hill
[redacted]

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

Dear Mr. Hill:

As you may be aware, your letter of June 7 addressed to Richard Redlo of the Department of Law has been forwarded to the Committee on Open Government and reached this office on June 23. The Committee is authorized to provide advice concerning the New York Freedom of Information Law.

As I understand your correspondence, you are attempting to obtain records concerning yourself from entities that were involved in providing foster care services. Those entities appear to have been private in some instances and perhaps agencies of government in others.

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 or other governmental 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 only to records of governmental entities.

Second, rights of access to the records in question appear to be governed not by the Freedom of Information Law, but rather by

other statutes. With regard to records maintained by a children's or youth facility, whether public or private, it appears that the applicable statute is §372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of §372 states in relevant part that such records:

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

Based on the foregoing, I do not believe that records maintained by entities having duties relating to the classes of children described at the beginning of §372 of the Social Services Law can be disclosed, unless authorization to disclose is conferred by a court, by the Department of Social Services or, where appropriate, by the Division for Youth.

Under the circumstances, it is suggested that you write to the Department of Social Services, explain your situation, and seek authorization to disclose as described in §372 of the Social Services Law. The address for that agency is:

> Department of Social Services
> Division of Family and Children's Services
> 40 North Pearl Street
> Albany, NY 12243

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-7783

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 6, 1993

Mr. Robert Dutko
86-B-2357
Ossining 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. Dutko:

I have received your letter of June 20. According to your letter, you wrote to the Deputy Commissioner for Administrative Services at the Department of Correctional Services and asked for copies of all of your "master index records", but you have received no reply. Similarly, you received no replies to your requests for medical records and those maintained by the Inspector General.

You have asked for assistance in these matters. In this regard, I offer the following comments.

First, it is noted that, pursuant to the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law, requests for records kept at a correctional facility may be made to the facility superintendent or his designee. A request for records kept at the Department's central offices in Albany may be made to the Deputy Commissioner for Administration, and a request for medical records may be directed to the Assistant Commissioner of Health Services, NYS Department of Correctional Services, Building 2, State Campus, Albany, NY 12226.

Second, 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 or "master index" 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, you might want to seek records pertaining to you in a request that includes sufficient detail to enable Department staff to locate and identify the records in which you are interested.

Lastly, 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7784

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 6, 1993

Ms. Wreathea E. O'Hara
[redacted]

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

Dear Ms. O'Hara:

I have received your letter of June 22. As in the case of prior correspondence, your inquiry relates to requests for records of the Town of Mentz.

Having been involved in a controversy relating to two sites within the Town, you have made requests for "any new papers" that may have been added to the files of your interest. You have asked whether the Town's records access officer "has the right to pick and choose what [you] receive from these files", irrespective of whether "it is something that [you] wrote or something that she cut out from the newspaper as long as it is put in these files who's [sic] choice is it." You also expressed the view that you should not "be expected to even begin to know what she might file in these files, but [you] also feel that no matter what it might be [you] should be the one to make the choice as to whether or not [you] may or may not want a copy for [your] files, not the Records Access Officer."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to agency records and that §86(4) of the Law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings,

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

In a case in which an agency claimed, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that claim. As stated by the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, 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 FOIL 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 could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

Lastly, when records are accessible under the Freedom of Information Law, §87(2) of the Law states that they are available for inspection and copying. Therefore, you would have the right to inspect or review those records at no charge and later determine to request copies of certain of those records. As you are aware, an agency may ordinarily charge up to twenty-five cents per photocopy.

As you requested, a copy of this opinion will be forwarded to the Town's records access officer.

I hope that I have been of some 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-7785

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 6, 1993

Ms. Roberta Stellato
[redacted]

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

Dear Ms. Stellato:

I have received your correspondence of June 21 in which you sought assistance concerning requests for records of the Ellenville Central School District.

The records sought involve payments made by the District to its attorneys. Although portions of the records sought indicating the fees billed by the law firm and the amount of time spent by the firm were disclosed, virtually all other information concerning the services rendered were deleted. You have questioned the propriety of the extent to which those deletions were made.

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). Similarly, there may be references to students, whose names must be kept confidential (see Family Educational Rights and Privacy Act, 20 USC, §1232g) or tenured teachers against whom charges have been brought that have not yet been determined (see Education Law, §3020-a). 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: Nancy B. Chase, Assistant to the Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7786

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 7, 1993

Mr. Edward Swain
Albany County Jail
840 Albany Shaker Road
Albany, N.Y. 12211

Dear Mr. Swain:

I have received your letter of July 1 in which you requested information from this office, including a diagram of a bullet proof vest "that will illustrate it as a whole inside and out."

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, such those that are the subject of your request. However, I offer the following comments.

First, a request for records should be directed to the "records access officer" at the agency that maintains the records sought. The records access officer has the duty of coordinating an agency's response to requests.

Second, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see Freedom of Information Law, §89(3)]. Therefore, if there is no diagram of the equipment, the agency would not be obliged to prepare such a record on your behalf.

Third, as a general matter, 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 §87(2)(a) through (i) of the Law. Of potential relevance under the circumstances is §87(2)(f). That provision enables an agency to withhold records when disclosure "would endanger the life or safety of any person."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1787

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 7, 1993

Mr. Ivan Kline
Town Attorney
Town of North Hempstead
Town Hall
Manhasset, NY 11030

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

Dear Mr. Kline:

I have received your letter of June 21, which reached this office on June 28.

You wrote that the Town of North Hempstead recently received a request under the Freedom of Information Law for a letter "sent by a partner in the Town's outside auditing firm to the Town Supervisor." You added that the letter is not an audit or part of an audit report but rather is a "status report" indicating reasons for certain delays, "what the auditors perceived to be impediments to their completing their work in a timely manner", and comments concerning "personnel in the Town Comptroller's office." It is your view that the letter is reflective of a communication between a municipality and its consultant that may be withheld under §87(2)(g) of the Freedom of Information Law.

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 §87(2)(a) through (i) of the Law.

Second, based upon the judicial interpretation of the Freedom of Information Law, assuming that the record in question may be characterized as having been prepared by the Town's consultant, I believe that it may be treated as "intra-agency" material that falls 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 records prepared by consultants retained by agencies, the Court of Appeals has 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 record 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, if it was indeed prepared by a consultant, consists of advice, recommendations or opinions, it 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 1788

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 7, 1993

Mr. James P. Lamb
[redacted]

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

Dear Mr. Lamb:

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

According to the correspondence attached to your letter, you submitted a request to the records access officer at the State University for "all records pertaining to the University at Albany President's official request...to establish the athletic fee on the Albany campus." You added that, pursuant to "Board of Trustees policy, this request shall include the submission of the results of the consultative process." It is your view that the records in question are "intra-agency communications" consisting of "statistical or factual tabulations or data," and that, therefore, they must be disclosed. However, the records access officer denied the request because the proposal "has not yet been approved by the Chancellor." You have asked "whether the University can legally withhold the information [you] have requested until **after** the Chancellor has taken action on the proposal" (emphasis yours).

From my perspective, it is likely that some aspects of the records sought may be withheld, while others must be disclosed, even though the Chancellor might not yet have acted on the proposal. In this regard, I offer the following analysis of the matter.

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 §87(2)(a) through (i) of the Law.

Second, based upon the judicial interpretation of the Freedom of Information Law, inter-agency and intra-agency communications,

as well as records prepared for an agency by a consultant, fall within the scope of §87(2)(g) of the Law. That provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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 consideration of access to consultant reports as intra-agency materials, 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, 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, inter-agency materials, intra-agency materials or records prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on their contents. In my view, insofar as the records in question consist of advice, recommendations or opinions, they could be withheld. However, to the extent that they consist of statistical or factual data, for example, I believe that they would be available, unless a different ground for denial could be asserted.

Lastly, in a decision dealing specifically with statistical and factual information found within intra-agency materials, 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 different ground for denial could properly be asserted.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Randy Symanski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO 1789

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 7, 1993

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 June 21 in which you seek an opinion concerning a situation involving the Freedom of Information Law.

You wrote that you requested records identifying the members of the Fulton County Industrial Development Agency from the County Ethics Board. Since you received no response to the request, you appealed to the Fulton County appeals officer on June 7. 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, the provisions concerning industrial development agencies are found in Article 18-A of the General Municipal Law, and §856(2) of the General Municipal Law states in part that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation". A public benefit corporation is a "public corporation" as that term is defined by §66(1) of the General Construction Law.

Second, the Freedom of Information Law is applicable to agency records, and §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."

Based upon the foregoing, it is clear in my view that an industrial development agency constitutes an "agency" subject to the Freedom of Information Law, for it is a public corporation. Moreover, §895-c of the General Municipal Law established the Fulton County Industrial Development Agency and states that the agency is "a body corporate and politic", that its members "shall be appointed by the governing body of the County of Fulton", and that it is governed by the provisions of Article 18-A of the General Municipal Law.

Second, I have no knowledge as to whether members of the Industrial Development Agency are required to file materials with the County Ethics Board or whether that Board maintains the records sought. Irrespective of whether the Ethics Board maintains the records of your interest, I believe that it should have responded to your request, even if the response might be that it does not maintain the records in question. Further, since the Fulton County Industrial Development Agency is a public corporation distinct from the County, it may have its own records access and appeals officers.

Third, in view of §895-c of the General Municipal Law, it is clear in my opinion that both the Industrial Development Agency and the governing body of the County would maintain records identifying the members of the Agency. Consequently, requests to either of those entities should result in disclosure of the information sought.

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

Robert J. Freeman
Executive Director

RJF:pb

cc: Fulton County Industrial Development Agency
Fulton County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1790

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 12, 1993

Mr. John Jacobi
71-C-0080
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. Jacobi:

I have received your letter of June 29 in which you sought assistance concerning a denial of a request by the Division of Parole for a copy of a 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

cc: William Altschuller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AD-1791

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 12, 1993

Mr. Abraham Hightower
92-A-1231
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. Hightower:

I have received your letter of June 26 concerning your efforts in obtaining records from the Nassau County Attorney, the Freeport Police Department and from the court in which your trial was conducted.

Having reviewed your commentary, I offer the following remarks.

First, 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 or other governmental 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 is applicable to records of a county attorney, a district attorney or a police department, for example. It does not apply, however, to the courts or court records. This is not to suggest that court

records may not be available, for other provisions of law (see e.g., Judiciary Law, §255) often grant access to court records. To seek court records, it is suggested that you submit a request to the clerk of the appropriate court citing an applicable provision of law.

Since you referred to the "privacy act", I point out that the Personal Privacy Protection Law applies only to state agencies; specifically excluded from its coverage are the courts, units of local governments and offices of district attorneys [see Personal Privacy Protection Law, §92(1)].

Second, insofar as your inquiry pertains to agency records subject to the Freedom of Information Law, requests generally should be made to the "records access officers" at the agencies that maintain the records sought. The records access officer has the duty of coordinating an agency's response to requests.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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)].

Fourth, with respect to rights of access to agency records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more 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. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential relevance 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.

Of potential significance is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)]. With respect to access to certain kinds of records used in a public proceeding, the Court in Moore noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

While you may not have possession of the records sought, it is possible that some of the records at issue were disclosed to your trial counsel. As such, it is suggested that you contact that attorney to obtain the records or to ascertain whether he or she maintains the records.

Lastly, it is unclear why you believe that a county attorney would maintain records relating to your case. It is more likely in my view that the office of the district attorney would possess such records.

As you requested, enclosed is "Your Right to Know", which describes the Freedom of Information Law and includes a sample letter of request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7792

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

[redacted]

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, unless otherwise indicated.

Dear Mr. Kane:

As you are aware, I have received your letter of June 10 in which you sought an advisory opinion under the Freedom of Information Law. Based on our telephone conversations, although you had at one point asked that your letter be disregarded, you indicated on July 7 that you would prefer receipt of an opinion.

You wrote that the State Department of Health "has refused to answer [your] appeal pertaining to 'What action has the New York Department of Health, station at Amsterdam, N.Y., that is the enforcement agency for Johnstown, N.Y., in Fulton County, taken as to [your] request to this division.'"

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law, in terms of its title, may be somewhat misleading. That statute does not require agencies to disclose information per se or to respond to questions; rather, it is a vehicle that enables the public to seek records and that often requires agencies to disclose records. Based upon your correspondence, you sought an answer to a question, rather than a record. It is also noted that §89(3) of the Freedom of Information Law states in part that an agency need not create a record in response to request.

Instead of seeking information in response to questions, it is suggested in the future that you request records, i.e., those reflective of action taken by the Health Department pertaining to a particular matter. In response to such a request, the Department in my view would be obliged to grant or deny access to the records sought or indicate that it does not maintain such records.

Second, with respect to responses to appeals, §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."

A copy of this response will be for forwarded to Peter Slocum, the Health Department's appeals officer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Peter Slocum

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7793

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 13, 1993

Mr. Edwin Garcia
[redacted]

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

Dear Mr. Garcia:

I have received your letter of June 9, which reached this office on July 6.

Your inquiry pertains to a request for records of the Division of State Police. Although 198 pages of records were made available, others were withheld on various grounds. Your complaint is that "the records in question were never identified as per Vaughn." Having reviewed the materials attached to your letter, I offer the following comments.

First, the basis for your request was the "Freedom of Information Act (FOIA), 5 U.S.C. 552." That is a federal statute that applies only to federal agencies. That statute generally applicable to government records in New York is the New York Freedom of Information Law, Public Officers Law, §§84 to 90.

Second, your reference to "Vaughn" relates to Vaughn v. Rosen [484 F2d 820 (1973)], which was rendered under the federal Freedom of Information Act and which pertains to an index providing 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)].

Third, with respect to rights of access to agency records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more 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. Nevertheless, the following paragraphs will review the provisions cited in the correspondence justifying a denial.

Section §87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the withholding of records or the deletion of identifying details in a variety of situations, i.e., where a record identifies persons other than yourself, such as a confidential source or a witness.

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).

The remaining ground for denial reference by the Division 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.

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

Robert J. Freeman
Executive Director

RJF:pb
cc: Francis A. DeFrancesco, Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1794

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 13, 1993

Mr. Derrick Vaughn
Drawer B
Green Haven Corr. Fac.
Stormville, N.Y. 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. Vaughn:

I have received your letter of July 6 in which you sought assistance in obtaining records from Supreme Court Kings County. The records in question involve the sentencing minutes of a witness who testified against you.

In this regard, since you referred to certain of its provisions at the beginning of your letter, I point out that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

In turn, §86(1) of the Freedom of Information Law defines "judiciary" to mean:

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

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

This is not to suggest that court records may not be available, for other provisions of law (see e.g., Judiciary Law,

§255) often grant access to those records. Rather than requesting the records in question under the Freedom of Information Law, it is suggested that you seek them from the clerk of the court pursuant to an applicable provision of law.

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 1795

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 13, 1993

Mr. Hugh C. Burnett
#87-C-0107
P.O. Box G
Wallkill Corr. Fac.
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. Burnett:

I have received your letter of June 30. You have sought assistance concerning a number of unanswered requests for records pertaining to you.

In this regard, I offer the following comments.

First, your letter refers to five requests, two of which appear to have been made to private attorneys. Here I point out that the 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 or other governmental 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, although the Freedom of Information Law would apply to records maintained by a city, for example, it does not apply to records maintained by a private attorney.

Second, when seeking records of an agency, a request should be made to the agency's "records access officer". The records access officer has the duty of coordinating an agency's response to requests.

Third, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records in which you are interested. A request for records pertaining to yourself, without additional description, may not reasonably describe the records.

Lastly, 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)].

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 1796

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 13, 1993

Mr. Nathan Brown
#90-A-3219
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. Brown:

I have received your letter, which is dated March 4 but which reached this office on July 6.

You wrote that "many prisoners", including yourself, "have been experiencing many unnecessary delays in obtaining responses to Freedom of Information requests." You have sought advice on the matter. In this regard, I offer the following comments.

First, according to the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law, a request for records kept at a correctional facility should be made to the facility superintendent or his designee.

Second, 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)].

Enclosed is a copy of the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1797

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 13, 1993

Mr. Peter Bujanow
[redacted]

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

Dear Mr. Bujanow:

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

The issue is "whether an unofficial tape recording made by an individual board member," yourself, "is discoverable under the Freedom of Information Law." You indicated that a fellow member of the Ichabod Crane Central School District Board of Education has requested your tape recording of a meeting held in February. You denied the request because in your view, you are not an "agency", and the tape recording was "produced for a personal purpose" and, therefore, is not a "record" as defined by the Freedom of Information Law. In addition, you asked whether I am aware of any other situations in which a member of a public body has sought documents under the Freedom of Information Law from another member of the same body, and whether it is "appropriate for an individual board member, acting and without knowledge of other board members, to attempt by form of resolution to force another member to make a tape recording available."

In this regard, I offer the following comments.

First, while I believe that situations have arisen in which a member of a public body may have sought records from another member of the same body, I am unaware of any judicial decisions pertaining to the issue.

Second, I know of no provision that would preclude a member of a public body from drafting a resolution to be reviewed or considered later by other members of the body. Certainly the public body, as a whole, could to choose to accept, reject or modify such a proposal.

Third, from my perspective, your letter contains conflicting statements. Despite references to reasons for denying access to the tape recording, you also wrote that:

> "[a]s a member of the Ichabod Crane Central School Board, [you] have been taping regular, special and committee board meetings since December 1992. The taping allowed [you] to pay closer attention to the business being transacted without taking notes."

In my opinion, the foregoing clearly suggests that you tape recorded the meetings due to and in furtherance of the performance of your duties as a member of the Board. If that is indeed so, while individually, you are not an agency, I believe that the tape recording would constitute an "agency record" subject to rights conferred by the Freedom of Information Law, for it was produced in your capacity as a member of an agency, the Board of Education.

As you are aware, §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.).

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).

Your letter indicates that you are familiar with 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. In that decision, 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)].

Based upon the foregoing, and again, assuming that you recorded the meetings in furtherance of the performance of your duties as a member of the Board, I believe that the tape recording in question falls within the coverage of the Freedom of Information Law.

Fourth, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

Lastly, since any person presumably could have been present at the meeting recorded on tape, and since any person present at that meeting could have tape recorded the proceedings [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], it is difficult to understand why there would be resistance to a request that would enable a Board member, or perhaps others, to hear or to obtain a copy of the tape recording 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:pb

cc: Rosalie J. Johnson
Melvin H. Osterman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7798

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

July 14, 1993

Mr. Joe Valentine
[redacted]

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

Dear Mr. Valentine:

I have received your recent correspondence, which reached this office on July 7.

You have asked for assistance in obtaining "the exact whereabouts of an individual now in prison in Monroe County New York State (or surrounding areas)."

In this regard, if the individual is incarcerated in a state correctional facility, a request may be made to the Office of Public Information at the New York State Department of Correctional Services, State Campus, Correctional Services Building, Albany, N.Y. 12226. In requesting a record indicating the facility where an inmate is housed, it is suggested that you include as much identifying information as possible, such as the inmate's name, date of birth, the court in which he was convicted, etc.

The individual in question might be incarcerated in a county jail. If that is so, §500-f of the Correction Law, which pertains to county jails, would be relevant. That statute 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."

Based on the foregoing, I believe that you may review the daily record described above at the Monroe County Jail, for example, or at a county jail in a neighboring county.

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 7799

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

July 14, 1993

Mr. James E. Landers
[redacted]

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

Dear Mr. Landers:

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

You have asked that the Town of Gates "be investigated for possible violations of the State's Freedom of Information Laws." You wrote that your requests have "been repeatedly delayed and thwarted" and you referred specifically to a failure by the Town to provide a subject matter list and to the Town's contention that your requests are not sufficiently specific.

In this regard, although this office does not have the resources to "investigate", I offer the following comments in an effort to assist you.

First, by way of background, the Freedom of Information Law pertains to existing records and states that, in general, an agency, such as the Town, 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 subject matter list, 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, for the schedules are in my view more detailed and expansive than a subject matter list must be.

Second, the Freedom of Information Law does not require that a request for a record identify the record with specificity; rather, §89(3) of the Law 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 insufficent 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 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. One potential problem is that your request includes no limitation in terms of time. For example, one aspect of your request pertains to "budget hearings and review files." It is possible that the Town might maintain records relating to budgets involving many years. If your interest involves the budget hearing and review files concerning the latest fiscal year, for example, a request for those files for the latest fiscal year would likely meet the standard of reasonably describing the records.

It also noted that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, provide in part that an agency's "records access officer is responsible for assuring that agency personnel...Assist the requester in identifying requested records, if necessary" [§1401.2(b)(2)].

Lastly, 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 Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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: Richard A. Warner, Records Access Officer
Ralph J. Esposito, Supervisor

No

7800

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2245
FOIL-AO 7801

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

July 14, 1993

Ms. Kym Vanderbilt
Project Director
Public Education Association
39 West 32nd Street
New York, NY 10001

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

Dear Ms. Vanderbilt:

I have received your letter of July 7 in which you requested an advisory opinion concerning a meeting held by New York City Community School Board #9 on July 1.

According to your letter and the minutes of the meeting, the Board held a "Special Executive Session" for the "Election of Officers". It is your view that the election of officers in executive session is inconsistent with the Open Meetings Law. Moreover, since the minutes fail to indicate "how each member voted", you contend that the Board failed to comply with the Freedom of Information Law. You also expressed the belief that "those violations invalidate the elections and that the Board must now reconvene the meeting and vote in public."

In this regard, I offer the following comments.

First, it is emphasized 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, an executive session is not separate and distinct from an open meeting; on the contrary, an executive session is a part of an open meeting that must be convened open to the public and preceded by notice given to the news media and by means of posting in accordance with §104 of the Open Meetings Law. In a related vein, a public body cannot enter into an executive session without accomplishing the procedure described in §105(1) of the Open Meetings Law. 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..."

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].

Second, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

In my opinion, discussions regarding the election of officers would not have fallen within any of the grounds for entry into executive session. The only provision that appears to be relevant

to the matter, §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..."

Although the discussion and election of officers involves consideration of particular individuals, it is unlikely that any of the specific subjects included within §105(1)(f) would have been applicable in conjunction with deliberations involving the selection of school board officers. In short, while "matters leading to" certain actions relating to specific persons may be discussed during executive sessions, matters leading to the election of officers is not among them.

Third, with respect to the absence of any record indicating how the members voted, I point out in passing 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. 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, none of which would have been present in the situation in question.

With regard to information "detailing 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 cast 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.".

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, 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); aff'd 72 NY 2d 1034 (1988)].

Further, there is case law dealing with the notion 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).

As such, if a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous 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 a public body relies in carrying out its duties, I believe that the minutes should reflect the actual votes of the members.

Lastly, although it appears that the Board has failed to comply with the Freedom of Information Law and the Open Meetings Law, I believe that its actions may be voidable, but that they are not automatically void. With respect to the enforcement of the Open Meetings Law, §107(1) states in relevant part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Community School Board #9
Felton Johnson, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1802

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

July 15, 1993

Mr. Michael Stahl
[redacted]

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

Dear Mr. Stahl:

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

According to your letter:

> "In 1989, La Guardia Community College and the Research Foundation [of the City University of New York] signed a contract with the New York City Department of Employment in which they received hundreds of thousands of taxpayer dollars funded by the Jobs Training Partnership Act."

You wrote that you are "interested in finding out how much money it cost the United States taxpayers to place one student on a job", for it appears that only one student was placed in "Cycle II" of a plan described in the contract.

In this regard, I offer the following comments.

First, it is emphasized at the outset that the Freedom of Information Law pertains to existing records of an agency. Section 89(3) of that statute states in part that an agency need not create or prepare a record in response to a request. With respect to the information that you seek, I am unaware of whether any agency possesses a record or records indicating precisely "how much money was spent" to place a single student in Cycle II. If no such record or records exist, an agency would not be obliged to prepare a tabulation or create a new record on your behalf.

Second, assuming that such records do exist, I point out that the Freedom of Information Law is based upon a presumption of

access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Of relevance would be §87(2)(g). Although that provision is one of the grounds for denial, due to its structure, it often requires disclosure. 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.

Lastly, as indicated earlier, 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, La Guardia Community College, which is part of the City University of New York (CUNY), and the New York City Department of Employment would clearly constitute "agencies" required to comply with the Freedom of Information Law. The correspondence that you enclosed, however, includes a letter in which an attorney for the CUNY Research Foundation expressed the belief that the Foundation

is a not-for-profit corporation and, therefore, is not subject to the Freedom of Information Law. In this regard, although I am unaware of the exact nature of the relationship between CUNY and the Research Foundation, I point out that it has been held that a foundation associated with Kingsborough Community College is an "agency" subject to the Freedom of Information Law (see attached, Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988). Similarly, this office has advised that a similar organization associated with the State University, the SUNY Research Foundation, is an agency required to comply with the Freedom of Information Law (see attached).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Catherine McGrath, Senior Associate Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7803

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

July 16, 1993

Mr. David McCallum
86-B-2336
Box 338
Napanoch, NY 12458

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

Dear Mr. McCallum:

I have received your letter of July 8 in which you sought assistance in obtaining a "grand jury synopsis sheet" from the office of the Kings County District Attorney. It is your view that none of the grounds for denial in the Freedom of Information Law could properly be asserted to withhold that record.

In this regard, although the Freedom of Information Law 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 Criminal Procedure Law, 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, "subdivision three" of §190.25 includes specific reference to a 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 must in my view 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Matthew S. Greenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7804

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 16, 1993

Mr. Anthony Navy
#91-R-6164
S.C.F. 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. Navy:

I have received your letter of July 8 in which you raised several issues concerning access to records.

You referred initially to a request made under the Freedom of Information Law for copies of your medical records at your facility. In addition, you asked that the fee for copies be waived.

In this regard, although the Freedom of Information Law pertains to government records generally, §18 of the Public Health Law deals specifically with access to medical records by the subjects of those records. In brief, §18 of the Public Health Law generally grants access to medical records to the subjects of those records. Further, I point out that §5.24(b) of the regulations promulgated by the Department of Correctional Services states that:

> "A request for medical records may be submitted to the Assistant Commissioner of Health Services, Department of Correctional Services, Building 2, State Campus, Albany, N.Y. 12226."

Second, you asked that I send information concerning your ability to obtain records from the FBI and the Division for Youth. It is noted that the Committee on Open Government is authorized to provide advice concerning the New York State Freedom of Information Laws and access to government records in New York. The FBI is a federal agency and, therefore, is subject to the federal Freedom of Information Act. Since this office does not maintain descriptive material concerning the federal Act, it is suggested that you

obtain a copy of that statute through your facility librarian. The federal Freedom of Information Act is found in 5.U.S.C. §552.

With respect to records of the Divison for Youth, although the Freedom of Information Law provides broad rights of access, of likely relevance regarding records of that agency identifiable to youths is §87(2)(a) of that statute. Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is §372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of §372 states in relevant part that such records:

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

For purposes of construing §372, I was advised some time ago that references to the "department" have been construed to include the Division for Youth. As such, I believe that records that identify persons committed to a facility of the Division for Youth are confidential and cannot be disclosed, except under the conditions described above.

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-1805

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 19, 1993

Mr. Edward MacKenzie
#92007197
Nassau County Corr. Fac.
C.S. 1072
Hicksville, N.Y. 11802

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

Dear Mr. MacKenzie:

I have received your letter of July 8 and the materials attached to it.

You have sought assistance concerning requests for a record directed to the Nassau County District Attorney that have not been answered. In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government involving the procedural implementation by the Freedom of Information (21 NYCRR Part 1401), each agency must designate a "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be made to that person. Under the circumstances, although I believe that the District Attorney should have responded to the request or forwarded it to the appropriate person in his office, it is suggested that you might transmit a request to the records access officer.

Second, 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.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Dennis Dillon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2248
FOIL-AO 7806

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 19, 1993

Mr. Harry C. Kuntzleman
SERVICES
124 South Main Street
Newark Valley, NY 13811

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

Dear Mr. Kuntzleman:

I have received your letter of July 9 and the materials attached to it. You have sought advice concerning requests directed to the Newark Valley Central School District.

Having reviewed the documentation, I offer the following comments.

First, your requests were apparently based upon the "Freedom of Information Act, 5 USC 552 and the Privacy Act, 5 USC 552 a", and you sought a waiver of fees and an "indexing, itemization and detailed justification concerning information" that might be withheld.

In this regard, the acts referenced above are federal statutes applicable only to federal agencies. The statute that pertains generally to rights of access to records of state and municipal agencies in New York is the New York Freedom of Information Law. It is also noted that there is nothing in the Freedom of Information Law concerning the waiver of fees, irrespective of the intended use of the records or the financial status of an applicant [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990), and that an agency may ordinarily charge up to twenty-five cents per photocopy. Further, your request for an "indexing" or "itemization" of records that might be withheld appears to be based on 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 [see Nalo v. Sullivan, 125 AD 2d 311 (1987)].

Second, despite its title, the Freedom of Information Law is not a statute that requires agencies to respond to questions or to provide information in response to questions. Rather, the Freedom of Information Law pertains to existing records of an agency, and §89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Therefore, rather than seeking information by raising a series of questions, it is suggested for the future that you request existing records.

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

Lastly, one aspect of a request involves why a particular person's questions or comments were not recorded in minutes of a meeting. Here I direct your attention to the Open Meetings Law, which includes provisions regarding minutes of meetings. Those provisions, in my view, prescribe minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law 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 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. While a public body may choose to include reference to comments or questions by members attending a meeting in its minutes, the Open Meetings Law does not require that kind of information to be included. It is implicit in the Law, however, that whether minutes are brief or expansive, they must accurately describe what transpired at a meeting.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Thomas Wieland

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7807

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 19, 1993

Mr. Ricardo A. DiRose
#85-C-0773
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. DiRose:

I have received your letter of July 14 in which you requested an advisory opinion concerning rights of access to an Inmate Grievance Resolution Committee (IGRC) log.

You wrote that you have served as IGRC chairman for the past year and that you are not only familiar with the log, but that you have "personally made notations thereon in accordance [with your] duties as chairman." You added that the log "contains grievants names, DIN number, grievance title, and the dates of the hearings and any appeals..." Nevertheless, in response to your request for the log, you were informed that you would "only be entitled to pages containing [your] name with all others deleated [sic] out."

In this regard, I offer the following comments.

First, in my view, the fact that you have seen the log on previous occasions does not necessarily confer rights of access upon you to the log. Your prior review of its contents was not the result of a disclosure made under the Freedom of Information Law; rather, you viewed the log in your capacity as chairman of IGRC. When seeking records under the Freedom of Information Law, your status is as a member of the public, and your position as chairman of the Committee in my view neither enhances nor diminishes your rights of access to the log as a member of the public [see Farbman v. New York City, 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 §87(2)(a) through (i) of the Law.

The only ground for denial of significance, in my opinion, is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." There is indication in the regulations promulgated by the Department of Correctional Services that information relating to certain grievances, at the very least, is publicly disclosed. In §701.3(d), which appears to pertain to "like grievances", responses to grievances may be provided by means of "written response, posting on inmate bulletin boards or radio announcement." I believe that references to grievances in the log that are identified by posting or radio announcement would be available. With respect to remaining grievances noted in the log, if your description of the contents of the log is accurate, it is unlikely in my view that disclosure would result in an unwarranted invasion of personal privacy. Further, even if the log contains information in addition to or different from that which you described, I believe that only those portions identifiable to individual inmates consisting of intimate or highly personal information could justifiably be withheld.

In short, it would appear that a denial of access to every aspect of the log except those portions pertaining to you is overbroad.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Anthony Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1808

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 19, 1993

Mr. Albert F. Rielly
#89-T-4182/B-6-352
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. Rielly:

I have received your letter of July 5, which reached this office on July 14. You have raised a number of questions concerning the status of the Office of Public Administrator of Queens County.

In this regard, in an effort in to learn more about Offices of Public Administrators, I recently engaged in telephone conversations involving New York City, New York State and Surrogate's Court officials. As you may be aware, Public Administrators are appointed by the Surrogate in their respective counties, and their salaries are paid by New York City (see Surrogate's Court Procedure Act, §§1102, 1108). Further, §1110(1) of the Surrogate's Court Procedure Act states that:

> "The City of New York shall be answerable for the faithful execution by the public administrator of all the duties of his office and for the application by him of all moneys and property received by him and for all moneys and securities and the interest, earnings and dividends actually received by him or which he should have collected or received."

Nevertheless, a representative of the New York City Office of Corporation Counsel expressed the opinion that the Office of Public Administrator is not a City agency, for the City government has no general authority to oversee the operations of the Public Administrator or compel the Public Administrator to carry out his or her duties. Similarly, it was advised that Corporation Counsel has no jurisdiction over the Public Administrator concerning the

implementation of the Freedom of Information Law. Having discussed the matter with an attorney for the Office of Court Administration, it was contended that the Office of Public Administrator is something of a hybrid, and that it is not an extension or an arm of that agency.

Based upon a review of the law and the discussions described earlier, in my opinion, the Office of Public Administrator is not clearly an agency of either New York City or New York State, but rather is *sui generis*, a unique entity unto itself. Moreover, I believe that it is an "agency" with an independent responsibility to give effect to the Freedom of Information Law.

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 or other governmental 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 are not subject to the Freedom of Information Law. By means of analogy, however, I point out that it has been held that the Office of Court Administration is an "agency" required to comply with the Freedom of Information Law. The initial decision on the subject, which cited an advisory opinion prepared by this office, included the following discussion of the matter:

> "The court must look to the intent of the legislature to determine whether the Office of Court Administration, in the exercise of a purely administrative and personnel function, is to be excluded from the applicable provisions of the Freedom of Information Law. Public Officers Law §84 states in part 'The people's right to know the process of governmental decisionmaking and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.'

> "In view of the legislative purpose to promote open government, the court is inclined to construe narrowly any section that would tend to exclude offices of government from the law. Public Officers Law §86 specifically refer to courts when it defines 'Judiciary.' The legislature did not include the administrative arm of the court. The Office of Court Administration does not exercise a judicial function, conduct civil or criminal trials, or determine pre-trial motions. Respondent is not a 'court.'
>
> "It is significant to note that respondent refers to several sections of the Judiciary Law that regulate access to judicial records and allegedly perform a function similar to that of the Freedom of Information Law. None of the sections specified would address access to the information sought by petitioner pertaining to personnel and salaries exclusively.
>
> "Accordingly, the court rejects respondent's contention that it is in all respects exempt from the provisions of the Freedom of Information Law." [Babigian v. Evans, 427 NYS 2d 688, 689 (1980) aff'd 97 Ad 2d 992 (1983); Quirk v. Evans, 455 NYS 2d 918, 97 Ad 2d 992 (1983)].

Like the Office of Court Administration, which administers the court system and is an agency subject to the Freedom of Information Law, the Office of Public Administrator, as its title suggests, performs administrative functions relative to Surrogates' Courts in New York City. Further, the records of a Public Administrator would appear pertain to administrative functions and would not likely constitute court records or records of judicial proceedings.

Assuming that the Office of Public Administrator is an agency subject to the Freedom of Information Law, it would be required to carry out its duties in accordance with certain procedural rules and regulations. 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) of the Law requires each agency to promulgate rules and regulations consistent with the Law and the Committee's regulations.

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."

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.

In addition, §1401.7 of the Committee's regulations provide in part that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

I point out, too, that 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)].

In sum, as the head of an agency subject to the Freedom of Information Law, the Public Administrator is in my opinion required to promulgate rules for the procedural implementation of that statute, which would include the designation of a records access officer, as well as an appeals officer. The appeals officer would be the Public Administrator or a person designated to determine appeals by the Public Administrator.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Frances Svaigsen, Public Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FO.L - AO 7809

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 19, 1993

Mr. Nicholas M. Bianco
[redacted]

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

Dear Mr. Bianco:

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

Although your comments are not completely clear, it appears that you have raised two issues concerning requests directed to the New York State Department of Social Services. As I understand the matter, one involves certification of records; the other involves access to requests made under the Freedom of Information Law. Assuming the accuracy of those assumptions, I offer the following comments.

First, the only reference in the Freedom of Information Law to a certification appears in §89(3), which states in relevant part that:

> "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

In my view, based upon the language quoted above, a certification made under the Freedom of Information Law does not pertain to the accuracy of the contents of a record, but rather would involve an assertion that a copy is a true copy, or that an agency does not maintain or cannot locate a record. Further, §89(3) would not indicate that the contents of a record are complete, accurate or "legal"; it would merely indicate that the copy of the record is a true copy.

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

In conjunction with the foregoing, 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 request is made by an entity, such as a firm or a news media organization, or if the request does not include information the disclosure of which would constitute an unwarranted invasion of personal privacy, I believe that it would be accessible under the Law. In such a case, an applicant could ask for a certification that a copy of the record is a true copy pursuant to §89(3).

Lastly, the materials attached to your letter refer to a request but do not include a copy of the request. Although I am unfamiliar with the contents of any such request, I point out that §89(3) of the Freedom of Information Law also requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James P. White
Sherrill A. Backer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7810

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 19, 1993

Owen B. Walsh, Chief
Deputy County Attorney
County of Nassau
Nassau County Executive Building
1 West Street
Mineola, NY 11501-4820

Dear Mr. Walsh:

I appreciate receipt of your determination of an appeal made under the Freedom of Information Law by Glenn Urbanas.

The determination focuses on rights of access to the resumés or applications of two individuals employed by Nassau County. Although some of the material requested was made available, you affirmed the initial denial with respect to the remainder. In this regard, I offer the following comments concerning your determination.

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, you alluded to §87(2)(a) in your determination. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." While there may be portions of the records in question that might justifiably be withheld, I do not believe that the records fall within the scope of any statute that specifically exempts them from disclosure or, therefore, that §87(2)(a) would serve as a basis for denial.

In my opinion, the only relevant basis for denial would have been §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 view, the provisions cited above might serve to enable an agency to withhold some aspects of a resumé or an application. Nevertheless, it is likely that other aspects of those kinds of records 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 resumé 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)]. Consequently, while reference to one's private sector employment could likely be withheld, reference to prior public employment would in my view be accessible. 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, reliance upon some of the cases cited in your determination is in my opinion misplaced. For instance, Gannett v. James [86 AD 2d 774 (1982)] dealt with police officers' personnel records, and that decision was based largely upon the provisions of §50-a of the Civil Rights Law; Bahlman v. Brier [119 Misc. 2d 110 (1983)] was effectively reversed by Capital Newspaper v. Burns [109 AD 2d 292, aff'd 67 NY 2d 562 (1986)]. Further, Short v. Board of Managers [57 NY 2d 399 (1982)] involved a situation in which a class of records was, in its entirety, exempted from disclosure by statute. In my view, none of those decisions would have been relevant or applicable to the records that were the subject of your determination.

For the foregoing reasons, your determination, insofar as it upheld a denial of access to records, may in my opinion have been overbroad.

If you would like to discuss the matter, please feel free to contact me. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Glenn Urbanas

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7811

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 20, 1993

Mr. Henry J. Kassis
Kassis Management Inc./Real Estate
141 East 45th Street
New York, N.Y. 10017

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

Dear Mr. Kassis:

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

According to your letter, your "tenant's business has suffered greatly as a result of continuous and unfounded complaints directed to the [New York City] Fire Department and various other governmental entities which, heretofore, have also been nsubstantiated and anonymous complaints." In a determination rendered in response to an appeal issued by Counsel to the Fire Department in which a denial of your request for the names of complainants was sustained, she suggested that you "appeal" her decision to this office. As such, you have sought our "cooperation in overturning" the Department's denial.

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 render determinations following appeals or to compel an agency to grant or deny access to records. The provision pertaining to 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."

Second, while I am not in complete agreement with the rationale for the denial offered by the Department, I believe that there may be a different basis for denial that is more generally applicable.

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.

When a complaint is made to an agency, §87(2)(b) of the Freedom of Information Law is often relevant. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

With respect to such complaints, it has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

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

In my view, what is relevant to the work of the 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, and in such circumstances, I believe that identifying details may be deleted.

Lastly, it is noted that the Freedom of Information Law is permissive. While an agency may withhold records in appropriate

circumstances, it is not required to do so. As stated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, while I believe that identifying details pertaining to complainants may ordinarily be withheld, an agency is not prohibited from disclosing the records in question in their entirety.

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: Molly O'Neill Birkett, Counsel
Edwin Ayala

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7812

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 20, 1993

Mr. Robert Williams
#90-B-1489
Sullivan Correctional Facility
P.O. Box A-G
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. Williams:

I have received your letter of July 14 in which you sought assistance in using the Freedom of Information Law to obtain "hospital records respecting the person [you are] alleged to have killed." It is your view that those records would have been relevant at your trial.

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 or other governmental 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, if the hospital in possession of the records sought is private and is not a governmental entity, it would not be subject to the Freedom of Information Law.

Second, even if the hospital is a governmental entity subject to the Freedom of Information Law, I believe that medical records pertaining to a person other than yourself could be withheld. Relevant 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..."

Further, I believe that various provisions of the Public Health Law prohibit the disclosure of medical records to persons other than the subjects of those records or their representatives.

In sum, the Freedom of Information Law would not, in my opinion, serve as a vehicle for obtaining the records in which you are interested. 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7813

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 20, 1993

Ms. Elizabeth Lynch
[redacted]

Dear Ms. Lynch:

I have received your letter of July 14. As in the case of your previous correspondence, you have focused upon disclosure of records reflective of the expenditure of public moneys, and you enclosed a copy of a news article relating to the decision rendered in Day v. Town Board of Milton (Supreme Court, Saratoga County, April 27, 1992).

In the Day decision, the Court relied upon and adopted the reasoning offered in an advisory opinion prepared by this office. That opinion involved the same considerations that I have presented in opinions addressed to you concerning employee benefits in the nature of health insurance. As you are aware, Day involved a request for W-2 forms pertaining to public employees. In brief, it was advised that those portions of W-2 forms identifying public employees and indicating their gross wages should be disclosed. However, it was also advised, and the court agreed, that other portions of the forms could be withheld, such as social security numbers, home addresses and figures indicating net pay. To arrive at net pay, deductions from gross pay are made with respect to exemptions claimed by employees (i.e., based on whether an employee claims a spouse and dependent children as exemptions), charitable contributions automatically made from one's paycheck, and garnishments, for example. Those deductions, the social security numbers and home addresses have no relationship to the manner in which public employees carry out their duties. Consequently, although it was advised by this office and held by the court that figures reflective of gross pay must be disclosed, the other items described above which have no bearing on the performance of one's official duties, were found to be deniable on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Based upon Day and other decisions that have been cited in previous correspondence with you, it would appear that records, insofar as they indicate whether an employee partakes in a certain health insurance plan or has family or individual coverage, for example, could be withheld due to considerations of privacy, for

those factors apparently have nothing to do with the performance of public employees' duties.

In my view, the issues that you have raised involving insurance coverage relate more significantly to an agency's accountability and practices than the accountability of individual employees. It has been suggested that there may be methods of disclosing information relating to payments for health insurance without identifying particular employees. If such methods exist, it is assumed that they would be satisfactory to you. Alternatively, it is possible that a court might distinguish the situation of your interest from other cases cited involving the privacy and/or accountability of public employees. However, in order to find whether that may be so would involve judicial review of an agency's denial of access to the information in which you are interested. In addition, since a copy of my letter to Mr. Francis Keough was sent to you, you are aware of other suggestions offered to encourage or require disclosure.

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-7814

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 20, 1993

Mr. Ralph Buck Phillips
92-B-2578
Box 149
Attica, NY 14011-0149

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

Dear Mr. Phillips:

I have received your letter of July 14 in which you described difficulties in obtaining records and sought assistance in the matter.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government involving the procedural implementation by the Freedom of Information (21 NYCRR Part 1401), each agency must designate a "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be made to that person.

Second, it is noted that the Freedom of Information Law pertains to existing records and that §89(3) of the Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate records.

Third, 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7815

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 21, 1993

Mr. W. Jackson
c/o Saugerties Legal Service
15 Barclay Street, Suite 10
Saugerties, NY 12477

The staff of the Committee on Open 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 9, which reached this office on July 19.

You wrote that a state agency interested in information that you had accepted your collect and person to person telephone calls to that agency. Having asked for copies of certain telephone records from the agency, you indicated that the request was denied on the following grounds:

> "(1) These telephone records are not considered records,
> (2) Billing records are not maintained by agency,
> (3) Agency is not required to search office telephone logs for requested information, even when given the time period information, etc..
> (4) Records suddenly become inter agency, therefore, not open to the public,
> (5) According to the agency, my appeal was never received, but the U.S. Post Office controverts this."

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

First, all agency records are subject to rights conferred by the Freedom of Information Law, for §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)]. Therefore, telephone bills, statements, logs and the like that are maintained by an agency would in my view constitute "records" subject to rights conferred by the Freedom of Information Law.

Second, the Freedom of Information Law does not require that a request for a record identify the record with specificity; rather, §89(3) of the Law 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 inquiry, I am unfamiliar with the agency'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. Insofar as the records sought can be located based upon the terms of your request, I believe that the request would have reasonably described the records.

Third, assuming that the agency maintains the records sought and that you have reasonably described them, 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.

If it can also be assumed that your request involves records or portions thereof pertaining to your calls, only one of the grounds for denial would appear to be relevant. Due to its structure, however, that provision may require 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.

In my view, a list of calls prepared or generated by an agency or which refers to collect calls would constitute "intra-agency materials." However, that kind of record would likely consist solely of factual information accessible under §87(2)(g)(i). Notations made in a phone log regarding your calls would also constitute intra-agency materials which in my view would be available or deniable, in whole or in part, depending upon their contents. Opinions expressed in a log entry, for instance, might properly be withheld, while factual notations involving your communications would likely be available to you.

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 7816

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 21, 1993

Ms. Dorothy M. Burdick
[redacted]

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

Dear Ms. Burdick:

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

In brief, the problem that you described relates to a neighbor who has a disposal business contiguous to your property. According to the correspondence, he has "stored a large quantity of old rusted-out dumpsters in full view of [your] living room," and on occasion, various other kinds of "junk". It is your opinion that the accumulation of junk constitutes an "eyesore" and diminishes the value of your property. Despite your efforts to encourage the Town of Richland to take appropriate action, nothing has been done. As the matter relates to the Freedom of Information Law, you indicated that the Town "has not only refused to answer but also even to acknowledge a letter." Your latest request involves records, such as permits, licenses, restrictions and the like, pertaining to the disposal business.

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

First, it is noted 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)].

Second, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, insofar as the Town maintains the records in which you are interested, those records must be disclosed. In short, the grounds for withholding records are limited, and none in my opinion could properly be asserted to withhold the kinds of records that you are seeking.

You asked whether the Attorney General's office takes action in the kind of situation that you described. To the best of my knowledge, it does not. In my view, the Town is responsible for the enforcement of its laws, and I point out that one basis for initiating an "Article 78" proceeding involves a claim that a public officer or public body has failed to carry out a duty required by law to be performed.

I hope that 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 M. Mahaffey, Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7817

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 21, 1993

Mr. Salvatore D'Agnone
89-A-9751
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. D'Agnone:

I have received your letter of July 14 in which you raised questions concerning rights of access.

The first involves delays in disclosure of records on the part of an agency that is having difficulty locating your file, and you asked whether there is "anything [you] can do to make them find [your] file." In this regard, until an agency locates records, it has no capacity to disclose them, and it is suggested that you maintain contact with the agency in order to keep abreast of the status of the request. It is also noted 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)].

Second, you asked whether anyone can obtain a copy of the transcript of your criminal trial without your knowledge. Although the courts and court records are not subject to the Freedom of Information Law, other provisions of law often require the disclosure of court records (see e.g, Judiciary Law, §255). Unless court records are confidential by statute or sealed, they are generally accessible to any person. If the records in question are public, there may be circumstances in which they would be disclosed without your knowledge.

Lastly, you asked how you can request records under the Freedom of Information Law from the New York City Police Department, to whom such a request should be made, and what you can request. In this regard, every agency must designate at least one "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person. To seek records from the agency in question, you may write to:

> Sgt. William J. Matusiak, Records Access Officer
> New York City Police Department
> Legal Bureau
> F.O.I.L. Unit, Room 110C
> One Police Plaza
> New York, New York 10038

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 the records.

Lastly, the Freedom of Information Law pertains to all agency records and is based upon a presumption of access. Stated

differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7818

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 22, 1993

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 July 14 and the correspondence attached to it.

According to your letter:

> "On June 9, 1993, when Liberty residents entered the Liberty high school auditorium to vote on their budget/school board candidates, they were approached by persons for their names. Superintendent Beruk was also present overseeing the election."

Nevertheless, you learned later that those persons were not election officials and that had you known, you "would not have volunteered [your] name for a 'phantom' list." You also indicated that many people believed that those seeking names "were part of the election/board process."

Thereafter, you requested the following information from the District's Assistant Superintendent:

> "1. Written identification of persons acquiring names of voters on June 9, 1993 as voters were forming lines in auditorium;
>
> 2. Photocopies of records made by these persons;
>
> 3. Name of person who gave individuals permission for this procedure."

In response to the request, you were informed that the District "does not have records concerning the information requested." Further, it is your belief that the response was "deliberately delayed" in order to preclude the filing of a timely complaint with the State Education Department.

You have sought my views on the matter, and you asked additionally whether school or election officials were required "to identify anonymous individuals requesting voters' names, and explain their intent to voters."

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, the Freedom of Information Law pertains to agency records and §86(4) of the Law defines the term "record" to mean:

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

If the information sought is kept by or was produced for the District and exists in some physical form, I believe that it would constitute a "record" subject to rights of access conferred by the Freedom of Information Law. However, if the information sought is neither kept by nor was produced for the District, the Freedom of Information Law would be inapplicable.

Lastly, with respect to any obligation imposed upon the District to inform the public of the function or role of those who sought voters' names, or the possiblity that there was a deliberate delay in responding to your request, I have neither the jurisdiction nor the expertise to respond appropriately. It is suggested that you raise the issue with officials of the State Education Department.

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: Anthony C. Pagnucco

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7819

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 22, 1993

Peter Galdi, President
GeoLotto, Inc.
145 Hudson Street
New York, NY 10013

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

Dear Mr. Galdi:

I have received your correspondence of July 12, which reached this office on July 21.

According to the materials, your Director of Corporate Communications sent a request on June 14 to the Public Information Officer of the Western Regional Off-Track Betting Corporation (WROTBC) in which she sought a copy of a contract "as amended or revised" as of that date between the Corporation and the Automated Wagering Division of Video Lottery Consultants. As of the date of your letter to this office, there had been no response to the request.

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

First, §519(1) of the Racing and Wagering Law refers to particular "regions" to be served by off-track betting corporations, one of which is the western region [see §501(1)(g)]. Section 501(3) defines "corporation" to mean "Each regional off-track betting corporation as created by section five hundred two of this article." Section 502(1) of the Racing and Wagering Law states in relevant part that:

> "A regional off-track betting corporation is hereby established for each region...Each regional corporation shall be a body corporate and politic constituting a public benefit corporation."

Section 66(1) of the General Construction Law defines "public corporation" to include "a public benefit corporation". Therefore,

WROTBC is a "public corporation". The Freedom of Information Law is applicable to records of an "agency", a term defined in §86(3) of that statute to mean:

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

Since the term "agency" includes "a public corporation", WROTBC is, in my view, clearly an agency obliged to comply with 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)].

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, a contract to which an agency is party must be disclosed. In short, the grounds for denial are limited and, in my opinion, none could be asserted to withhold such a 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: Timothy McCarthy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7820

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 22, 1993

Mr. Richard Bernard Lyon
[redacted]

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

Dear Mr. Lyon:

I have received your letter of June 18, which reached this office on July 21. You have asked that I "make sure" that the Department of Correctional Services "will comply" with law concerning your request for records and that I prepare an advisory opinion with respect to the request.

It is noted that at the outset that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce the law or "make sure" that an agency complies with law.

According to the materials, you requested various records from the Superintendent of your facility on June 5. Since no response to the request had been received, you appealed to Counsel to the Department of Correctional Services on June 18. The records sought include your "Central Office folder or institutional folder", "Personal history and correctional supervision history record", and a "Supervision history record." Within each of those categories, you referred to several items, including security files, records relating to transfers, and counselor's files.

In this regard, I offer the following comments.

First, since your appeal was predicated upon a failure to respond to your request in a timely manner, 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)].

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.

While I believe that many of the records or portions of the records sought must be disclosed, others might justifiably be withheld. For instance, those aspects of records prepared by Department staff or which were communicated to the Department from another agency which consist of advice or opinions could properly be withheld. Of relevance in my view is §87(2)(g) of the Freedom of Information Law, which enables an agency to withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, 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 point out that a decision rendered in 1989 dealt with records that are likely the same as or similar to several of those in which you are interested.

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, §87[2][g]. We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Again, insofar as the records sought consist of advice, recommendations, opinions or which are evaluative in nature, I believe that they may be withheld.

A copy of this opinion will be forwarded to Counsel to the Department of Correctional Services. No other communications regarding your inquiry have been made.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Anthony J. Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-782

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 22, 1993

Mr. Milton Payne
75-A-0741
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Payne:

I have received your letter of June 28, which reached this office on July 21.

Attached to your letter is a copy of a request for records directed to the New York City Department of Correction. In response to the request, which involves records prepared nearly twenty years ago, you were informed that the Department no longer maintains the records. You have sought my comments on the matter.

First, in view of the age of the records and the likelihood that such records would be inactive, it is possible that the Department indeed no longer maintains them. Since you have questioned the veracity or accuracy of the response, I point out that §89(3) of the Freedom of Information Law states in part that, an agency, on request, "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." As such, you could seek a statement from the records access officer certifying in writing that the records in question are not maintained by the Department.

Second, it is possible that the records were destroyed or transferred to the Department of Records and Information Services, which maintains the City's Municipal Archives. You may inquire with respect to the records in question by writing to Tyrone Butler, Records Access Officer, Department of Records and Information Services, 31 Chambers Street, New York, New York 10007.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7822

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 22, 1993

Mrs. Patricia Meisenburg
[redacted]

The staff of the Committee on 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. Meisenburg:

I have received your letter of July 15 in which you sought assistance concerning the Freedom of Information Law.

Attached to your letter is a form used by the Starpoint Central School District that must be completed when a member of the public seeks records under the Freedom of Information Law. It is your view that the form is incomplete, and you questioned the procedure to be followed to obtain a "correct form" to be used for making requests and appeals.

In this regard, I offer the following comments.

First, the form that you attached is out of date and inconsistent with current law. By way of background, the initial version of the New York Freedom of Information Law was enacted in 1974. In that statute, reference was made to a form to be used to request payroll information (i.e., public employees' names, addresses, titles and salaries). However, the original Freedom of Information Law was repealed and replaced with a completely new law that became effective in 1978. Under that version of the Law, which remains in effect, agencies are required to maintain "a record setting forth the name, public office address, title and salary of every officer or employee of the agency." That record is available to any person, irrespective of one's status or interest.

Second, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §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 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 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, it is emphasized that, 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 right 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 §87(2) of the Law, the use of the records, including the potential for private or commercial use, is in my opinion irrelevant; when records are accessible, the recipient may do with the records as he or she sees fit.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §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, §89(2)(b) includes examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [section 89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the Law. As 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 §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 judgement for that of the respondents" (id.).

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses. That situation, however, represents the only case under the Freedom of Information Law in which an agency may inquire as to the purpose for which a request is made, or in which the intended use of the record has a bearing upon rights of access.

Nevertheless, as inferred earlier, I do not believe that an agency may properly inquire as to the use of the payroll record identifying public employees by name, public office address, title and salary, even if it is requested for a commercial or fund-raising purpose. Section 89(6) of the Freedom of Information Law states that:

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

Therefore, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of

access. In this instance, since payroll information was found to be available prior to the enactment of the Freedom of Information Law [see Winston V. Mangan, 338 NYS 2d 654 (1972)], I believe that it must be disclosed, regardless of the intended use of the records. Consequently, in my view the payroll record required to be maintained should be disclosed to any person, irrespective of its intended use, and that it should be unnecessary to sign the certification on the District's form.

Enclosed is "Your Right to Know", which explains the Freedom of Information Law and includes sample letters of request and appeal.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7823

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 26, 1993

Mr. Joseph Franco
#92-R-6593
Wende Correctional Facility
P.O. Box 1187/SHU-G-37-17
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. Franco:

I have received your letter of July 19 in which you requested assistance in obtaining records from your "old parole official," as well as "all [your] records in here...now." It is assume that "here" is intended to mean the facility where you are incarcerated.

In this regard, I offer the following comments.

First, 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 generally be made to that person. I point out that the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that a request for records kept at a correctional facility may be made to the facility superintendent or his designee. To seek records relating to parole, it is suggested that you write to the Records Access Officer, Division of Parole, 97 Central Avenue, Albany, N.Y. 12206.

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 staff to locate and identify the records in which you are interested.

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. As

such, the right to obtain records is dependent upon the nature and content of records, as well as the effects of disclosure.

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 7824

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 26, 1993

Mr. Shateek Bilal
#91-R-7460
Clinton Correctional Facility
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. Bilal:

I have received your letter of July 18 in which you questioned your right to obtain a copy of an employees rule book applicable to employees of the Department of Correctional Services.

In this regard, 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 an employee manual would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that it would be available, unless a different basis for denial could be asserted.

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

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations 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. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees 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 correction 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7825

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 27, 1993

Mr. George Clementi
#79-A-1638
Clinton Correctional Facility
Box 2001 Main
Dannemora, N.Y. 12929

Dear Mr. Clementi:

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

You wrote that you have made several requests for records of the New York City Police Department, but that you have received no response to those requests. As such, you asked that I provide the name of the agency to which you may "report this failure to comply with [your] Freedom of Information request."

In this regard, this agency, the Committee on Open Government, is the office to which you may complain. It is emphasized, however, that the Committee is authorized to provide advice concerning the Freedom of Information Law. This office is not empowered to enforce the law or compel an agency to grant or deny access to records. In an effort to assist you, I offer the following comments.

First, each agency must designate at least one "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be made to that person. If you have not done so already, it is suggested that a request be made to:

Sgt. William J. Matusiak, Records Access Officer
New York City Police Department
Legal Bureau
F.O.I.L. Unit, Room 110C
One Police Plaza
New York, N.Y. 10038

Second, 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)].

For your information, the person designated by the New York City Police 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 7826

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 27, 1993

Mr. Daniel Petigrow
Anderson, Banks, Curran & Donoghue
Attorneys & Counsellors at Law
61 Smith Avenue - P.O. Box 240
Mount Kisco, N.Y. 10549-0240

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

Dear Mr. Petigrow:

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

You have requested an advisory opinion:

> "on whether a school district is obligated under the Freedom of Information Law, and to what extent, to release the transcript and complete record, including exhibits, from a proceeding held pursuant to §3020-a of the Education Law wherein: (i) students testified at the hearing and exhibits that were introduced contain numerous references to students' names; and (ii) the determination that was made sustained some, but not all of, the charges preferred against the teacher."

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 §87(2) refers to the authority to withhold "records or portions of thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report, for example, might include both accessible and deniable information. In addition, that phrase in my opinion imposes an

obligation upon an agency to review requested records in their entirety to determine which portions, if any, may justifiably be withheld and to disclose the remainder.

Second, from my perspective, three of the grounds for denial may be relevant to an analysis of rights of access to records in question.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, the federal Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. §1232g), generally requires that "education records" identifiable to students be kept confidential with respect to the public. The regulations promulgated by the U.S. Department of Education define the phrase "education records" (34 CFR 99.3) to mean:

> "those records that are -
> (1) Directly related to a student; and
> (2) Maintained by an educational agency or institution or by a party acting for the agency or institution."

The regulations exclude from the scope of education records:

> "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..."

In my opinion, records prepared in conjunction with a proceeding conducted pursuant to §3020-a of the Education Law would not have been made and maintained in the ordinary course of business. If that is so, insofar as the records in question are identifiable to particular students, I believe that they would constitute education records that are specifically exempted from disclosure by means of a federal statute, the FERPA.

Also relevant is §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." Even if the FERPA is inapplicable, I believe that disclosure of portions of the records identifiable to students could be withheld on the basis of §87(2)(b).

Further, 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. 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, and 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 or unsubstantiated charges 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 were dismissed or were found to be without merit, I believe that those charges and records relating to them may be withheld.

Lastly, §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 the proceeding would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like offered by public officers or employees, I believe that they could be withheld. For instance, opinions offered by public employees who testified could in my view be withheld. However, I believe that factual information would be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy or would otherwise be exempted from disclosure by statute. A final agency determination, insofar as it includes findings of misconduct, would in my opinion be accessible.

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 7827

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 27, 1993

Hon. Thomas G. Clingan
County Clerk
Office of the Albany County Clerk
Albany County Court House
Albany, N.Y. 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 July 19, as well as the materials attached to it.

You have sought an advisory opinion concerning a request by a firm "that sells information on tax maps and related indices." The firm has in the past obtained microfilm copies of Albany County's tax maps, and your inquiry involves a recent request for a copy of "the computer tape of the tax mapping program's ownership listing." In view of the firm's intent to resell the data, the Director of Real Property Tax Services has contended that the request should be denied on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; the First Assistant County Attorney, however, has advised that the data must be disclosed. It is noted that in her discussion of the issue, she pointed out that the "tax maps indicate by section, block and lot number real properties in the County," and that "[s]upplemental information regarding ownership data is also maintained, but separate from the map itself." Additionally, she stressed that ownership information, which does not appear in the data sought, "is readily available not only in each Assessor's office but also from the State and/or your office" (the Office of the Director of the Real Property Tax Service Agency).

In this regard, I offer the following comments.

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

Second, with respect to the protection of personal privacy, as indicated earlier, §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. In this instance, the requested data does not include names and addresses. Consequently, I do not believe that the provisions concerning the protection of privacy, or any other ground for denial, could justifiably be asserted to withhold the computer tape in question. Moreover, more than a decade ago, it was held that a request for a county's tax maps must be granted, even though the applicant sought to use the maps for a commercial purpose [Szikszay v. Buelow, 436 NYS 2d 558 (1981)]. In the same case, another 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. Therefore, even if the data requested included the names and addresses of owners of real property, it would be accessible. Specifically, the court in Szikszay 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].

In short, both tax maps and computer tapes of assessment rolls have been found to be available, notwithstanding the fact that they may be requested for a commercial purpose.

Lastly, with respect to fees, §87(1)(b)(ii) of the Freedom of Information Law states in part that for reproducing records that cannot be photocopied (i.e., computer tapes), an agency may charge a fee based on the actual cost of reproduction. However, as you are aware, legislation has been prepared by the Committee on Open Government and introduced at the request of the Governor to enable agencies to establish fees based upon the commercial utility of records in certain circumstances, one of which would include the kinds of records at issue. Although the legislation has not been approved, I believe that interest is significant and that the bill, or something similar to it, will be enacted in the not too distant future.

I hope that 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: John Lynch
Christine Marbach Kellett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7828

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 28, 1993

Ms. Linda Bolard
[redacted]

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

Dear Ms. Bolard:

I have received your letter of July 19 in which you sought assistance in obtaining records from Brooklyn College.

According to your correspondence, two requests were delivered to the College's records access officer on May 26. Other than a letter confirming that a determination concerning your request would be made by June 22, you have received no response to the requests as of the date of your letter to this office.

The initial request involves "a full listing of the tuition waivers and any and all other financial help awarded by Brooklyn College...to all graduate students accepted and enrolled" for particular semesters. You specified that such a list should include names or a code that can be used to identify students, the amount and dates of awards, the income of students and their grade point averages. In addition you requested a "full and true explanation, including code, articles and other applicable guidelines for awarding any and all financial aid form to any and all graduate students..." The second request pertains to records relating to a complaint made against you.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record

> available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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, the Freedom of Information Law pertains to existing records, and §89(3) of the Law also states in part that an agency need not create a record in response to a request. Therefore, insofar as the College does not maintain the records sought, it would not be obliged to prepare 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.

Relevant to your inquiry is the first 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 the federal Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. §1232g), which relates to access to records maintained by a educational agency institution that are identifiable to students.

In brief, FERPA applies to all educational agencies or institutions that participate in grant or loan 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.

Consequently, to the extent that the records sought would include personally identifiable information pertaining to students, the College would in my opinion be prohibited by federal law from disclosure. If there are records or statistics pertaining to financial aid that are not personally identifiable to students or from which personally identifiable details could be deleted, I believe that those records would be available so long as that they do not include personally identifiable details.

Fourth, with respect guidelines, procedures and similar records relating to the award of financial aid, I direct your attention to §87(2)(g). While that provision is one of the grounds for denial, due to its structure, it often requires disclosure. That provision permits an agency to withhold records that:

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

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

Therefore, policies, procedures, guidelines and similar records would likely be accessible under §87(2)(g) or (iii).

Lastly, with regard to your second request involving a complaint against you, there is insufficient detail to offer specific guidance. However, I point out that, in addition to protecting students' privacy, FERPA generally provides rights of access to education records to the subjects of those records who are eighteen years of age or more. While the phrase "education records" is defined broadly, the regulations promulgated under FERPA exclude from the definition:

> "Records of a law enforcement unit of an educational agency or institution but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are -
>
> (i) Maintained separately from education records;
>
> (ii) Maintained solely for law enforcement purposes; and
>
> (iii) Disclosed only to law enforcement officials of the same jurisdiction." (34 C.F.R. §99.3).

If the records in question are not "education records" accessible to you under FERPA due to the exclusion cited above, I believe that they would nonetheless be subject to the New York Freedom of Information Law.

In that event, although I have no familiarity with the records, §87(2)(g), which was discussed earlier, may be relevant to an analysis of rights of access. Also relevant may be §87(2)(b), which enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy," and §87(2)(e). That provision permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> (i) interfere with law enforcement investigations or judicial proceedings;
>
> (ii) deprive a person a right to a fair trial or impartial adjudication;
>
> (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Pamela Pollack

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO 7829

162 Washington Avenue, Albany, New York 12231
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July 28, 1993

Ms. Susan R. Rosenberg
Assistant Commissioner
Civil Matter
The City of New York Police Dept.
New York, N.Y. 10038

Dear Ms. Rosenberg:

Thank you for forwarding your determination of an appeal rendered under the Freedom of Information Law concerning a request for records by Karen A. Herrling, Esq.

In brief, you sustained a denial of a request for complaint follow up reports (DD5's) based upon a decision attached to the determination. Additionally, you affirmed a denial of access to police officers' memo books "since these records are the personal property of the individual officers and are not in the custody of the Police Department."

From my perspective, the position apparently taken by the Department, to engage in blanket denials of DD-5's generally, is simplistic and inappropriate as a matter of law.

The case that upon which you relied, Scott v. Slade [577 NYS 2d 861, ___AD 2d___(1992)], affirmed a decision upholding a denial of a request for a DD-5. While that decision might have been correct in that instance, another decision rendered by the same court, the Appellate Division, First Department, reached a different conclusion following an in camera inspection. In Mitchell v. Slade, it was found that:

> "[t]he Motion Court, after reviewing the documents in camera, declined to dismiss the petition and held that respondent had failed to meet its burden of proving exemption for the redacted DD-5 follow up report. The Motion Court held that the exceptions contained in Public Officers Law §87(2) did not apply in this factual context, citing *Cornell Univ. v. City of N.Y. Police Dept.* (153 Ad 2d 515), and ordered production of the DD-5 with appropriate redaction. On this

> record, after a careful review of the documents produced to the Motion Court, we are satisfied that the materials are not exempt under the law enforcement exemption (Public Officers Law §87[2][e] or the intra-agency (Public Officers Law §87[2][g])" [173 Ad 2d 226, 227 (1991)].

In my opinion, based upon Mitchell, it would be inappropriate to engage in denials of access to DD-5's in every instance in which they are requested. Rather, as suggested in that decision, the "factual context", the specific contents of the records, and the effects of their disclosure are the factors that must be considered in determining the extent to which those records may be withheld or, conversely, must be disclosed.

As you are aware, §87(2)(e) 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."

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).

The other basis for denial, of potential significance, §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.

Again, I believe that the contents of the records and the effects of disclosure determine rights of access, and that a policy of denying requests for DD-5's in every instance is inconsistent with the requirements of the Freedom of Information Law.

Further, it has also been held that police officers' memo books are agency records subject to rights conferred by the Freedom of Information Law [see Laureano v. Grimes, 579 NYS 2d 357, __AD__(1992)]. While I am not suggesting that police officers' memo books must be disclosed in their entirety, based upon Laureano, I believe that those records fall within the scope of the Freedom of Information Law and are accessible or deniable, in whole or in part, depending upon their contents and based upon an analysis similar to that described by the court in Laureano.

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:pb

cc: Karen A. Herrling, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7830

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 28, 1993

Mr. Michael Quartararo
#86-B-0085
P.O. 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. Quartararo:

I have received your letter of July 19 in which you questioned the propriety of a denial access to records by the Department of Correctional Services.

Specifically, you were denied access to "Temporary Release Monthly Reports" pertaining to you. The reports apparently include chronogical information, as well as commentary concerning an individual's success or failure in the program. You indicated that no specific basis for the denial was offered, and that in your view, there appears to be no exception that would justify 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, while I am unfamiliar with the specific contents of the records in question, it appears that one of the grounds for denial is relevant to an analysis of rights of access. That provision, however, due to its structure, may require the disclosure of portions of the records, while permitting an agency withhold other portions of records. Specifically, §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.

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 781

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 28, 1993

Mr. Robert Williams
#86-A-3179
Great Meadow Corr. Fac.
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. Williams:

I have received your letter of July 23 in which you sought advice concerning the Freedom of Information Law in relation to a request for records of the Division of State Police.

By way of background, you requested a variety of records relating to your arrest. Although some of the records were determined to be accessible, others were denied, including an autopsy report and pathology reports, which were found to be exempted from disclosure pursuant to §679 of the County Law, as well as case investigation and follow up reports, detective reports, statements of witnesses and informants and memoranda prepared by investigators. Those records were withheld on the grounds that disclosure would constitute an unwarranted invasion of personal privacy and because they were compiled for law enforcement purposes and, if disclosed "would reveal criminal investigative techniques and procedures and identify confidential information relating to a criminal investigation."

In this regard, I offer the following comments.

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

record or report may contain both accessible and deniable information. That phrase also imposes on obligation to review records sought in their entirety to determine which portions, if any, may justifiably be withheld and to disclose the remainder.

Second, as suggested in response to the request, §677 of the County Law provides essentially that autopsy reports and related records are available only to a district attorney and the next of kin of the deceased; others would need a court order to obtain such records. Consequently those records would be specifically exempted from disclosure in conjunction with §87(2)(a) of the Freedom of Information Law and §677 of the County Law.

Third, with respect to the remaining records that were withheld, since I am unaware of their contents or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential relevance 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 or withholding records 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.

Lastly, of potential significance is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)]. With respect to access to the kinds of records used in a public proceeding, the Court in Moore noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

While you may not have possession of the records sought, it is possible that the records at issue were disclosed to your trial counsel. As such, it is suggested that you contact that attorney to obtain the records or to ascertain whether he or she maintains the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Francis DeFrancesco, Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7832

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 29, 1993

Mr. Albert Merget
[redacted]

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

Dear Mr. Merget:

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

You referred to issues raised previously as well as an advisory opinion rendered at your request on April 21 concerning requests for records of the East Ramapo Central School District. While I do not believe that I can add significantly to the commentary offered in the opinion issued in April, I offer the following comments.

First, it is likely that the best source of administrators' salaries and "benefit packages" would be their contracts. In this regard, to reiterate, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 opinion, a contract between an administrator or administrators 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, an administrators' 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.

Second, when an agency denies access to records, a 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 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, 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."

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: Janet Hardwick
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7833

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 29, 1993

Mr. Arthur Marotta
[redacted]

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

Dear Mr. Marotta:

I have received your letters of July 26 and July 28 in which you sought assistance concerning a request for records of the Town of Huntington.

The form attached to your initial letter indicates that you requested contracts between the Town and a particular firm, as well as permits issued to "excavate and trench" in a certain location. Because it was assumed that you are a litigant, the request was denied on the advice of a Town attorney on the ground that the Freedom of Information Law "may not be used as a substitute for the discovery techniques provided by the Civil Practice Law & Rules." You indicated, however, that you are not involved in litigation.

In this regard, I offer the following comments.

First, the pendency of litigation or the possibility that a person seeking records may be a litigant is largely irrelevant to considerations of public rights of access under the Freedom of Information Law. As stated by the State's highest court, 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

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 or one's status as a litigant in my opinion would have no effect upon a person's rights as a member of the public when seeking records 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. From my perspective, contracts into which the Town has entered and permits issued by the Town should be disclosed. In short, the grounds for withholding records are limited, and none in my view could justifiably be asserted to withhold the records sought.

As you requested and 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Mr. Camelerie
Gary Field, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7834

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 30, 1993

Mr. Ronald Jackson
[redacted]

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

Dear Mr. Jackson:

As you are aware, I have received your recent correspondence which relates to questions that you have raised concerning the "procurement policy" of the White Plains Housing Authority. You serve as a tenant representative on the Authority's Board.

Most recently you wrote to the Chairman of the Board in an effort "to perform [your] duties and to represent the people who elected" you, and you requested a variety of materials under the Freedom of Information Law, including the Authority's contracts for insurance policies, records concerning "personal and slander liability suits with the Authority" or its personnel, insurance companies' letters to the Authority "spelling out the liabilities and whether or not we are covered under said policy," and a report outlining any pending litigation in which the Authority or its personnel may be involved.

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, and §422 of the Public Housing Law specifies that the White Plains Housing Authority "shall constitute a body corporate and politic." Since the definition of "agency" includes public corporations, I believe that the White Plains Housing Authority is clearly an "agency" required to comply with the Freedom of Information Law. Moreover, in a decision involving the White Plains Housing Authority, it was held 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Third, it is noted that the Freedom of Information Law pertains to existing records, and that §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 Authority does not maintain a record outlining litigation in which it is involved, it would not be obliged to prepare such a record on your behalf. However, even if no such record exists, for reasons to be described later, I believe that other records pertaining to litigation would be available under the Freedom of Information Law.

Fourth, 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, contracts or agreements between the authority and insurance companies, as well as the policies themselves must be disclosed. Similarly, I believe tht correspondence from insurance companies explaining their coverage would be available. In short, the grounds for withholding records are limited, and none in my view could justifiably be asserted to withhold those kinds of records.

With respect to records relating to litigation, 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, 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)]. In addition, §4503 of the

Civil Practice Law exempts from disclosure records that are subject to the attorney-client privilege. However, insofar as records maintained by Authority pertaining to litigation have been served upon the Authority by party in litigation against the Authority, have been served by the Authority upon or filed with a party to a proceeding or a court or have otherwise been disclosed to persons other than clients subject to an attorney-client relationship, I believe that they must be disclosed by the Authority under the Freedom of Information Law. On the basis of those kinds of litigation papers, you can ascertain the nature of proceedings in which the Authority is involved.

I hope that 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: Myron C. Simon, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7835

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 30, 1993

Mr. Sean Ryan
#78-B-1089 B2/155
P.O. Box 700
Wallkill, N.Y. 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. Ryan:

I have received your letter of July 26 in which you wrote that the Cayuga County District Attorney's office has failed to respond to your requests. You have sought guidance 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)].

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.

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 §87(2)(a) through (i) of the Law.

Third, since I am unaware of the nature of the records sought, their contents or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential relevance 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 or withholding records 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 the Office of the District Attorney for use by its staff or those communicated with another agency, i.e., a police department, insofar as they consist of opinions or advice, for example, could in my opinion be withheld under §87(2)(g).

Lastly, of potential significance is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)]. With respect to access to the kinds of records used in a public proceeding, the Court in Moore noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

While you may not have possession of the records sought, it is possible that the records at issue were disclosed to your trial counsel. As such, it is suggested that you contact that attorney to obtain the records or to ascertain whether he or she maintains the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: District Attorney, Cayuga County

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7836

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 30, 1993

Mr. Gerry Galbreath
Regulatory Agency Management Systems
8789 San Jose Boulevard, Suite 103
Jacksonville, FL 32217

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

Dear Mr. Galbreath:

As you are aware, your letter of July 14 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee is authorized to provide advice concerning the State's Freedom of Information Law.

According to your letter, your requests for lists or computer tapes containing the names and addresses of licensees have been met with "a variety of responses." You have asked whether those kinds of records are available to the public generally or whether their use is "restricted."

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 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, 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 right 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 right 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 §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.

Third, the only exception to the principles described above involves the protection of personal privacy. By way of background, §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, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

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

Fourth, it is likely that among agencies' concerns is compliance with the Personal Privacy Protection Law, which applies only to state agencies, but not units of local government. In brief, under §96 of that statute, a state agency is precluded from disclosing personal information, except in conjunction with certain exceptions authorizing disclosure. Further, when §96 of the Personal Privacy Protection Law is read in conjunction with §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."

It is emphasized that the provision pertaining to lists of names and addresses pertains only to lists identifying natural persons, as opposed to business entities, for example. Therefore, a list of nursing homes regulated by the State Department of Health, for instance, would be available, for it would not identify natural persons.

Lastly, if a statute other than the Freedom of Information Law specifically directs or prohibits disclosure of certain records, that statute would prevail over the Freedom of Information Law. For example, the Election Law directs that voter registration lists are available. Because a statute pertaining to particular lists requires disclosure, those lists must be made available, notwithstanding the provisions of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7837

162 Washington Avenue, Albany, New York 12231
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August 2, 1993

Mr. Jeffrey N. Mis
City Attorney
City of North Tonawanda
City Hall
216 Payne Avenue
North Tonawanda, NY 14120-5489

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

Dear Mr. Mis:

I have received your letter of July 23 in which you raised questions concerning access to certain records.

You wrote that it is your understanding that "where a bid opening has taken place, the records reflecting the outcome of the bid are available to the public." However, you asked whether "the actual bids once received by the Clerk's office [are] considered public records that are available for inspection, or are they not public records available for inspection until the bids are officially opened." You asked further whether "the opening of the bids alone and compiling of same determine whether they are public records" or whether they do not become accessible "until the public body has made a determination on those bids." Finally, you questioned whether actual bids and their contents or "only the compilation of same" are accessible.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to mean:

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

Therefore, as soon as a bid or any other documentation comes into the possession of an agency, I believe that it would constitute a "record" that falls within the coverage of the Freedom of Information Law. This is not to suggest that a bid must be disclosed immediately when it is received, but rather that it is subject to rights of access conferred by the Freedom of Information Law.

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

I believe that most relevant with respect to access to bids and related records is §87(2)(c). That provision permits an agency to withhold records or portions thereof that:

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

In my view, the key word in §87(2)(c) is "impair", and the potential for harm or impairment as a result of disclosure is the determining factor regarding the propriety of a denial under that provision.

In the context of your letter, if, for example, an agency seeking bids receives a number of bids and related records, but the deadline for their submission has not been reached, premature disclosure of the records to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or other records has been reached, often the passage of that event results in the elimination of harm. As such, bids may be available, depending upon the attendant facts, even prior to an official bid opening or a determination to make an award. Further, it has been held that bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. From my perspective, the same principles would apply to letters or other documentation submitted by bidders.

Another provision 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."

In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. If, for example, records 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 §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.

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-7838

162 Washington Avenue, Albany, New York 12231
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August 2, 1993

Mr. Abraham Hightower
92-A-1231
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. Hightower:

I have received your letter of July 18, which reached this office on July 29. Please accept my apologies for failing to include "Your Right to Know" with the opinion of July 12 addressed to you. Enclosed is a copy of that publication.

You have raised a series of questions relating to that opinion. In this regard, I offer the following comments.

First, the general provision concerning access to court records is §255 of the Judiciary Law, and it is suggested that requests for those records be made pursuant to that statute.

Second, with respect to records maintained by police departments or offices of district attorneys and the scope of the Freedom of Information Law, I point out that §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."

Therefore, in my opinion, records maintained by agencies are subject to rights conferred by the Freedom of Information Law, regardless of their function or source, and that statute may be cited when seeking agency records.

Third, the difficulties that you have encountered regarding your efforts to obtain records from your attorney are not directly related to the Freedom of Information Law, for the attorney and his her records fall beyond the coverage of that statute. However, it is suggested that you review the passages quoted from Moore v. Santucci in the earlier opinion on pages 4 and 5, for I believe that the direction provided in that decision may be useful to you.

Lastly, you wrote that "the D.A. the courts and the police failed to issue detailed refusals of [your] request[s] pursuant: §89(4)(A)", and you questioned "the gravity of this violation." As indicated in the earlier opinion, the courts are not subject to the Freedom of Information Law. Consequently, §89(4)(a) is inapplicable regarding a response to an appeal rendered by court personnel. With respect to agencies that are required to comply with the Freedom of Information Law, in my view a failure to "fully explain" the reasons for a denial tends to encourage litigation. Conversely, if a determination sustaining an initial denial includes complete rationale for a denial, an applicant has more adequate information to judge whether such a determination has merit or should be the subject of judicial review.

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 7839

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 3, 1993

Mr. Donald H. Piron
[redacted]

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

Dear Mr. Piron:

I have received your letter of July 28 and the materials attached to it.

In brief, having attempted to obtain records indicating the address of former tenants who owe you back rent, Onondaga County has denied your request, and you have sought assistance in the matter.

In this regard, I offer the following comments.

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

Second, of relevance to the issue is the first 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 §136 of the Social Services Law. Subdivision (1) of §136 states in part that:

> "The names and 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 the social services official of the county, city or town, to a person or agency considered entitled to such information."

Further, subdivision (2) of §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."

Based upon the foregoing, I believe that the information in question is exempted from disclosure pursuant to §136 of the Social Services Law and, therefore, §87(2)(a) of the Freedom of Information Law.

In short, while I am sympathetic, I do not believe that the County has the authority to disclose records identifiable to recipients of public assistance.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Christina Pezzulo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1840

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 3, 1993

Kenneth G. Pavel
#90-C-1235
Elmira Correctional &
Reception Center
P.O. Box 500
Elmira, N.Y. 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. Pavel:

I have received your letter of July 25 which pertains to a request for a manual maintained by the Department of Correctional Services.

In brief, you were informed that the fee would be twenty-five cents per photocopy. It is apparently your view that you should be charged "the actual reproduction costs," and you have sought my opinion on the matter.

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, the first clause provides that an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, irrespective of the actual cost of preparing a photocopy. 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, computers tapes or disks, etc., or those records that are larger than nine by fourteen inches. With respect to those records, the regulations promulgated by the Committee on Open

Government indicate that the actual cost of reproduction "is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries" [21 NYCRR §1401.8(c)(3)].

In sum, when photocopies up to nine by fourteen inches are prepared in response to a request made under the Freedom of Information Law, the portion of §87(1)(b)(iii) involving the actual cost of reproduction is, in my view, inapplicable, for an agency in such cases may, by rule, charge up to twenty-five cents per photocopy, whether the actual cost is above or below that amount.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2253
FOIL-AO- 7841

162 Washington Avenue, Albany, New York 12231
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August 3, 1993

Ms. Victoria V. Lawson
[redacted]

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

Dear Ms. Lawson:

I have received your note of July 24 pertaining to a request for records of the Town of Greenburgh.

Insofar as I can understand your comments and notations, you requested minutes of a public hearing/meeting, and particularly, page 18. In this regard, §106 of the Open Meetings Law pertains to minutes of meetings and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, that provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of 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, while minutes of an open meeting must consist, at a minimum, of a "record or summary" of motions, proposals, resolutions, action taken and the vote of the members of a public body, there is no requirement that minutes consist of a verbatim account of the statements made or discussions that occurred at meetings.

Additionally, it appears that you requested records relating to escrow funds, escrow districts, and certain trust deposits maintained by the Town. While I am unfamiliar with any law pertaining to "escrow districts", it is noted that the Freedom of Law is based upon a presumption of access. Stated differently, all records 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 town's books of accounts, ledgers and similar records would likely be available. In short, the grounds for denial are limited, and it does not appear that any would be applicable regarding 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

OML-AO 2254
FOIL-AO 7842

162 Washington Avenue, Albany, New York 12231
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August 4, 1993

Ms. Loretta Prisco
Representative
Parents Action Committee for
Education
30 Westbury Avenue
Staten Island, NY 10301

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

Dear Ms. Prisco:

I have received your letter of July 30 in which you requested an advisory opinion on behalf of the Parents Action Committee for Education (PACE).

According to your letter:

> "In January 1993, the Superintendent of District 31 convened a Committee of community members to review the NYC HIV/AIDS Curriculum. Members of this committee included parents, Director of the SI AIDS Task Force, members of the clergy, a gay person, UFT District Rep, three members of the Community School Board, a principal and a teacher. A Special Assistant to the Superintendent chaired the several meetings held. All meetings were held in the District Office and closed to the public."

You wrote that when the Task Force had completed its work, minutes of meetings and a summary report were submitted to the District. PACE requested a copy of the report on July 24, and as of the date of your letter to this office, it had received no response. However, you added that the Superintendent has informed the news media that the report is not "public".

In conjunction with the foregoing, you expressed the belief that the meetings of the Task Force should have been open to the public pursuant to the Education Law and that the report should be disclosed to the public. You have sought my views on the matter.

In this regard, I offer the following comments.

First, with respect to meetings of the Task Force, I point out that 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."

Recent decisions indicate generally that advisory ad hoc entities, other than committees consisting solely of 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, it appears that the Task Force would not have been subject to the Open Meetings Law.

Second, while I am not an expert on the subject, even when an entity is not subject to the Open Meetings Law, if it holds its meetings on school property, §414 of the Education Law may require that its meetings be held open to the public. That provision enables a board of education to authorize school property to be used for certain purposes, such as:

> "For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public" [§414(1)(c)].

If the Task Force met on school property to engage in a "civic" function or a matter "pertaining to the welfare of the community", it appears that §414 of the Education Law would have required that its meetings be held open to the public. Again, since I lack expertise regarding the Education Law, it is suggested that you might contact the Office of Counsel at the State Education Department to obtain additional guidance on the subject. That office can be reached at (518) 474-6400.

Third, with respect to the report, I direct your attention to the Freedom of Information Law. As you may be aware, that statute pertains to agency records, and §86(4) defines the term "record" broadly to include:

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

Based on the foregoing, when a document or report is maintained by or produced for an agency, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

In §86(3) of the Freedom of Information Law, "agency" is defined to mean:

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

As such, a school district or school board would clearly constitute an "agency". However, if the Task Force is not a public body because, based on judicial decisions, it does not perform a governmental function, it would not be an agency, for it would not perform that function. If that is so, the only ground for denial in the Freedom of Information Law of likely relevance would in my opinion be inapplicable. 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 §87(2)(a) through (i) of the Law. The provision to which I alluded, §87(2)(g), permits an agency to withhold "inter-agency or intra-agency materials", depending upon their contents. From my perspective, since the Task Force is apparently not an agency, the report transmitted to the Superintendent would not consist of either inter-agency or intra-agency material. If that is so, §87(2)(g) could not be asserted as a basis for denial. Moreover, in view of the information that you provided, none of the other grounds for denial would be applicable.

Lastly, although I am unaware of whether or when a response to your request may be been given, 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

Robert J. Freeman
Executive Director

RJF:jm

cc: District Superintendent
Christy Cugini

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2255
FOIL-AO 7843

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 4, 1993

Ms. Marilyn Wessels
President - SAFE
1365 Van Antwerp Road
Schenectady, NY 12309

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

Dear Ms. Wessels:

I have received your letter of July 28 in which you described a series of difficulties and delays concerning your attempts to obtain information from the State Education Department. Based upon your commentary, I offer the following remarks.

First, although I have not seen the correspondence between yourself and the Department, it appears that you raised questions in an effort to obtain information. In this regard, it is noted at the outset that 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, a Department official in my view would not be obliged to provide information by answering the questions raised in a request.

Second, when a request for existing records is made, 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)].

Third, you referred to deliberations that occurred during an open meeting and a request for "minutes of that discussion". In this regard, §106 of the Open Meetings Law pertains to minutes of meetings and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, that provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be

> made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of 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, while minutes of an open meeting must consist, at a minimum, of a "record or summary" of motions, proposals, resolutions, action taken and the vote of the members of a public body, there is no requirement that minutes consist of a verbatim account of the statements made or describe in detail discussions that occurred at meetings.

Lastly, 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 §87(2)(a) through (i) of the Law.

It appears that you are seeking information indicating the basis for reinstatement of a position. Insofar as records exist concerning that subject, it is likely that one of the grounds for denial would be particularly relevant. That provision, however, due to its structure, may require disclosure of records or portions of records. Section 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, if a tape recording of an open meeting is maintained by an agency, such a record, based upon the language of the Freedom of Information Law and its judicial interpretation, would clearly be available (see Zaleski v. Hicksville Union Free School District Board of Education, Supreme Court, Nassau County, NYLJ, December 27, 1978).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eugene Snay

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7844

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 4, 1993

Mr. Vell Kurt Smithers
88-B-2429
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. Smithers:

I have received your letter of July 25 and the materials attached to it.

The correspondence pertains to a request made to the Division of State Police for records relating to the investigation of a homicide for which you were convicted. In response to the request, you were informed that the Division was unable to locate some of the records sought, and certain records were made available, while others were withheld. You have asked whether a response to a request "must contain more than just the mere recitation of the statute", and you requested my views concerning access to the records in question.

In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law provides that a denial of a request must be made in writing, and the regulations promulgated by the Committee on Open Government state that the reasons for the denial must be given [21 NYCRR §1401.2(b)(3)(ii)]. In my view, the response to the request was appropriate, for it offered, albeit briefly, reasons for a denial. I point out that a response to an appeal must be more detailed, for §89(4)(a) of the Freedom of Information Law provides that such response must "fully explain in writing to the person requesting the record the reasons for further denial..."

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 §87(2)(a) through (i) of the Law.

Since I am unaware of the nature of the records sought, their contents or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential relevance 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 or withholding records 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 the Office of the District Attorney for use by its staff or those communicated with another agency, i.e., a police department, insofar as they consist of opinions or advice, for example, could in my opinion be withheld under §87(2)(g).

Lastly, of potential significance is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)]. With respect to access to the kinds of records used in a public proceeding, the Court in Moore noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

While you may not have possession of the records sought, it is possible that the records at issue were disclosed to your trial counsel. As such, it is suggested that you contact that attorney to obtain the records or to ascertain whether he or she maintains the records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Col. Raymond G. Dutcher
Francis A. DeFrancesco, Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7845

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 4, 1993

Mr. Otto R. Sykora
[redacted]

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

Dear Mr. Sykora:

I have received your letter of July 28 in which you raised questions concerning access to records of the Bay Shore Union Free School District.

By way of background, on July 8, you requested the 1993-94 salaries of the District's professional staff. In response, you were informed that you could obtain the information "around September 1, 1993." You questioned the delay, particularly since those salaries would be paid beginning on July 1. You also asked whether in February of next year, you can obtain the 1993 W-2 forms of staff.

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, 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.

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 and maintained on an ongoing basis 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. Further, if employees began to be paid at their current level since July 1, there would appear to be no valid reason for delaying the disclosure of the salary information in question until the date that was suggested by the District.

Lastly, with respect to W-2 forms, it has been contended that those 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 it is possible a public employer, 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.

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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Manus O'Donnell
Doris Willaschat

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7846

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 5, 1993

Mr. Edward MacKenzie
92007197
Nassau County Correctional Center
C.S. 1072
Hicksville, NY 11802

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

Dear Mr. MacKenzie:

I have received your letter of July 29 in which you sought assistance concerning access to records.

Having requested your sentence and commitment papers from the inmate records coordinator at the Nassau County Correctional Center, you were advised that you should seek them from Supreme Court, New York County. When you wrote to the Court, you were advised to seek the records in question from the inmate records coordinator.

From my perspective, insofar as either the Correctional Center or the court maintains the records in which you are interested, either should disclose the records. In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law pertains 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 or other governmental 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 the Freedom of Information Law is applicable to the Correctional Center, the courts and court records are outside its coverage.

This is not to suggest, however, that court records are necessarily exempt from disclosure, for other provisions of law often require disclosure of court records (see e.g., Judiciary Law, §255). Consequently, if you cannot obtain the records from the Correctional Center, it is recommended that you seek them from the clerk of the appropriate court pursuant to an applicable statute.

Second, as the Freedom of Information Law pertains to an agency, all agency records are subject to rights of access, and §86(4) defines the term "record" to mean:

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

Therefore, if the documents you seek are maintained by the Correctional Center, I believe that they would constitute "records" that fall within the scope of the Freedom of Information Law, and that the agency must respond to a request by granting or denying access to those 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 §87(2)(a) through (i) of the Law. If my understanding of the nature of records in question is accurate, the Correctional Center would be required to disclose them if it possesses those records, for none of the grounds for denial would appear to applicable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7847

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 6, 1993

Mr. Robert Poole
87-A-8514
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Poole:

I have received your letter of August 2 and the materials attached to it.

According to your letter, on June 24, you requested a copy of "the C.P.L. Section 330.30 motion filed with the Court on [your] behalf before sentencing" from the Queens County District Attorney. As of the date of your letter, you had received no response to the request, and you have sought assistance in the matter.

In this regard, I offer the following comments.

First, each agency is required to designate one or more "records access officers". The records access officer has the duty to coordinate an agency's response to requests, and a request should generally be directed to that person. I believe that the records access officer designated by the District Attorney is Mr. Gregory Pavlides. In my opinion, the District Attorney should either have responded to the request or forwarded it to Mr. Pavlides or other person in his office for the purpose of responding.

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 §87(2)(a) through (i) of the Law. It would appear that the record in question, if it is maintained by the Office of the District Attorney, would be accessible, for none of the grounds for denial would likely apply.

Lastly, as an alternative, although the Freedom of Information Law does not apply to the courts, court records are often available under other statutes (see e.g., Judiciary Law, §255). As such, you could seek the record from the clerk of the appropriate court.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Gregory Pavlides

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7848

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 6, 1993

Dr. Mark S. McNeill
Superintendent of Schools
101 Church Street
Nanuet, NY 10954

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

Dear Dr. McNeill:

I have received your letter of August 2 and the correspondence attached to it.

You have sought clarification with respect to requests for information that have been directed to the District that you serve, and the "proper scope of the Freedom of Information Law." Specifically, you asked whether "all requests for information made of the District [should] be equated with the Freedom of Information Law", or whether "the district [can] reasonably expect requests to be made in writing and identify themselves as pursuant to the Freedom of Information Law." In one of the requests for information, the District was asked to provide advice concerning "the status of Latin study", whether Latin courses are or will be available, and whether there has "been anything special about your Latin program." That inquiry did not refer to the Freedom of Information Law. Another request, which was made "[P]ursuant to the Freedom of Information Law", involves "a list of all the custodians who have worked in the past three years at the Nanuet School District, and the amount of salary and overtime they have earned."

In this regard, I offer the following comments.

First, when a person seeks records from an agency, although I believe that an agency can require that the request be made in writing, I do not believe that he or she must specifically refer to the Freedom of Information Law. While some people may have familiarity with that statute, others may have only a general notion that there is some sort of right to gain access to government records. Further, in view of the broad statement of intent appearing in its legislative declaration (see Freedom of

Information Law, §84), a refusal to respond to a request based upon a failure to cite that statute would in my opinion be inconsistent with its intent.

Second, however, 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 a "list" of custodians employed by the District during the past three years, I do not believe that staff would be required by the Freedom of Information Law to prepare new records on behalf of an applicant.

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 or providing information sought in a 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, while there may be no list of custodians and their wages, that kind of information, insofar as it is contained in existing records, would in my opinion be clearly available. As you may be aware, §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. Therefore, even though there may no single record identifying custodians and their wages, there would appear to be no overriding reason for not answering, for records containing the information sought would be available under the law.

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

OML AO 2257
FOIL-AO 7849

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 6, 1993

Ms. Cathy Lombardi
The Special Projects Group
75 Aden Road
Liberty, NY 12754

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

Dear Ms. Lombardi:

I have received your letter of August 1 and the materials attached to it.

Your inquiry concerns a reorganizational meeting recently held by the Liberty Central School District Board of Education, and the issue involves the propriety of an executive session held by the Board to discuss the election of its officers. You wrote that a lengthy executive session was held prior to nominations and the vote.

In this regard, I offer the following comments.

First, by way of background, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, an executive session is not separate and distinct from an open meeting; on the contrary, an executive session is a part of an open meeting that must be convened open to the public and preceded by notice given to the news media and by means of posting in accordance with §104 of the Open Meetings Law. Moreover, a public body cannot enter into an executive session without accomplishing the procedure described in §105(1) of the Open Meetings Law. 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..."

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].

Second, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

In my opinion, discussions regarding the election of officers would not have fallen within any of the grounds for entry into executive session. The only provision that appears to be relevant to the matter, §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..."

Although the discussion and election of officers involves consideration of particular individuals, it is unlikely that any of the specific subjects included within §105(1)(f) would have been applicable in conjunction with deliberations involving the selection of school board officers. In short, while "matters leading to" certain actions relating to specific persons may be discussed during executive sessions, matters leading to the election of officers is not among them.

Third, with respect to the absence of any record indicating how the members voted, I point out in passing 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. 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, none of which would have been present in the situation in question.

In addition, 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 cast 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."

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, 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); aff'd 72 NY 2d 1034 (1988)].

Further, there is case law dealing with the notion 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, 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).

As such, if a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous 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 a public body relies in carrying out its duties, I believe that the minutes should reflect the actual votes of the members.

As you requested, enclosed are copies of the Freedom of Information Law and the Open Meetings Law, as well as a brochure that describes both of those laws.

I hope that I have been of some assistance.

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-7850

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 6, 1993

Mr. Michael A. Kless
[redacted]

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

Dear Mr. Kless:

I have received your recent letter in which you requested guidance concerning a request directed to the Buffalo Municipal Civil Service Commission.

Having received a copy of an eligible list, you requested a copy of the procedure concerning the manner in which information pertaining to the race and sex of candidates is obtained. In response, you were informed that you are "only entitled to documents." It is your contention, however, that "if it is listed it must be covered by a procedure."

In this regard, I offer the following comments.

First, 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 there is no written policy or procedure concerning the acquisition of the information in question, the agency would not be obliged to prepare such a record on your behalf.

Second, if a written policy or procedure regarding the matter does exist, I believe that it would be accessible under the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Although one of the grounds for denial is relevant to analysis of rights of access to any such records, that provision, due to its structure, 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.

Lastly, I point out that another 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". In my opinion, although the eligible list attached to your letter includes candidates' social security numbers, their race and their sex, those items could have been withhold 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Buffalo Municipal Civil Service Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7851

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 6, 1993

Mr. Lester B. Herzog
Attorney and Counselor at Law
1729 East 15th Street
Brooklyn, NY 11229

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

Dear Mr. Herzog:

I have received your letter of July 28 and the correspondence attached to it.

You have sought assistance in "prodding" the New York City Transit Authority to comply with the Freedom of Information Law regarding a request, thereby "obviating the need" to resort to litigation on the matter. You wrote that an initial request was made in September of 1992, and that you received a response "with some of the documents in March of this year." Later that month, you wrote to the Transit Authority "indicating what is still outstanding." As of the date of your letter to this office, you wrote that "all items sought therein remain outstanding."

Although the correspondence does not describe the incident that precipitated the request, it appears that the records sought relate to an incident involving a token booth clerk, as well as other records pertaining to that person.

In this regard, I offer the following comments.

First, it is noted 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)].

Second, many of the records sought involve complaints concerning the clerk or disciplinary action that may have been taken. 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 §87(2)(a) through (i) of the Law.

Of likely relevance is §87(2)(b) of the Freedom of Information Law, which 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. 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].

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 complaints, 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)]. To the extent that charges are dismissed or allegations or complaints are found to be without merit, I believe that they may be withheld.

While I am unfamiliar with the records sought, I believe that the provisions concerning unwarranted invasions of personal privacy may also be applicable as a basis for withholding identifying details pertaining to civilians or passengers who may have made complaints.

Also of relevance is §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. Many of the records prepared in conjunction with an investigation would constitute inter-agency or 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.

Two aspects of your request pertain to "voice communication tapes." It is unclear who might have been involved in any such communications or whether the incident involved criminal activity. If that is a consideration, in addition to the provisions previously discussed, §87(2)(e) may be of significance, for it 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."

Insofar as the records in question could be characterized as having been compiled for law enforcement purposes, such records may be withheld to the extent that the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e) would arise as a result of disclosure.

Lastly, one aspect of your request involves "[a]ny records/reports/statements made or filed by the token booth clerk." While that portion of the request may be intended to relate to records pertaining to the incident, its scope is not clearly defined. As you may be aware, §89(3) of the Freedom of Information Law 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 the context of your request, I must admit to being unfamiliar with the Authority'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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carol Harris
Albert C. Cosenza

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2258
FOIL-AO 7852

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August 9, 1993

Mr. Christopher J. Nolan
Corporate Counsel
Newsday
235 Pinelawn Road
Melville, N.Y. 11747-4250

The staff of the Committee on Open 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:

As you are aware, I have received your letter of August 2 in which you requested an advisory opinion concerning the status of the Queens Borough Public Library ("the Library") under the Freedom of Information Law.

By way of background, you wrote that the issue has arisen in conjunction with a Newsday reporter's efforts to obtain financial information pertaining to the Library in general, and its Board of Trustees in particular. You added than in an oral denial of the reporter's request, he was informed that the Library is a "private non-profit corporation which simply contracts with the City of New York to provide free public libraries to the residents of Queens," and that, therefore, it is not a government agency falling within the coverage of the Freedom of Information Law.

Enclosed with your letter are copies of various materials describing the history of the Library, including legislation enacted in 1907 and later amended in 1913. The legislation of 1907 "incorporates" the "Queens Borough Public Library," and significantly, in my opinion, states in Section 1 that the Library constitutes "a body corporate and politic." Section 3 states in part that the Library's Board of Trustees "shall have absolute control of the City of New York for the maintenance of libraries conducted, or to be conducted in the Borough of Queens..." The amendment to the act of incorporation enacted in 1913 states that the Mayor, the Comptroller and the President of the Board of Aldermen shall be ex officio members of the Board of Trustees and that the "trustees shall hereafter be chosen and vacancies occurring in such office filled by appointment by the Mayor of the City of New York."

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 or other governmental 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 noted that the definition makes specific reference to public corporations and any other governmental entity performing a governmental or proprietary function for a municipality. In my view, by constituting the Library as "a body politic and corporate" in the Act of Incorporation enacted by the State Legislature, the Legislature created a public corporation. I point out that the primary meaning of "politic" according to an ordinary dictionary definition of that term is "political", and that "political" is defined to mean "of or relating to government, a government, or the conduct of government" (see Webster's Seventh New Collegiate Dictionary." Similarly, Black's Law Dictionary defines the phrase "political corporation" to mean a "public or municipal corporation; one created for political purposes, and having for its object the administration of governmental powers of a subordinate or local nature.

Based upon the foregoing, I believe that the Library is a public corporation. Since a public corporation is an "agency" for purposes of the Freedom of Information Law, the Library in my view is clearly required to comply and disclose its records in accordance with that statute.

Second, even if it were not clear that the Library is a public corporation, I point out that there is case law in which it has been determined that certain entities, although characterized as not-for-profit corporations, are agencies subject to the Freedom of Information Law due to their statutory relationships or nexus with government.

For instance, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information

> Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84; id., 579).

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control

> over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Another example involves local development corporations created pursuant to §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."

In two judicial decisions dealing with the status of local development corporations, both 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."

It is noted that in the agreement between the City of New York and the Library entered into 1907 following the incorporation of the Library by the State Legislature earlier that year, there are various provisions that indicate a nexus between the City and the Library and which suggest that the Library is essentially an extension of City government. Paragraph three of the agreement states in part that the City:

> "will appropriate and pay for the maintenance and support of said The Queens Borough Public Library such sums as may be requisite for the proper maintenance of the libraries under its jurisdiction, such amount to constitute a city charge and to provide for in the annual Budget and tax levy of said City."

Paragraph five of the agreement states in part that:

> "...the title to the library property in said Borough of Queens heretofore vested in the City as part of said free library system, shall remain in said City, and all books and other personal property hereafter purchased by said The Queens Borough Public Library out of moneys appropriated by said City for the maintenance of said free library system, shall be and remain the property of the City..."

Moreover, as indicated earlier, the Board of Trustees of the Library, by statute, consists of ex officio City officials and others, all of whom are appointed by the Mayor. As such, the Mayor

and New York City government maintain significant control and have significant legal relationships with respect to the Library.

In view of the case law pertaining to somewhat analogous relationships between governmental entities and the not-for-profit entities described in those decisions, again, I believe that the Library would constitute an agency subject to the Freedom of Information Law even if its corporate status were not entirely clear. However, for reasons expressed previously, I believe that the Library is a public corporation and that, as such, it is an "agency" required to comply with the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the kinds of records sought by Newsday's reporter would be accessible. The grounds for denial are limited, and none would apparently be applicable with regard to records containing "financial information pertaining to the Queens Library in general," or with regard to financial information relating to members of the Board of Trustees acting in their capacities as Board members.

Lastly, I point out that the companion statute to the Freedom of Information Law, the Open Meetings Law (Public Officers Law, Article 7), is applicable to meetings of the Board of Trustees. While I believe that the governing body of a public corporation would constitute a "public body" as defined by S102(2) of the Open Meetings Law, in addition to that statute, §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 must be conducted in accordance with that statute. Please note 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.

I hope that 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: Constance B. Cooke, Executive Director
Curtis R. Simmons, Reporter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7853

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 9, 1993

Ms. Betty 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 August 1. As in the case of previous correspondence, the issue involves lists prepared by certain individuals who collected voters' names during a recent election at the Liberty School District. Since you learned that those individuals were not election officials, the question was whether the records they prepared were subject to the Freedom of Information Law.

In brief, I advised as follows:

> "If the information sought is kept by or was produced for the District and exists in some physical form, I believe that it would constitute a "record" subject to rights of access conferred by the Freedom of Information Law. However, if the information sought is neither kept by nor was produced for the District, the Freedom of Information Law would be inapplicable."

Recently, however, you obtained and sent a copy of a bulletin issued by the Liberty Faculty Association. The bulletin states in relevant part:

> "We are again in need of people to make phone calls on the budget vote on Tuesday the 8th. Calls will be made from Cablevision headquarters from 7:00 to 9:00 pm. You will have a prepared script to work from.
>
> "We are also in need of 2 to 4 poll watchers and a runner to deliver lists of names to

> callers on Wed. from 4:00 to 6:00 pm. If you will help to do either the calls on Tuesday or the poll watching on Wed. contact Terri Barbuti at the elementary school or at home 292-5879. You can also contact Charlie Barbuti at the store 292-4826."

You wrote that Terri Barbuti is a teacher employed by the District, that, according to the bulletin, she was contacted during school hours, and that, therefore, "taxpayers' dollars were involved." You have asked whether this additional information is relevant or useful in ascertaining whether the lists collected during the election constitute "records" that fall within the requirements of the Freedom of Information Law.

From my perspective, the opinion previously rendered and quoted above must remain the same. Although the Liberty Faculty Association consists of public employees and is associated with government, I do not believe that it could be characterized as a governmental entity subject to the Freedom of Information Law or that its records fall within the coverage of that statute.

That the teacher may have taken calls on school time raises questions concerning the propriety of that activity. However, I do not believe that it directly bears on an issue concerning access to records. If the lists were prepared by and for the Faculty Association and are solely in its possession, I do not believe that the Freedom of Information Law would apply. On the other hand, if they were produced for the District or are maintained by the District, again, I believe that they would constitute "records" subject to rights of access conferred by the Freedom of Information Law.

I regret that I cannot be of greater 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 7854

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 10, 1993

Mr. Derek Caldwell
#93-A-4157
Clinton Correctional Facility
P.O. Box 2002
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. Caldwell:

I have received your letter of August 2 in which you sought assistance.

According to your letter, have had "problems receiving all papers pertaining to [you] such as any police reports and any material pertaining to [you] on file at One Police Plaza in New York City." In this regard, I offer the following comments.

First, each agency 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 for records, and a request should be made to that person. The records access officer for the New York City Police Department is Sgt. William J. Matusiak, whose office is at Room 110 at One Police Plaza.

Second, if you have merely requested all records pertaining to you, without additional description, such a request would not in my opinion meet the requirements of the law. Section 89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. Therefore, when requesting records, an applicant should provide sufficient detail to enable agency officials to locate the records in which he or she is interested. For instance, identifying information, such as names, dates, indictment numbers, locations and descriptions of events, precinct numbers and similar details would serve to enable agency staff to ascertain which records may be the subject of a request.

Lastly, as a general matter the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. While many records pertaining to you may be available, it is possible that others may be withheld, in whole or in part, in accordance with the grounds for denial.

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 7855

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 10, 1993

Mr. Christopher Anderson
#91-A-7253
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. Anderson:

Your letter addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government, upon which the Secretary serves as a member.

Attached to your letter is a request dated June 21 directed to the records access officer at the Office of the Bronx County District Attorney. It appears that, as of the date of your letter to Secretary Shaffer, you had received no response to the request, and you have sought "redress" from this office.

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 grant or deny access to records or to comply with the Freedom of Information Law.

Second, however, 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, I believe that the person designated to determine appeals by the District Attorney is Anthony Girese, Counsel to the District Attorney.

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 1856

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 10, 1993

Mr. Steve Coffman
Finger Lake Times
218 Genesee Street
P.O. Box 393
Geneva, N.Y. 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. Coffman:

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

The correspondence attached to your letter indicates that you requested "records or portions thereof pertaining to the time sheets filed in 1993 by special annual employees for state Senators Michael F. Nozzolio and John 'Randy' Kuhl." The request was denied.

In this regard, I offer the following comments.

First, I point out that §88 of the Freedom of Information Law deals with rights of access to records of the State Legislature. Further, while there have been numerous judicial decisions concerning rights of access to agency records in accordance with provisions applicable to agencies, there are few decisions that have been rendered with respect to access to records of the Legislature.

It is also noted that the structure of the Freedom of Information Law as it pertains to the State Legislature differs from its structure as it pertains to agencies of state and local government subject to §87 of the Law. In brief, as the Freedom of Information Law applies to agencies, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. As the Law applies to the State Legislature, §88(2) and (3) include reference to certain categories of records that must be disclosed. Therefore, unless records of the Legislature fall within one or more of those categories of accessible records, there is no obligation to disclose.

Second, of potential relevance to your inquiry is §88(3)(b), which requires that each house of the State Legislature maintain and make available "a record setting forth the name, public office address, title and salary of every officer or employee." While that record is not the subject of your request, it may relate to the records sought. Among the categories of records available from the State Legislature is §88(2)(e), which requires the disclosure of "internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for inspection and copying pursuant to this section or any other applicable provision of law."

I am unfamiliar with the specific content of the records in which you are interested. However, if they are typical of time and attendance records, arguably, they would include "statistical or tabulations of, or with respect to" the payroll record required to be made available pursuant to §88(3)(b); on the other hand, if their contents are different or unrelated to records otherwise available by law, they would be beyond the scope of rights of access.

Lastly, it is noted that in a decision affirmed by the State's highest court dealing with attendance records maintained by an agency (not the State Legislature), specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found that the records are accessible. In that case, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the 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 an agency's 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.

Moreover, 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 that an agency's attendance records must be disclosed under the Freedom of Information Law. As suggested earlier, whether that is so with respect to similar records maintained by the State Legislature would be dependent upon their contents and their relationship to records that are available pursuant to the law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Angelo Mangia, Counsel to the Majority
Stephen Sloan, Secretary of the Senate

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1859

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 10, 1993

Ms. Sylvia Gottlieb
District Office of Assemblyman Koppell
3107 Kingsbridge Avenue
Bronx, N.Y. 10463

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

Dear Mr. Gottlieb:

As you are aware, I have received Assemblyman Koppell's letter of August 5 in which he asked that I respond to you concerning the status of the New York Compensation Insurance Rating Board under the Freedom of Information Law.

According to his letter, the entity is a private, non-profit organization. If that is so, the entity in question would not in my opinion be subject to the Freedom of Information Law.

I point out that the Freedom of Information Law is applicable to agencies and that §86(3) of the Law defines the term "agency" to mean:

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

Based upon the foregoing, the Freedom of Information Law generally pertains to entities of state and local government; it does not ordinarily apply to non-profit or private organizations.

It is possible, however, that the Compensation Insurance Rating Board transmits records to an agency, perhaps the Insurance Department or the State Insurance Fund, for example. Any such records maintained by an agency would be subject to rights of access conferred by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7858

162 Washington Avenue, Albany, New York 12231
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FAX (518) 474-1^27

August 11, 1993

Ms. Dianne E. Dixon
Deputy Commissioner
Law Enforcement Bureau
Commission on Human Rights
40 Rector Street
New York, N.Y. 10006

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

Dear Ms. Dixon:

I have received your letter of August 6 addressed to William Bookman, Chairman of the Committee on Open Government. As indicated above, the staff of the Committee is authorized to prepare advisory opinions on its behalf.

You have asked "whether personnel records lose their exempt status under the FOIL when these records become part of an investigation file of another agency, and a FOIL request is made for the file." By way of background, you wrote that your agency, the New York City Commission on Human Rights, investigates and prosecutes discriminatory acts and that many of its cases are brought against other city agencies which, by law, must cooperate. You added that it is often necessary in the course of an investigation to request "the personnel records of non-party employees as a means of evaluating the treatment of the complainant in determining whether probable cause exists to credit the allegations of discrimination." In conjunction with the foregoing, you indicated that "a question has arisen concerning whether [you] are able to assert FOIL's exemption for personnel records, given that these are not the personnel records of [y]our agency." It is your understanding that you "cannot claim that these records are exempt because they are not [y]our personnel records."

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, the function to which it relates, or its origin 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 foregoing, when documents come into the possession of the Commission on Human Rights, even though they may have been forwarded by another City agency, for the purpose of the Freedom of Information Law, I believe that they constitute "records" of the Commission subject to the Freedom of Information

Law. Consequently, in my view, while the Commission is obliged to disclose any such records to the extent required by the Freedom of Information Law, it also has the ability to withhold those records in accordance with the grounds for denial appearing in that statute. In short, even though the Commission did not prepare the records in question and the subjects of those records are not its employees, the records are nonetheless maintained by the Commission and, therefore may be disclosed or withheld by the Commission pursuant to disclosure and/or denial provisions of the Freedom of Information Law. Similarly, I believe that the Commission would have the same duty to disclose or authority to withhold the records as the agency that is the primary custodian of the records.

Second, there is no specific reference or exemption in the Freedom of Information Law regarding personnel records, and the nature and content of those records 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.

Third, 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.

From my perspective, it is likely that two of the grounds for denial would be most relevant in ascertaining rights of access to the records at issue. Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Again, in my opinion, the nature and content of personally identifiable information, not necessarily the agency that maintains it, would be the factors to consider in an analysis of rights of access or the authority to withhold. A deletion that you currently make can serve as an example. Specifically, whether the Commission or an employing agency maintains an employee's social security number is irrelevant in terms of the Freedom of Information Law; either in my view could withhold that item as an unwarranted invasion of personal privacy, for the infringement upon privacy and the effect of disclosure would be same, regardless of which agency maintains or perhaps discloses that kind of personal information.

The other ground for denial of likely significance, §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.

In my view, opinions expressed by non-party employees in the context of an investigation, for example, could be withheld under §87(2)(g), and perhaps §87(2)(b) as well.

Lastly, since you referred to agencies' "fear that they may be incurring liability from these disclosures," I point out that the Freedom of Information Law is permissive. While an agency may withhold records in appropriate circumstances, it is not required to do so. As stated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, while an agency may withhold records in accordance with the grounds for denial, it is ordinarily not obliged to do so. This is not to suggest that records otherwise deniable should be disclosed. While I am not an expert on the subject, consideration should be given to the possibility that inappropriate disclosures could result in claims regarding stigma under the federal Civil Rights Act.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1859

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 10, 1993

Ms. Sylvia Gottlieb
District Office of Assemblyman Koppell
3107 Kingsbridge Avenue
Bronx, N.Y. 10463

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

Dear Mr. Gottlieb:

As you are aware, I have received Assemblyman Koppell's letter of August 5 in which he asked that I respond to you concerning the status of the New York Compensation Insurance Rating Board under the Freedom of Information Law.

According to his letter, the entity is a private, non-profit organization. If that is so, the entity in question would not in my opinion be subject to the Freedom of Information Law.

I point out that the Freedom of Information Law is applicable to agencies and that §86(3) of the Law defines the term "agency" to mean:

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

Based upon the foregoing, the Freedom of Information Law generally pertains to entities of state and local government; it does not ordinarily apply to non-profit or private organizations.

It is possible, however, that the Compensation Insurance Rating Board transmits records to an agency, perhaps the Insurance Department or the State Insurance Fund, for example. Any such records maintained by an agency would be subject to rights of access conferred by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7860

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 11, 1993

Mr. Cornelius Glenn
#88-A-3203
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. Glenn:

I have received your letter of August 6 in which you raised questions concerning access to certain records.

You wrote that you are attempting to obtain copies of the "rap sheet" and toxicology report pertaining to the victim in your case. You added that you "have been charged with the demise of this 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.

With respect to a "rap sheet" or criminal history record, 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, which pertains to records that "are specifically exempted from disclosure by state or federal statute." 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.

With regard to the toxicology report, since the victim is deceased, it is assumed that the report would have been prepared by a medical examiner or coroner in conjunction with an autopsy or similar examination. If that is so, I point out that subdivision (2) of §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 finding, 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 §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 therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

As such, the records prepared by a coroner or medical examiner pursuant to §677 of the County Law are essentially confidential regarding all but the district attorney and the next of kin.

Others seeking such records must seek a court order to attempt to obtain them. In terms of the Freedom of Information Law, those records could in my opinion be withheld under §87(2)(a) pertaining to records that are specifically exempted from disclosure by statute.

Lastly, while the Freedom of Information Law may not serve as an appropriate vehicle for seeking the records in question, there may be other disclosure devices that could be employed. As such, 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2261
FOIL-AO 7861

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 12, 1993

Ms. Lynnette Smith
[redacted]

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

Dear Ms. Smith:

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

According to your letter you wrote to the Village of Valatie on May 20 and requested minutes of meetings from January, 1989 to January, 1992, as well as attorney bills submitted this year. Since you received no response, a second request was made on June 18. Nevertheless, as of the date of your letter to this office you had received none of the records requested. In addition, you wrote that you were charged $17.75 for copies of the minutes, and you asked whether "this is a standard procedure."

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

Lynnette Smith
RR 3, Box 186
Hudson, N.Y. 12534

acknowledges that a request has been received, a request may, in 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 respect to minutes of meetings, §106 of the Open Meetings Law provides that:

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

Lynnette Smith
RR 3, Box 186
Hudson, N.Y. 12534

> 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.

It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, even when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law.

Although you are familiar with my views regarding access to attorney's bills, it may be worthwhile to reiterate those points. In my opinion, 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

Lynnette Smith
RR 3, Box 186
Hudson, N.Y. 12534

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

Lynnette Smith
RR 3, Box 186
Hudson, N.Y. 12534

> 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, when a request is made for copies of records, §87(1)(b)(iii) of the Freedom of Information Law generally authorizes an agency to charge up to twenty-five cents per photocopy.

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 Village Board of Trustees.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7862

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 12, 1993

Mr. Deveron Le Grand
#79-A-0969
Sullivan Correctional Facility
P.O. Box A-G
Fallsburg, N.Y. 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. Le Grand:

I have received your letter of August 3 in which you sought advice concerning "the time wherein a FOIL request must be responded to."

In this regard, the Freedom of Information Law provides direction pertaining to 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7863

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 16, 1993

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 August 7 and the materials attached to it.

According to your letter, it is your understanding the Ossining Village Manager was involved in a car accident near Albany, and that his vehicle was repaired and "given over to the police department." Consequently, you requested copies of the motor vehicle accident report "concerning this Village-owned vehicle" and the bill of sale pertaining to the purchase of a new car "which should clearly indicate the options this vehicle was purchased with and the bottom line cost figure of said vehicle." In addition, you asked for the odometer reading at the time of the accident.

In response to the request, you were informed that the Village Manager does not have a copy of the accident report and that you should request the report from the police department that prepared it. Further, it appears to be your view, or perhaps that of Village officials, that an accident report can only be released to or with the consent of a person involved in the accident.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records and §86(4) of the Law defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals,

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

Based on the foregoing, if the Village or the Village Manager maintains the records in which you are interested, I believe that those records must be disclosed by the Village to the extent required by law. If the Village and/or the Village Manager do not maintain a copy of the accident report, you could seek the report either from the police department that prepared it or from the Department of Motor Vehicles.

Second, except in unusual circumstances, accident reports prepared by police agencies are in my opinion available under both the Freedom of Information Law and §66-a of the Public Officers Law. Section 66-a states that:

> "Notwithstanding any inconsistent provisions of law, general, special of local or any limitation contained in the provision of any city charter, all reports and records of any accident, kept or maintained by the state police or by the police department or force of any county, city, town, village or other district of the state, shall be open to the inspection of any person having an interest therein, or of such person's attorney or agent, even though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection, and may withhold from inspection any reports or records the disclosure of which would interfere with the investigation or involved in or connected with the accident."

The Freedom of Information Law is consistent with the language quoted above, for while accident reports are generally available, §87(2)(e)(i) of the Freedom of Information Law states in relevant part that records compiled for law enforcement purposes may be withheld to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings." Further, the state's highest court, the Court of Appeals, has held that a right of access to accident reports "is not contingent upon the showing of some cognizable interest other than that inhering in being a member of the public" [Scott, Sardano & Pomeranz v. Records Access Officer, 65 NY 2d 294, 491 NYS 2d 289, 291 (1985)]. Therefore, unless disclosure would interfere with a criminal investigation, an accident report would be available to any person, including one who had no involvement in an accident.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Assuming that the Village maintains a record indicating the odometer reading of the damaged vehicle at the time of the accident, as well as a bill of sale or similar or related records reflective of the nature of a new vehicle and the expenditure of public moneys, those records in my view would be available. In short, the grounds for denial are limited, and none would appear to be applicable with respect to those records.

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

cc: Gennaro Faiella, Village Manager
Marie Fuesey, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7864

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 16, 1993

Gary L. Rhodes, Supervisor
Town of Henderson
RR1, Box 668
Henderson, NY 13650

The staff of the Committee on 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 Rhodes:

I have received your letter in which you raised questions concerning a request made under the Freedom of Information Law.

The request pertains to "the town's data base concerning its accounting package", including "data on appropriations, revenues and general ledgers for the General Fund and Highway Fund respectively." The applicant provided a floppy disk in order that the data could be transferred onto his disk. In conjunction with the foregoing, you asked that I comment on the following questions:

> "1. What is the town's obligation to fill this request? How should it be answered?
>
> 2. This request is more than a normal request. How should we charge for this service as it will involve computer time and extra effort by the town's accountant?
>
> 3. Could you send any case law or opinions concerning this request, or requests of a similar nature?
>
> 4. If we do have to comply with this request, we will not allow a foreign disk into our system, we would provide a backup copy for the request.
>
> 5. What are the time constraints concerning a request of this nature? We have advised Mr. Schneider that we will get the information as soon as we are able to."

In this regard, I offer the following comments.

First, 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. 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)].

A recent decision may be relevant 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 data can be transferred or that a conversion of format can be accomplished, and that the data sought is available under the Freedom of Information Law, I believe that the Town would be obliged to do so.

Third, with respect to fees, §87(1)(b)(iii) of the Freedom of Information Law requires agencies to establish rules and regulations pertaining to:

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

Consequently, once a program has been created or altered, and information can be retrieved on the basis of that program, I believe that an agency may charge only on the basis of the actual cost of reproduction, i.e., computer time, plus the cost of an information storage medium, such as paper, a computer tape or a computer disk.

In a related area, if you believe that the introduction of a "foreign disk" might result in contamination, in my opinion, the Town need not use that disk, but rather its own.

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. From my perspective, the data in question are accessible, for none of the grounds for denial would apply. Further, it appears that the data in question is the same in substance as that required to be maintained and made available pursuant to §29(4) of the Town Law. That provision states that the supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In addition, subdivision (1) of §119 of the Town Law states in part that:

> "When a claim has been audited by the town board of the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours."

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 7865

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 16, 1993

Hon. Joyce A. Teal
Town Clerk
Town of Sand Lake
Box 273
Sand Lake, NY 12153

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

Dear Ms. Teal:

I have received your letter of August 11 and the materials attached to it.

By way of background, on May 13, two residents of the Town of Sand Lake requested "a comprehensive list of changes in assessment (increases and decreases) for the Town of Sand Lake for 1993 from the Assessor's Office." The Assessor indicated that no such list had been prepared, and you denied the request on the ground that the Town is not required "to do detailed research." Nevertheless, the persons who made the request contacted the County Director of Real Property Tax Services, who informed them that the Assessor received "a single-page printout summary from the County that corresponds to the change of assessment notices." Consequently, they requested that record on June 8. Having received no response, they appealed to the Town Board on July 20. However, as of the date of your letter to this office, the Board had not responded to the appeal, and the applicants for the record asked that you contact me to seek assistance in the matter.

In this regard, I offer the following comments.

First, 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, when the initial request was made, if there was no list indicating changes in assessments, I would agree that Town officials would not have been obliged to create a list on behalf of the applicants. However, when the list generated by the County came into the possession of the Town, it became a Town 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 §87(2)(a) through (i) of the Law. In my view, a "print out summary" of changes in assessments must be made available. In short, the grounds for denial are limited, and none would be applicable with respect to the record in question.

Third, the Freedom of Information Law provides direction concerning the time and manner in which an agency 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)].

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 Board.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Thomas and Flora Fasoldt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO. 2262
FOIL-AO. 7866

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 16, 1993

Mr. Gene D. Mentzer
[redacted]

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

Dear Mr. Mentzer:

I have received your letter of August 5 and the materials attached to it, which reached this office on August 12.

You have raised a series of issues concerning the implementation of the Open Meetings Law by Wappingers Central School District Board of Education and its stuff. You referred to executive sessions held prior to meetings and "discussing and voting on public issues in executive sessions and not providing minutes." In addition, you wrote that raises were recently given to three administrators, but that there "was no motion made or vote taken in the public meeting that followed nor was there a record of the salary increase in the minutes." It has been contended that no vote concerning the increases was required, and you were informed that minutes of executive sessions are generally not prepared.

In this regard, I offer the following comments.

First, 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, when 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, 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].

Therefore, even when a subject to be discussed could properly be considered during an executive session, I believe that a public body must first convene an open meeting, preceded by notice of the time and place given in accordance with §104 of the Open Meetings Law. Following the initiation of the meeting in public, when a subject arises that may be discussed in executive session, the procedure described earlier in §105(1) should be carried out.

Third, I am unaware of whether the Board was required to act with regard to the raises given to administrators. Since I am not an expert with respect to the Education Law, it is suggested that you seek guidance from the Office of Counsel at the State Education Department. However, when action is taken by a public body, I believe that it must be memorialized in minutes, and §106 of the Open Meetings Law provides that:

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must include reference to action taken by a public body.

It is noted 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. As such, minutes of executive sessions need not generally be prepared by a board of education.

Further, if a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. 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).

Therefore, if 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, the minutes, in my view, should reflect the actual votes of the members.

Lastly, the Assistant Superintendent for Personnel, in the context of your inquiries, wrote that information is "confidential because it involves personnel." In this regard, while information might have been obtained during an executive session properly held or from records characterized as "confidential", the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as

confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as a 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, absent the consent of the parents of a student, because a statute requires confidentiality. However, no statute of which I am aware would generally confer or require confidentiality with respect to the matters discussed during executive sessions.

In a situation in which the issue was "whether discussions had at an executive session of a school board are privileged and exempt from disclosure", 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 participant 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 short, unless a statute specifically prohibits disclosure of certain information or records, I do not believe that statements made during an executive session or information derived from an executive session could be characterized as "confidential" or that there would be a valid basis for sustaining a claim of confidentiality.

Moreover, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. 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 are the factors used 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 §87(2)(a) through (i) of the Law. While two of the grounds for denial may be most often relevant to an analysis of rights of access to most personnel records, again, the contents of those records are the factors used to determine the extent to which they may be available or deniable.

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.

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. It is clear based upon judicial decisions 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 in a variety of contexts that 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)]. When a record is accessible because disclosure would result in a permissible invasion of privacy, no consent would be needed or required from the subject of the record as a condition precedent to disclosure. 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 an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to District Officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education
Paul R. Lussier, Acting Superintendent
Ann Marie Mullen, Assistant Superintendent for Personnel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7867

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 16, 1993

Hon. Jacqueline Papatsos
Mayor
Village of Island Park
127 Long Beach Road
Island Park, NY 11558

Dear Mayor Papatsos:

Thank you for sending a copy of your August 4 determination of an appeal made by Emil Murtha. In brief, you upheld a denial of access to an itemized bill apparently submitted to the Village by an attorney.

Although I am unfamiliar with the contents of the record in question, I would like to offer the following comments.

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

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 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

cc: Emil Murtha

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1868

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 17, 1993

Mr. David R. Sheridan
Bond, Schoeneck & King
111 Washington Avenue
Albany, NY 12210-2280

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

Dear Mr. Sheridan:

I have received your lengthy letter of August 12 and the exhibits attached to it. You have requested an advisory opinion concerning the Freedom of Information Law on behalf of the Glens Falls Post-Star.

By way of background, in March, a reporter for the Post-Star requested records or portions of records from the City of Glens Falls:

> "pertaining to those receiving health insurance provided by the city...[those] to whom the city now provides health insurance, under which plan, and at what cost to the city and the person covered...[and] a list of part-time employees working for the city, and whether any of them are receiving health insurance."

The City Attorney denied the request on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" and indicated that he "confirmed" that position in a conversation with me. Thereafter, a modified request was made by the same reporter for records reflective of:

> "the number of people the city covers with health insurance, broken down by which health insurance carrier covers them...for 1992 and year-to-date for 1993,...[h]ow many employees working 30 hours per week or less were covered by city health insurance in 1992, and how many are covered now...what positions these people

> hold and how many hours per week they work...how many of these people were elected to their positions and how many were appointed...[and] the cost to the city for insuring these people in 1992, as well as the projected cost of 1993...[and] [h]ow many people who left their positions before they were eligible to retire were covered by city health insurance in 1992, and how many are covered now...what positions they left...how many were elected and how many were appointed...[and] the cost of insuring these people in 1992, as well as the projected cost for 1993."

The City Attorney denied that request based on the contention that the effort to "distinguish between elected and non-elected officials...would provide indirectly the identity of the covered persons." Although the Post-Star appealed the denial on June 18, the City had not responded to the appeal as of the date of your letter to this office.

It is your contention "that compensation that is paid to public employees by their public employer is a matter of legitimate public interest" and, therefore, must be disclosed. You added that the information sought involves "the identity of public officials who are receiving health insurance at public expense, and the cost to the public of that health insurance", and that "no attempt is being made to discover who, other than the public official in question, is covered by the insurance; that is, there is no attempt being made to determine whether only the public official is covered, or whether members of his family are also covered." Further, having reviewed advisory opinions previously rendered by this office on this and somewhat related subjects, you sought to distinguish this situation from others considered in judicial decisions. Concurrently, you expressed the view that some of those opinions and decisions are consistent with the arguments that you offered in favor of disclosure. You also referred to opinions and decisions that indicate that items reflective of employees' compensation are public, while others indicating how public officers and employees spend their own money may justifiably be withheld. You also contend that none of the examples of unwarranted invasions of personal privacy appearing in §89(2)(b) would be applicable or serve as a basis for withholding the information in question.

In this regard, I offer the following comments.

First, your initial statements concerning the nature of the information sought may in my opinion be somewhat specious. Again, you wrote that the Post-Star seeks only the identities of public officials who receive health insurance at public expense and the cost of the insurance, and that no attempt is being made to learn whether only the public official is covered, or whether family

members are covered as well. As a public employee who has a degree of familiarity with health insurance plans offered to public employees, it is likely if not a certainty that disclosure of the identities of public officials covered by employer paid health insurance plans coupled with information regarding the cost of those plans would indicate whether the official partakes in a particular plan and whether he or she has opted for individual or family coverage. Under a particular plan, the cost of individual coverage will always be "X", and the cost of family coverage will always by "Y". Similarly, materials distributed to employees to enable them to select coverage include information concerning the cost of individual or family coverage under various plans, i.e., an "Empire Plan" as opposed to an "HMO". In short, I believe that disclosure of the identities of those covered by paid health insurance plans and the cost of coverage together would implicitly indicate the plan that an employee or official has chosen and whether the coverage is for that person alone or for his or her family as well.

Second, notwithstanding the foregoing, 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. In my opinion, the primary issue is whether disclosure would constitute "an unwarranted invasion of personal privacy" in accordance with §§87(2)(b) and 89(2) of the Freedom of Information Law.

In its most recent annual report, the Committee on Open Government considered that standard and whether it remains viable. To provide perspective on the matter, I offer the following excerpt from the report:

> "When the Committee's director gives a presentation and reviews the law, he always asks whether anyone in the crowd knows what an unwarranted invasion of personal privacy is. Nobody raises their hands. He says that's okay, because nobody knows what it means, and because everybody has a different line of demarcation between what is considered to be offensive as opposed to innocuous. Two equally reasonable people looking at the same items of personal information will disagree -- one might say that he or she would not want a certain item of information to be disclosed, the other says 'who cares' -- and never the twain shall meet. If a reporter asks the director for his home phone number, he provides it; his number is in the phone book. However, his wife is in an unrelated profession, as she uses her maiden name

professionally and a different phone number for that aspect of her life.

"In terms of the standard itself, it is virtually the same in every access law. The federal Freedom of Information Act refers to a 'clearly unwarranted invasion of personal privacy'; some statutes refer to "unreasonable" invasions of personal privacy. The point is that there are no words that can be used to deal with every conceivable instance in which privacy is an issue, and it is doubtful that any 'standard' would be better than what we have now. Further, from our perspective, vagueness may be the equivalent of flexibility, and flexibility may be more appropriate as society and community mores change.

"When government officials deal with the standard, the reality is that somebody at an agency must often make subjective judgments. Obviously not every invasion of privacy is 'unwarranted'; some invasions of privacy are permissible.

"One of the areas in which substantial numbers of questions arise involves the privacy of public employees, and 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 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].

"Therefore, if, for example, a public employee is found to have engaged in misconduct, a determination so indicating would be public. On the other hand, if allegations made against that person are unsubstantiated and there is no determination indicating misconduct, the records can be withheld, for the allegations that did not result in findings of "guilt" should not follow that person, perhaps forever, to his or her detriment. Attendance records indicating time in and out, leave accruals and the like are available, but if there is a notation of the nature of an illness, that portion of the record could be withheld as an unwarranted invasion of personal privacy. What is relevant, according to the courts, is when and where public employees come to work when they are scheduled to do so. It is also noted that §89(7) specifies that nothing in the Freedom of Information Law requires the disclosure of the home address of a present or former public employee.

"In short, there is no formula that would apply in every instance that could be used to determine when disclosure would constitute a permissible as opposed to an unwarranted invasion of personal privacy. Moreover, we do not believe that a formula would be appropriate, for rational decisions must frequently be made on the basis of attendant facts, which may differ from one circumstance to the next."

One aspect of the commentary appearing in advisory opinions rendered by this office and which in my view consistently appears in judicial decisions was not directly considered in your letter. Specifically, in several contexts, I believe that public rights of access have been determined in consideration of whether an item of personal information is relevant to the performance of a public officer's or employee's duties. In the two decisions upon which you focused, Matter of Wool (Supreme Court, Nassau County, NYLJ,

November 22, 1977) and Minerva v. Village of Valley Stream (Supreme Court, Nassau County, May 20, 1981), you reasoned that both involved disclosure of information concerning compensation, as opposed to the manner in which public officers and employees choose to spend their money. In Wool, the issue involved a request for a record indicating salaries of certain public employees, as well as notations of deductions made for payment of union dues. The court held that salary information is clearly available, but that the information involving the payment of union dues could be withheld, stating that "[m]embership in the CSEA has no relevance to an employee's on the job performance or to the functioning of his or her employer." In Minerva, the request involved both sides of checks paid by a municipality to its attorney. While the court held that the front side of the checks must be disclosed, it found that the backs of checks indicating "how he disposes of his lawful salary or fees" could be withheld as an unwarranted invasion of personal privacy. Again, as you suggested, while the matter involves compensation, I believe that it also involves a finding that the manner in which the attorney spent his money had no relevance to the performance of his duties.

If that is the test to be used, whether items of information identifiable to public officers and employees are relevant to the performance of their official duties, I believe that the information sought could be withheld. Whether a public officer or employee is covered or chooses to be covered by a public employer paid health insurance plan or whether that person opts for family or individual coverage, for example, in my opinion has no relevance to the performance of that person's official duties.

Nevertheless, perhaps that should not be the only "test" for determining rights of access to records identifiable to public officers and employees. As suggested earlier, the standard in the Freedom of Information Law, "unwarranted invasion of personal privacy", is subject to a variety of considerations and points of view, and the language of the law in applying that standard is flexible. You contended, for instance, that none of the examples of unwarranted invasions of personal privacy appearing in §89(2)(b) appear to be applicable in the situation at issue. While that may be so, those examples in my opinion represent few among many conceivable circumstances in which disclosure would constitute an unwarranted invasion of personal privacy. Moreover, the legislature apparently did not intend that the list of unwarranted invasions of personal privacy be exhaustive, for the introductory clause in §89(2)(b) states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the five examples that follow. As such, I do not view those examples to be determinative of all issues that arise relating to the application of the privacy standard.

A countervailing argument, vis à vis the test described above and my view of extant case law regarding the privacy of public employees, arises in the language of a decision rendered by the Court of Appeals that you cited and upon which I frequently rely in

rendering advisory opinions. In Capital Newspapers v. Burns [109 AD 2d 292 (1985), aff'd 67 NY 2d 562 (1986)], the issue involved records reflective of the days and dates of sick leave claimed by a particular police officer. The Appellate Division, as I interpret its decision, held that those records were clearly relevant to the performance of the officer's duties, for the Court 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 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..." [109 AD 2d 92, 94-95 (1985)].

Perhaps more importantly, in a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals affirmed and 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 foregoing, it might appropriately be contended that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse must be balanced against the possible infringement upon the privacy of a public officer or employee. The magnitude of an invasion of privacy is conjectural and must in many instances be determined subjectively. In this instance, if a court found the invasion of one's privacy to be substantial, it might be determined that the interest in protecting privacy outweighs the interest in identifying employees receiving coverage. It is possible, too, that a court could find that the identities of employees receiving coverage should be disclosed, but that the cost of coverage, by named employee, thereby indicating the nature of coverage (i.e., individual as opposed to family coverage) may be withheld, and that the cost of coverage should be disclosed generically. On the other hand, in conjunction with the direction provided by the Court of Appeals in the passage quoted earlier, it might be determined that the information sought should be disclosed in its entirety in view of the public's significant interest in knowing how public monies are being expended.

In sum, there may be a variety of considerations that may be used by a court in determining the extent to which the information sought is accessible or deniable. While advisory opinions are often rendered in an effort to resolve issues in order to obviate the need for litigation, it is questionable in my view whether an opinion specifically advising that the information sought should be disclosed in whole or in part will resolve the matter.

Nevertheless, in consideration of the factors that have been discussed, it is my view that a disclosure indicating that a public officer or employee is covered by a health insurance plan at public expense would not represent or reveal an intimate detail of one's life. Arguably, the record reflective of the dates of sick leave claimed by a public employee found by the courts to be available represents a more intimate or personal invasion of privacy. However, if a disclosure of the cost of coverage for a particular employee indicates which plan that person has chosen or whether his or her plan involves individual or dependent coverage, such a disclosure in my view may potentially result in the revelation of a number of details of a person's life and an unwarranted invasion of personal privacy. For instance, an indication of cost might reveal whether the coverage involves medical treatment routinely provided by a clinic, as opposed to a primary care physician; it also may indicate the nature of coverage, i.e., whether coverage is basic or includes catastrophic care. Again, the cost may also reveal whether coverage is for an employee alone or for that person's family or dependents. Preferable in my opinion would be a disclosure of costs by category, rather than by naming individuals, in terms of plans that are offered or available to officers or employees.

It is emphasized, however, that my opinion is just that, an opinion. As suggested earlier, judgments involving privacy often

of necessity must be subjective, and I believe that only the courts can effectively make such judgments.

Further, should litigation be initiated following a denial of a request to records, §89(4)(b) of the Freedom of Information Law states that the agency must prove that the records withheld fall within the scope of the grounds for denial appearing in §87(2). In this regard, I point out 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)]."

Lastly, your letter states that the City failed to respond to the Post-Star's appeal as required by §89(4)(a). That provision states in relevant part that:

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

In addition, it has been held that 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. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Francis X. O'Keefe, Mayor
Ronald L. Newell, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7869

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 18, 1993

Mr. Anthony S. Viola
#38206-053 (1B2)
United States Penitentiary
P.O. Box 33
Terre Haute, IN 47808-0033

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

Dear Mr. Viola:

As you are aware, your letter addressed to Attorney General Abrams on July 26 has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to advise with respect to the Freedom of Information Law.

Your inquiry concerns the status of the Waterfront Commission of New York Harbor under the Freedom of Information Law and its denial of access to records. In this regard, 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 or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since the entity in question is a bi-state agency, I do not believe that the Commission is subject to the Freedom of Information Law. As stated in Metro-ILA Pension Fund v. Waterfront Commission of New York Harbor (Supreme Court, New York County, NYLJ, December 16, 1986), "[a]n interstate agency is created by interstate compact, and New York may not impose its preferences with respect to freedom of information on the other party to the compact." Therefore, it was held that "the Waterfront Commission is not an 'agency' subject to New York's Freedom of Information Law."

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-7870

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 18, 1993

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, unless otherwise indicated.

Dear Ms. Loriz:

I have received your letters of August 11. As in the case of previous correspondence, you have raised questions concerning certain activities related to an election held at the Liberty Central School District.

Specifically, you referred to your initial request and asked whether the Superintendent is obligated to answer the following questions raised in that request:

> "1. Written identification of persons acquiring names of voters on June 9, 1993 as voters were forming lines in the auditorium;
>
> 3. Name of person who gave individuals permission for this procedure."

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 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 containing the information sought, I do not believe that staff

would be required by the Freedom of Information Law to prepare records on your behalf.

Second, as you may be aware, the Superintendent has forwarded a copy of his response to your appeal to this office. In short, he indicated that the District does not maintain records that contain the information in which you are interested. Consequently, for that reason and for the reason described in the preceding paragraph, I do not believe that the Freedom of Information Law is applicable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard P. Beruk, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7871

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 18, 1993

Mr. Frank DeFilippi
Business Agent
United Industry Workers Local 424
424 Rosevale Avenue
Lake Ronkonkoma, NY 11779-3020

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

Dear Mr. DeFilippi:

As you are aware, your letter of July 23 addressed to Attorney General Abrams was forwarded to the Committee on Open Government on August 10. The Committee is authorized to provide advice concerning the Freedom of Information Law.

By way of background, you wrote that SUNY College at Farmingdale, "through its 'Auxiliary Service Corporation' has contracted with Bon Appetit Management of California", and that a number of employers "may face job loss and health care loss due to the contractor's position". You also indicated that you requested the following records from the College under the Freedom of Information Law:

> "1. Copy of the Request for Proposal for Food Service, S.U.N.Y. Farmingdale.
>
> 2. Copy of the contract between S.U.N.Y. Farmingdale and/or its Auxiliary Service Corporation and Bon Appetit Management.
>
> 3. A list of the S.U.N.Y. Farmingdale's Auxiliary Service Corporation members.
>
> 4. Copy of said Auxiliary Service Corporation State Corporate Charter."

However, Dr. Samuel Taub denied the request and, according to your letter, claimed that SUNY is not subject to 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 the Law defines the term "agency" to mean:

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

Based upon the foregoing, the State University is clearly an "agency" required to comply with the Freedom of Information Law. Moreover, it was held long before the enactment of the Freedom of Information Law that the State University is an instrumentality of the State engaged in performing a governmental function [see State University of New York v. Syracuse University, 137 NYS 2d 916, aff'd 285 AD 59 (1954)].

Second, §86(4) of the Freedom of Information Law defines the term "record" broadly to include:

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

Therefore, insofar as SUNY College at Farmingdale maintains the documentation in which you are interested, any such documentation would constitute "records" subject to rights of access 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 §87(2)(a) through (i) of the Law. Assuming that the request for proposal relates to a contract that has been awarded and is in possession of the College, it would appear to be available. Similarly, the other records to which you referred, if maintained by the College, would also be available, for none of the grounds for denial would apply.

If the records sought are not maintained by the College but rather by the Auxiliary Services Corporation, it is questionable whether the Freedom of Information Law would apply to that entity.

However, if it is a not-for-profit corporation that was created to carry out its duties for or on behalf of SUNY College at Farmingdale, judicial decisions suggest that it may be subject to the Freedom of Information Law. By means of analogy, the Court of Appeals, the State's highest court has found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness

> what in any event is implicit" [Westchester-Rockland Newspapers v. Kimball, 50 NY 2d 575, 579 (1980)].

More recently, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for

> which they provide an essential public service."

If the relationship between SUNY College at Farmingdale and the Auxiliary Services Corporation is similar to that of a volunteer fire company and a municipality, it would appear that the Corporation, despite its not-for-profit status, would be an "agency" required to comply with the Freedom of Information Law.

I point out, too, that in a decision pertaining to a foundation associated with a public educational institution, it was claimed that the records fell outside the scope of the Freedom of Information Law because they were maintained by a "private, not-for-profit corporation." The records sought involved the Kingsborough Community College Foundation; Kingsborough is an institution of the City University of New York. In rejecting that contention, the Court stated that:

> "The activities of the Foundation...amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed the Foundation would not exist but for its relationship with the College. Even though the Foundation is set up as a not-for-profit corporation, as it is such an integral part of the College allowing it to stand as a separate entity would subvert the purpose of FOIL. I am in accord with the petitioner in rejecting as irrelevant, for the purposes of applying the FOIL, a distinction as to whether the Foundation is an independent, voluntary organization which provides public service to an agency of local government, rather than an 'organic arm of government' as the vehicle for the performance of the purposes and objectives of that agency. (Westchester Rockland Newspapers, Inc. v. Kimball, 50 NY 2d 575 [1980]). Even if the requested records were determined to be private documents of the Foundation, they are nevertheless records in the possession of a governmental agency and as such maintained by a governmental agency under Public Officer's Law Section 86(3)(4). (Capital Newspapers v. Whalen, 69 N.Y. 2d 246 (1987)].
>
> "It is without question that the '...FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government...(citations omitted) (Capital Newspapers v. Whalen, supra, at 252). In the instant case the respondents failed to meet

> their burden of demonstrating that the requested materials is within the bounds of some 'specific statutory protection' and therefore 'the Freedom of Information Law compels disclosure not concealment'... (Westchester News v. Kimball, supra, at 580)" [Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988].

As such, there is precedent indicating that a not-for-profit entity associated with a public educational institution constitutes an "agency" subject to the Freedom of Information Law.

If the Auxiliary Services Corporation exists due to its relationship with SUNY College at Farmingdale, and if the College would perform the functions of the Corporation if the Corporation had not been created, it might be concluded that such an entity conducts public business and performs a governmental function for the University.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Samuel Taub

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7872

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 18, 1993

Mr. Jason F. Balkum
92-B-2207
Attica Correctional Facility
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. Balkum:

I have received your letter of August 9. You have requested an advisory opinion concerning rights of access to records 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 §87(2)(a) through (i) of the Law.

Second, it is my view that records pertaining to grand jury proceedings could be withheld if requested under the Freedom of Information Law. 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."

As such, the grand jury records in which you are interested 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.

Lastly, you asked how you can receive summaries of the opinions rendered by this office. Although opinions are not summarized, an appendix to the Committee's annual report includes an index to the opinions that refers to opinions by key phrase and by number. Individual opinions may be requested based upon the format of the index, and I have enclosed a copy of the appendix.

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-7873

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 18, 1993

Mr. Thomas W. Jeram
D'Agostino, Hoblock, Greisler & Siegal, P.C.
39 North Pearl Street
Albany, New York 12207-2767

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

Dear Mr. Jeram:

I have received your letter of August 16 in which you sought an advisory opinion "concerning a statement by the Commissioner of Finance of the City of Mechanicville...denying [y]our examination of the tax records in the finance office."

Specifically, you wrote that the Commissioner informed you "that the only method available to obtain tax information was to pay a fee of $50.00." Further, having requested information concerning the procedure for seeking records under the Freedom of Information Law, the Commissioner informed you that "there was no way a representative from [y]our office could examine the tax records."

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 implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a city council, to adopt rules and regulations consistent with the Law and the Committee's regulations.

Relevant to your inquiry is §1401.2 of the regulations, which provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance

> with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests. As such, ordinarily a request to inspect or seek copies of records should be to made or forwarded to an agency's designated records access officer, and that person should respond to a request or ensure that other agency officials respond in a manner consistent with the Freedom of Information Law.

Second, in my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for inspecting or 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.

I point out that §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)].

Further, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee 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.

Additionally, 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, you indicated by phone that the records in question relate to the assessment of real property. In this regard, 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).

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Commissioner of Finance
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7874

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 18, 1993

Mr. James Leman
[redacted]

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

Dear Mr. Leman:

I have received your letter of August 12 and the correspondence attached to it.

By way of background, due to your interest in the creation of an E-911 communications system, you requested and were given "complete access" to the County's files on the matter. Having made a similar request for records to the Town of Orangetown, the request was denied on the ground that you failed to "reasonably describe" the records. In his response, the Deputy Town Attorney cited a number of opinions rendered by this office concerning that standard. You have sought my view on the matter.

In this regard, I offer the following comments.

First, the opinions to which the attorney referred are somewhat dated, and the judicial interpretation of the Law has in my view clarified agencies' responsibilities.

As indicated by the attorney, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be specifically designated, that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. 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 this instance, I am unaware of the means by which the Town maintains records relating to the E-911 system. If the Town maintains all such records in a file or group of files that are retrievable on the basis of the terms of your request, I believe that you met the requirement that the records be reasonably described. On the other hand, however, it is possible that the Town maintains records falling within the scope of your request in a number of locations or departments and by means of different filing systems within those departments. If indeed the records sought are kept by a variety of offices and by means of a variety of filing methods, it is possible in my opinion that your request might not have reasonably described the records in a manner that would enable the Town to locate all such records.

It is noted that, pursuant to regulations promulgated by the Committee on Open Government that pertain to the procedural implementation of the Freedom of Information Law (21 NYCRR Part 1401), an agency's records access officer "is responsible for assuring that agency personnel...Assist the requester in identifying requested records, if necessary" [§1401.2(b)(2)]. Therefore, it is suggested that you contact the records access officer to discuss the matter in an effort to ensure that you reasonably describe the records sought.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dennis D. Michaels, Deputy Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2265
FOIL-AO-7875

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 18, 1993

Mr. Alexei A. Waters
Project Director
Public Education Association
39 West 32nd Street
New York, NY 10001

Dear Mr. Waters:

I have received your letter of August 13 in which you requested an advisory opinion concerning meetings and records relating to "the asbestos crisis in New York City."

According to your letter, the Mayor of New York City recently initiated "Operation Clean House", an "accelerated Asbestos Remediation Program in all 1,069 New York City Schools." In conjunction with the program, the Mayor and the Board of Education established a "school asbestos remediation oversight committee", which is chaired by the First Deputy Mayor and includes representatives of various agencies. You have asked whether the meetings of the oversight committee must be conducted pursuant to the Open Meetings Law and whether its records are subject to the Freedom of Information Law. You raised the same issues with respect to the Asbestos Task Force created by the Board of Education to investigate asbestos contamination in City schools and to comply with the Federal Asbestos Hazard Emergency Response Act (AHERA). In addition, you referred to a memorandum apparently prepared by the New York City School Construction Authority's First Assistant Inspector General in which he referred to requirements that "management plans" prepared pursuant to AHERA be publicly disclosed, but that the Asbestos Task Force "has effectively frustrated these provisions..."

In this regard, I offer the following comments.

First, 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."

As suggested to you by phone, recent decisions indicate generally that advisory ad hoc entities, other than committees consisting solely of 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 Newspaper 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, assuming that the entities in question have no authority to take final and binding action on behalf of the City of New York or the Board of Education, I do not believe that either the Oversight Committee or the Asbestos Task Force would constitute "public bodies" required to comply with the Open Meetings Law.

I point out that the Poughkeepsie Newspaper decision cited above dealt with an intergovernmental task force that was also designated by the Mayor of New York City. Since the Appellate Division found that the entity in that case was not subject to the Open Meetings Law, and due to the apparent similarity between that entity and the Oversight Committee in particular, it is clear that applicable case law indicates that that kind of entity is not subject to the Open Meetings Law. The foregoing is not intended to suggest that either entity could not choose to conduct meetings in public, but rather that they are not required to do so.

Second, with respect to access to records, it is emphasized 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 breadth of the language quoted above, any documentation maintained by either of the entities in question would be "produced for" either New York City or the Board of Education, and, therefore, in my view would constitute "records" subject to rights of access conferred by the Freedom of Information Law.

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

Of likely relevance in ascertaining rights of access to the records in question is §87(2)(g), one of the grounds for denial. However, that provision, due to its structure, often requires disclosure of records or portions of records. 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.

Lastly, while I am unaware of whether it remains in effect, a memorandum referenced in an opinion rendered in 1990 was issued in 1989 by the manager of the Board's Asbestos Task Force. That memorandum pertains to management plans prepared pursuant to AHERA and advised that "by law", a management plan must be made available to the public. Enclosed for your review is a copy of that opinion.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7876

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 19, 1993

Mr. F. Quinn
Auburn Correctional Facility
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. Quinn:

I have received your letter of August 11 in which you described a variety of problems in obtaining records from a number of governmental entities.

The first issue relates to a request made to the State Liquor Authority that apparently was not answered. In this regard, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency subject to the Freedom of Information Law is required to 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 ordinarily be directed to that person. For your information, the records access officer for the State Liquor Authority in New York City is Richard Chernela.

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)].

The second issue involves court records. Here I point out that the Freedom of Information Law is applicable to agency records, and that §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."

As such, the courts and court records are not subject to the Freedom of Information Law. This is not intended to suggest that court records are not available, for statutes other than the Freedom of Information Law often require that such records be disclosed (see e.g., Judiciary Law, §255).

You also referred to difficulty in obtaining records from the office of a district attorney due to a claim that the records sought had been previously disclosed to you or to your attorney. 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 §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. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

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, "subdivision three" of §190.25 includes specific reference to the district attorney. As such, grand jury minutes and related records 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.

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 an 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 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 found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

It is suggested that you might 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-7877

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 19, 1993

Mr. Joseph Franco
92-R-6593 SHU-G-37-17
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004-1187

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

Dear Mr. Franco:

I have received your letter of August 15 in which you asked that I help you obtain "directives" issued by the Department of Correctional Services. 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 cannot obtain records on behalf of an individual or compel an agency to disclose records.

Second, the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that a request for records kept at a correctional facility may be directed to the facility superintendent or his designee.

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.

With respect to the directives, I believe that §87(2)(g) would likely be relevant in ascertaining rights of access. 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.

A directive would in my view be available on the ground that it constitutes agency policy, unless a different ground for denial applies. Having contacted the Department some time ago to discuss the matter, I was informed that directives classified for "A" distribution are generally available under the Freedom of Information Law. Those characterized as "D" involve security at a facility and, therefore, might justifiably be denied under §87(2)(f). That provision permits an agency to withhold records when disclosure would "endanger the life or safety of any person."

Lastly, you asked that I "send [you] on the Constitution Right of the Amendment of all of them." While I do not understand that request, I believe that copies of both the state and federal constitutions are or can be made available through your facility librarian.

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-7878

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 19, 1993

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 August 16 and the materials attached to it.

As in the case of previous correspondence, the materials pertain to your unsuccessful efforts in obtaining records from the Iroquois Central School District. Since you also described the problem to the State Education Department and the Attorney General, I point out that there is no state agency that enforces the Freedom of Information Law or which may compel an agency to comply with that statute.

You have requested from the District records concerning salaries and "additional stipends" pertaining to particular employees, as well as records reflective of "District expenditures for Doctoral education" of two employees.

For reasons discussed in the opinion addressed to you on December 30, I believe that records reflective of salaries of public employees are clearly available. Records containing the other information in question must in my opinion also be disclosed.

In this regard, I offer the following comments in addition to those expressed in the earlier opinion.

In addition to one's base salary, other wages would be included in a W-2 form, and with certain qualifications, I believe that W-2 forms or records containing equivalent information 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.

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).

With respect to costs of courses paid by the District, in Steinmetz v. Board of Education, East Moriches (Supreme Court, Suffolk County, NYLJ, October 30, 1980), the request involved "all written approvals for courses including name of course and number of credits...or if written approval is missing...all names of courses and number of credits (for each course) [and] Verification of satisfactory completion of each course and how this is done." Although the information sought was included in personnel files, the court determined that those records must be disclosed, except to the extent that they included teachers' grades in the courses, in which case the grades could be deleted. Further, as a general matter, bills, contracts, checks, vouchers and similar records reflective of the expenditure of public moneys must be disclosed, for none of the grounds for denial appearing in §87(2) of the Freedom of Information Law would be applicable.

Lastly, when a judicial proceeding is brought under the Freedom of Information Law, §89(4)(b) states that the agency bears the burden of proof. Further, 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 regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence F. Pereira, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7879

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 19, 1993

Mr. Karl Aarseth
[redacted]

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

Dear Mr. Aarseth:

I have received your letter of August 17 in which you sought assistance in obtaining information that you requested from the Malverne School District.

The request involves a copy of a specific individual's resumé and a "printout of the W-2 Central Listing for the teaching staff for calendar year 1992." You indicated that the W-2 listing had been previously 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 §87(2)(a) through (i) of the Law.

Second, in my opinion, the only relevant basis for denial concerning either a resumé or W-2 forms or information derived from them would be §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 resumé. Nevertheless, it is likely that other aspects of a resumé 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 resumé 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 resumé 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 related context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that a resumé contains information pertaining to the requirements that must have been met to hold the position, it should be disclosed, for I believe that disclosure of those aspects of a resume 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, reference to former private employers could in my opinion be withheld. Further, information included in a document that is irrelevant to criteria required for holding the position, such as grade point average, class rank, home address, social security number and the like, could in my opinion be deleted prior to disclosure of the remainder of the record to protect against an unwarranted invasion of personal privacy.

Second, with certain qualifications, I believe that W-2 forms or records containing equivalent information must be disclosed. Although tangential to your inquiry, 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 and made available to comply with the Freedom of Information Law.

As indicated earlier, §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. Moreover, 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, as you inferred, i.e., the District may 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.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1880

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 20, 1993

Mr. George N. Morgan
[redacted]

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

Dear Mr. Morgan:

I have received your letter of August 18 in which you wrote that the City of Long Beach has apparently been "ignoring requests" for records under the Freedom of Information Law. Further, you were informed that "it is not the policy of the City to respond in writing to these requests."

In this regard, 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)].

Further, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a city council, to adopt rules and regulations consistent with the Law and the Committee's regulations.

Relevant to your inquiry is §1401.2 of the regulations, which provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests. As such, in my opinion, either the records access officer or some other person should have responded to your request in a manner consistent with 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 City officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council
Eugene Cammarato

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7881

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 20, 1993

Mr. James Cowan
87-A-2778
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. Cowan:

I have received your letter of August 16 in which you sought assistance in obtaining various court records. It is noted that the materials attached to your letter indicate that you requested those records pursuant to the Freedom of Information Law.

In this regard, I point out 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 or other governmental 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 the term "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 are not subject to the provisions of the Freedom of Information Law.

This is not to suggest that court records need not be disclosed, for other provisions of law often require the disclosure of court records. In this instance, it appears that §255 of the

Judiciary Law may be applicable, and it is suggested that you review that statute.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7882

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 20, 1993

Mr. John Kenny
[redacted]

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

Dear Mr. Kenny:

I have received your letter of August 15 and the correspondence attached to it. The correspondence indicates that you believe that the Central Hudson Gas & Electric Corporation is required to comply with the Freedom of Information Law.

In this regard, the scope of the Freedom of Information Law is determined in part by §86(3), which defines "agency" to mean:

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

While a public utility might be regulated by government, it would not in my opinion be a governmental entity performing a governmental function. Consequently, I do not believe that the entity in question is subject to the Freedom of Information Law.

If you have difficulties relating to a public utility, it is suggested that you contact the Public Service Commissioner at 1-800-342-3355.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James E. Perry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 7883

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 20, 1993

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 August 16 concerning access to records pertaining to the performance of marriages by the Mayor of the Village of Mineola.

Pursuant to §11 of the Domestic Relations Law, a mayor of a village may solemnize marriages. Although you wrote that the Mayor may retain fees charged for so doing, there is no reference in that statute of which I am aware concerning fees that may be charged. However, §11-c of the Domestic Relations Law authorizes the governing body of a municipality to appoint one or more "marriage officers". Subdivision (3) of §11-c states that:

> "A marriage officer may receive a salary or wage in an amount to be determined by the governing body of the municipality which appoints him or her. In the event that a marriage officer receives a salary or wage, he or she shall not receive any remuneration or consideration from any other source for performing his or her duties. In the event that a marriage officer does not receive a salary or wage, he or she may accept and keep up to seventy-five dollars for each marriage at which he or she officiates, paid by or on behalf of the persons married."

In conjunction with the foregoing, you have sought an advisory opinion concerning whether you are entitled to obtain records indicating the number of marriages performed by the Mayor, the amounts he earned for so doing, and whether such records should be in the custody of the Village Clerk.

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law states in part that an agency or agency officials need not create a record in response to a request. Therefore, insofar as the information in question does not exist in the form of a record or records, the Freedom of Information Law, in my view, would be inapplicable.

Second, irrespective of where any such records may be kept, they are kept due to and in the performance of the Mayor's official duties and in his capacity as Mayor or marriage officer. Consequently, I believe that any such records would fall within the scope of the Freedom of Information Law. It is emphasized that the Freedom of Information Law pertains to agency records and that §86(4) of the Law defines the term "record" expansively to mean:

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

In a case in which an agency claimed, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that claim. As stated by the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR

> article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, 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 FOIL 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 could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

Again, a marriage could not be performed by the person in question except in his capacity as a government official acting in the performance of his duties as mayor or perhaps marriage officer. That being so, it is my opinion that records involving the performance of those duties 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 §87(2)(a) through (i) of the Law. In my view, records reflective of the number of marriages performed and payment made to the Mayor in his governmental capacity would be available. In short, the grounds for denial are limited, and none in my opinion could properly be asserted to withhold any such records.

Lastly, although the Freedom of Information Law does not deal with the location where records should be kept, as you indicated, the Village Law specifies that the village clerk is the custodian of village records. Moreover, statutes other than Freedom of Information Law provide direction concerning the custody, security, retention and disposal of records. For instance, §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, a local officer, such a mayor, must in my view "adequately protect" Village records. Further, 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 hope that I have 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 Mineola

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7884

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

September 13, 1993

Mr. Hiroshi Yoshida
Office of Director of Freedom of Information
Archives Division
Shizuoka Prefectural Government
9-6 Ohti-machi, Shizuoka City
Shizuoka Prefecture, Japan

Dear Mr. Yoshida:

I have received your letter of August 20, and I hope that you will accept my apologies for the delay in response.

Your inquiry concerns access to administrative documents maintained by the Shizuoka Prefectural Government concerning "spent fuel transportation". In relation to that issue, you referred to a series of records or facts contained within records and asked whether those materials would be "classified" or "disclosed" in this jurisdiction under the New York Freedom of Information Law.

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 §87(2)(a) through (i) of the Law.

From my perspective, one of the grounds for denial, §87(2)(f), is relevant in determining public rights of access as well as the ability to withhold records containing the information in question. Specifically, that provision enables an agency to withhold records or portions thereof to the extent that disclosure "would endanger the life or safety of any person." I believe the provision quoted above could properly be asserted if there is a possibility of terrorism or other hostile activities and where the safety of those involved in transporting the fuel, or perhaps those who may be present along the proposed route, is a valid consideration.

In my opinion, the capacity to assert §87(2)(f) is dependent upon attendant facts. For example, the name of the company transporting the fuel might have been previously disclosed in a contract between the company and the agency. In that event, I do not believe that there would be a basis for denial. Similarly,

reports by the news media might include several aspects of the information at issue, in which case records containing the same information would be public. If, however, those kinds of details are not known to the public, it is likely that they could be withheld. It is noted that it has been advised in the past that the proposed schedule and route of the transportation of nuclear waste could be withheld on the basis of §87(2)(f). Nevertheless, I do not believe that I can specifically address each of the matters that you have raised, for the facts, circumstances, other requirements of law, prior publicity and similar factors would be relevant to determining the ability to properly withhold the information in question.

While I regret that I cannot answer your questions with precision, I hope that the foregoing explanation will be useful to you 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-7885

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

September 14, 1993

Mr. Jackson Leeds
[redacted]

Dear Mr. Leeds:

Senator Ralph Marino recently forwarded to this office your correspondence concerning requests made under the Freedom of Information Law, and he asked that I provide assistance on the matter.

By way of background, having requested information from the Office of the State Comptroller indicating "how much money the state has paid out" for attorney's fees awarded under the Freedom of Information Law, you were informed that the Comptroller does not "keep any record of this type of payment", nor does it "issue any reports on such payments." The Comptroller's records access officer suggested that you might seek the information in question from the Attorney General's office.

In this regard, I offer the following comments.

First, as a general matter, 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. Based on the response to your request by the Comptroller's records access officer, that agency does not maintain records regarding payments that might have been made to attorneys in conjunction with litigation brought under the Freedom of Information Law.

Second, even if that agency possesses records containing the information in which you are interested, it does not appear that they would be kept in a manner that enables agency staff to locate or retrieve them. As you may be aware, §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 or record-keeping 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 case of your request, based upon the correspondence, even if the Comptroller's office maintains records containing the information in which you are interested, there appears to be no method or mechanism that has been developed or implemented by that agency to locate or retrieve the specific information that you are seeking.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Cynthia M. Munk, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7886

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

September 15, 1993

Barry M. Schreibman, Esq.
[redacted]

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

Dear Mr. Schreibman:

As you are aware, I have received your letter of August 24. You have requested an advisory opinion concerning the status of the Kripplebush-Lyonsville Fire Department, a volunteer fire company, 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 the Law defines the term "agency" to mean:

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

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

However, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a

> volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose

Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are 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.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kripplebush-Lyonsville Fire Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1887

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

September 15, 1993

Mr. Thomas H. Kheel
Kheel Properties
161 Ludlowville Road
Lansing, NY 14882

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

Dear Mr. Kheel:

As you are aware, I have received your letter of August 19, which pertains to a request for an appraisal that was denied by Tompkins County.

Specifically, you requested an appraisal "prepared by Mark Keller in connection with recent tax grievance of 218 The Commons" in Ithaca. The County Administrator denied the request on the basis of §87(2)(g) of the Freedom of Information Law and expressed the understanding that you do not own the property that is the subject of the appraisal and that the appraisal was "prepared at the request of the owner."

You have asked that I conduct an investigation of the matter and render a determination.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee has neither the resources nor the authority to investigate, and it has no power to issue a determination that is binding on an agency. Nevertheless, in an effort to assist you, 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, as I understand the situation, the provision cited by the County Administrator does not appear to be applicable as a basis for denial. Section 87(2)(g) of the Freedom of Information

Law pertains to "inter-agency" and "intra-agency" materials, 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 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 or perhaps between those officials and a consultant retained by the agency. When a member of the public, acting in that capacity, communicates with government or transmits a record to 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. Therefore, if the appraisal was not prepared by County officials or by a consultant retained by the County, §87(2)(g) would not in my view constitute a valid basis for denial.

In that circumstance, the only other possible ground for withholding portions of the appraisal would be §87(2)(d). That provision permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

An appraisal of commercial property might include income and expense information, for example, and if those or other aspects of the record would if disclosed "cause substantial injury to the competitive position" of a commercial enterprise, those portions could properly be withheld.

Lastly, if the appraisal was prepared by County officials or by the County's consultant, §87(2)(g) would be relevant [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under §87(2)(g).

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with 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 [i.e., §87(2)(c)] could properly be asserted.

A copy of this opinion will be forwarded to Mr. Heyman, the County Administrator.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Scott Heyman, County Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1888

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

September 15, 1993

Ms. Wanda McCabe
[redacted]

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

Dear Ms. McCabe:

I have received your letter of August 18 and the materials attached to it.

Having requested a report relating to an "asbestos remediation certificate" from the Village of Lindenhurst, you were informed by the Village Attorney that "such documents are not maintained as part of the official files of the Village of Lindenhurst." You have questioned the propriety of his response.

From my perspective, the issue is whether the Village has possession of the report that you requested, and I question the meaning of the term "official" as it was used by the Village Attorney. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records maintained by an agency. Therefore, if the Village does not possess the documentation in which you are interested, the Freedom of Information Law would not apply, and the Village would bear no obligation to acquire the materials on your behalf.

Second, however, §86(4) of the Freedom of Information Law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings,

> maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

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, if the documentation is in possession of the Village, I believe that it would constitute a "record" falling within the scope of the Freedom of Information Law, irrespective of whether it is characterized as "unofficial".

Lastly, when records are maintained by an agency, 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 §87(2)(a) through (i) of the Law. Based upon the materials attached to your letter, if the report of your interest is in possession of the Village, I believe that it would be available, for none of the grounds for denial would apparently be applicable. Again, however, if the Village does not possess the report, the Freedom of Information Law would not apply.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerard Glass, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7889

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

September 15, 1993

Mr. M. 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:

As you are aware, I have received your letter of August 19.

You have sought assistance concerning your desire to obtain copy of the City of Mount Vernon Police Department "Detective Guide", specifically those aspects of the guide pertaining to investigations.

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 response to requests, and you may submit a request by writing to that person at City Hall, Mount Vernon, NY 10550.

Second, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the record sought. Therefore, a request should contain sufficient detail to enable agency staff to locate 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 record 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 a detective guide would consist in part of instructions to staff that affect the public or an agency's policy. To that extent, I believe that it would be available, unless a different basis for denial could be asserted.

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

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations 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. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees 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 correction officers or others, it appears that section 87(2)(f) would be applicable.

In sum, while some aspects of such a guide might be available, others in my opinion could be withheld in conjunction with the preceding commentary.

I hope that I have been of some 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-7890

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

September 15, 1993

Mr. Edwin Arthur
90-A-8635
P.O. Box 180
Lock 11 Road
Comstock, NY 12821

Dear Mr. Arthur:

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

You indicated that you have attempted unsuccessfully for three years to obtain certain information from the New York City Police Department. Specifically, the request involves a copy of a "handwritten Log Book which is located at the 90th Pct, which would indicate the time and name of the detective from the 79th Pct, who dropped [you] off to be held overnight; on June 7, 1989 thru June 8, 1989." In addition, you cited the "amended Freedom of Information Act" as a basis for seeking a reduction or waiver of fees.

In this regard, I offer the following comments.

First, it is noted that the federal Freedom of Information Act is applicable only to records maintained by federal agencies. Therefore, it does not apply to the New York City Police Department. While the New York Freedom of Information Law is applicable to records of entities of state and local government, including the Police Department, I point out that nothing in that statute pertains to the waiver or reduction of fees. Further, it has been held that fees under the Freedom of Information Law, which generally cannot exceed twenty-five cents per photocopy, need not be waived, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Second, the Freedom of Information Law pertains to existing records. If the handwritten log to which you referred no longer exists, the Freedom of Information Law would not apply.

Third, insofar as agency records do exist, as a general matter, the Freedom of Information Law is based upon a presumption

of access. Stated differently, all records 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 opinion, to the extent that the record in question indicates the time and name of the detective who dropped you off, it would be available, for none of the grounds for denial would appear to be applicable.

Lastly, 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)].

For your information, the person designated by the New York City Police Department to determine appeals under the Freedom of Information Law 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. William J. Matusiak, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7891

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

September 14, 1993

Mr. Michael Cardona
92-A-3753
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. Cardona:

I have received your letter of August 19 in which you sought assistance concerning access to records.

As the subject of a disciplinary proceeding at your facility, you expressed the belief that you have the right to present evidence that may help you in establishing your innocence. You wrote that you have been denied access to a Department policy, §2803, entitled "Release of Inmate Related Statistical Data" and that you believe that the directive in question might contain information relating to you that may be useful in your defense.

If I understand your remarks correctly, it appears that there may be a degree of confusion. In this regard, I offer the following comments.

First, as I understand your statement, the policy in question would pertain generally to the release of inmate related statistical data; it would not appear to pertain to you specifically or contain information about you. If that is so, while the policy would likely be available under the Freedom of Information Law, it would have no direct relevance to your proceeding.

Second, the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a correctional facility may be directed to the facility superintendent or his designee. If a request is denied, you may appeal the denial to Counsel to the Department in Albany.

Third, with respect to rights of access to the policy, of likely relevance is §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

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

Lastly, if you have questions concerning the proceeding, 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-7892

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

September 28, 1993

Mr. Michael Melendez
#91-A-9649
PO 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. Melendez:

I have received your letter of August 20 in which you sought assistance concerning a request made under the Freedom of Information Law.

According to you letter, you requested records from the New York City Police Department early in June. The receipt of your request was acknowledged, and you were informed that a decision would be made on or about July 27. Nevertheless, as of the date of your letter to this office, you had received no further response.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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, Civil Matters.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Sergeant William J. Matusiak, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7893

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

September 28, 1993

Martin Jones Sr.
89-C-0145
P.O. Box 149
Attica, NY 14011

Dear Mr. Jones:

I have received a variety of correspondence concerning your letter of June 16 addressed to the Committee on Open Government in which you asserted that the Committee has failed to carry out its duties regarding that letter. Having searched our files, your letter of June 16 has been located. In all honesty, it was misplaced and I failed to respond on behalf of the Committee as I should have and as I routinely do. Please accept my apologies for the oversight.

As you requested, enclosed are the general regulations promulgated by the Committee on Open Government pursuant to the Freedom of Information Law. This office, however, does not have a copy of any such rules and regulations promulgated by the Erie County District Attorney's office. There is no requirement that an agency's rules and regulations be sent to this office, and we do not have possession of that record. You also requested "Copies of all final determinations made by the Erie County District Attorney's Office", in our possession. It is assumed that you are referring to determinations rendered in response to appeals made under the Freedom of Information Law. Based upon that assumption, it is noted that this office receives thousands of copies of such determinations annually, and that those records are filed chronologically, rather than by agency. Nevertheless, we have engaged in a search of those records, which are maintained for the period covering 1991 to the present. On the basis of that search, no determinations of appeals rendered under the Freedom of Information Law by the Erie County District Attorney have been located. As you may be aware, §89(4)(a) of the Law requires that agencies forward copies of appeals and the ensuing determinations to the Committee.

The second aspect of your inquiry involves a request for advice concerning access to records relating to a homicide investigation. 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 §87(2)(a) through (i) of the Law. Since I am unaware of to extent to which the records in which you are interested exist, the contents of any such records, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to any such 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 an 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 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 found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

You asked that the remaining aspect of your inquiry, which pertains to §240.65 of the Penal Law, be referred to Lieutenant Governor Stan Lundine. Here I point out that the Committee has authorized the staff to respond on its behalf. You also inquired as to which state agency has the obligation or authority to investigate the Erie County District Attorney and employees of his office concerning violations of the Freedom of Information Law. Similarly, you asked "how to proceed judicially against the Erie County District Attorney" with respect to the provision of the Penal Law cited above.

While the Committee on Open Government is authorized to provide advice regarding the Freedom of Information Law, there is no state agency that is empowered to enforce that statute. Further, I am unaware of any judicial decisions that have been rendered with respect to §240.65 of the Penal Law or its companion statute, §89(8) of the Freedom of Information Law. Ordinarily, violations of the Penal Law are prosecuted by a district attorney; in rare situations, a special prosecutor may be designated.

I hope that I have been of some assistance. Once again, I apologize for the delay in response.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Kevin M. Dillon, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7894

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

September 29, 1993

Mr. Billy Billups
#80-A-1328
Drawer B
Stormville, NY 12582

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

Dear Mr. Billups:

As you are aware, I have received your letter of August 19. In conjunction with a request directed to the Office of the Queens County District Attorney, you asked whether "microfilms and/or microfiches" are subject to the Freedom of Information Law.

In this regard, the Freedom of Information Law is applicable to agency records, and §86(4) of the law defines the term "record" to mean:

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

Due to the breadth of the language quoted above, which includes specific reference to microfilms, I believe that microfilms and microfiches maintained by an agency clearly constitute "records" subject to rights conferred by the Freedom of Information Law.

The foregoing is not intended to suggest that the Office of the District Attorney possesses microfilm or microfiches concerning the case that is the subject of your request. Further, even if that agency generally maintains those kinds of records, its possession of them would not necessarily require that such records be disclosed. As in the case of other records, i.e., those maintained on paper, their specific contents and the effects of

disclosure would be key factors in determining the extent to which microfilm or microfiche would be available or deniable in accordance with the grounds for denial appearing in paragraphs (a) through (i) of §87(2) of the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Steven J. Chananie

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7895

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

September 29, 1993

Mr. John Harris
91-A-7018
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. Harris:

As you are aware, I have received your letter of August 19. You have asked that this office "compel the Department of Corrections to produce the names of corrections officers who assaulted [you] on March 25, 1991..." You wrote that, despite having made requests under the Freedom of Information Law, the agency has not disclosed the information in question "even though the officers involved were subject to a disciplinary hearing for their actions in the illegal beating, and it resulted in the termination of employment for one of them."

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law; the Committee cannot "compel" an agency to comply with the Law or otherwise direct an agency to grant or deny access to records. Nevertheless, in an effort to enhance your understanding of the law, I offer the following comments.

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

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).

In my opinion, insofar as the subjects of your allegations continue to be employed as correction officers, §50-a of the Civil Rights Law would be applicable and might serve as a valid basis for a denial. On the other hand, if a subject of your allegations was dismissed, I do not believe that §50-a would be applicable, because he would no longer be a correction officer, and the rationale for the confidentiality accorded by that provision would no longer be present.

Also relevant 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 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ruby Ryles, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7896

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 1, 1993

Mr. Jonathan Bryant
77-A-2816
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. Bryant:

As you are aware, I have received your letter of August 23 and the correspondence attached to it.

You have asked for assistance concerning delays in response to requests directed to a court clerk and the office of a district attorney. 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 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 the term "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 office of a district attorney would be required to comply with the Freedom of Information Law, the courts and court records are not subject to that statute. As such, a court clerk, for example, would not be obliged to follow the procedural requirements imposed upon agencies

by the Freedom of Information Law. This is not to suggest that court records need not be disclosed, for statutes other than the Freedom of Information Law may grant rights of access to those records.

Second, your request to the Washington County District Attorney involves a request made on June 8 for records that had been previously made available but which were "inadvertently misplaced". As of the date of your letter to this office, you had received no response to the request.

Here 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. However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

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, attached are your "original enclosures" and the other information that you requested.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen M. LaBelle
Kevin C. Kortright

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-149
FOIL-AO-7897

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 1, 1993

Mr. George M. Clark
[redacted]

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

Dear Mr. Clark:

As you are aware, I have received your letter of August 23 and various correspondence related to it.

In brief, having been informed by the Office of Parks, Recreation and Historic Preservation that your position as a volunteer at Fort Ontario has been terminated and that the agency's ties with Friends of Fort Ontario, Inc., which is headed by your wife, have been severed, you requested correspondence that led to those actions. Although the agency disclosed some of the records sought, you have requested an advisory opinion concerning the propriety of the agency's responses. It is your contention that there is additional correspondence including your name or that of your wife that has been withheld and to which you are entitled.

Although it appears that the Office of Parks, Recreation and Historic Preservation has disclosed records in response to your requests to the extent required by law, 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. Since the records in question likely consist of inter-office communications, as indicated in the agency's responses, §87(2)(g) is relevant. That provision pertains to inter-agency and intra-agency materials and permits an agency to withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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, insofar as records pertain to you or your wife, also potentially relevant is the Personal Privacy Protection Law. That statute 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 general, 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.

Although I am unfamiliar with the contents of records maintained by the agency that may be retrievable by means of your name or that of your wife, any such records would likely be accessible to you or your wife, respectively, under the Personal

Privacy Protection Law, 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Steven L. Osborne, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1898

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 4, 1993

Mr. David Hunt
83-A-4739
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. Hunt:

As you are aware, I have received your letter of August 25.

You have sought an advisory opinion concerning access to certain records that you requested from the Office of the New York County District Attorney, "the law on the People's obligation to preserve such materials and the relationship between the Freedom of Information Law and the Freedom of Information Act.

In this regard, I offer the following comments.

First, the Freedom of Information Act is a federal statute (5 U.S.C. §552) that pertains to records maintained by federal agencies. The general statute pertaining to access to records of state and local government in New York is the New York Freedom of Information Law. Although the state and federal statutes are similar in structure, their specific language differs.

Second, the Freedom of Information Law pertains to access to records; it does not deal with the preservation of records or the obligation of the people, as represented by a district attorney, to preserve records. As such, I have neither the authority nor the expertise to respond to that aspect of your inquiry.

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 §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, the extent to which they exist, or the effects of their disclosure, I cannot offer specific

guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the kinds of records that you described.

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 as a basis for denying access to records or for 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 remaining ground for denial of likely relevance 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 an 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.

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 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 found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Vincent W.S. Lai, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7899

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 5, 1993

Mr. Matthew Lee
Executive Director
Inner City Press
P.O. Box 416
HUB Station
Bronx, NY 10455

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

Dear Mr. Lee:

As you are aware, I have received your letter of August 25 and related documents. Please accept my apologies for the delay in response.

Your correspondence relates to the treatment of requests for records directed to the Office of the Mayor of New York City and to Assemblywoman Gloria Davis, who has failed to respond.

In this regard, I offer the following comments.

First, according to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each entity subject to the Law must have designated at least one "records access officer". The records access officer has the duty of coordinating the entity's responses to requests. Therefore, in my opinion, if a request is received by a person other than an agency's designated records access officer, that person should either respond directly in a manner consistent with law or promptly forward the request to the records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which entities 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)].

Third, since one of the issues involves a request made to a member of the Assembly, I point out that there are provisions regarding the disclosure of records of the State Legislature that differ from those applicable to agencies generally. With respect to agency records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. With respect to records of the State Legislature, §88(2) and (3) of the Freedom of Information Law specify and limit the kinds of records that must be disclosed. Therefore, in some instances, although certain records might be available from agencies, similar records would not be available from the State Legislature. Enclosed is a copy of the Freedom of Information Law, and it is suggested that you review §88 to become familiar with provisions dealing specifically with the State Legislature. Further, it is recommended that a request for records of a member of the Assembly be directed to its records access officer, Ms. Sharon Galarneau, whose address is: Assembly Public Information Office, Room 202, Legislative Office Building, Albany, NY 12248.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7900

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 5, 1993

Mr. John J. Brennan
S. & A. Concrete Co. Inc.
1144 Zerega Avenue
Bronx, NY 10462

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

Dear Mr. Brennan:

As you are aware, I have received your letter of August 24. Please accept my apologies for the delay in response.

Although you were successful in obtaining most of the records that you requested from the New York City Transit Authority, you wrote that in the one instance in which your request was denied, it was indicated that "the matter was still being negotiated and therefore was not finalized."

You asked whether that is a valid reason for denying a request. In this regard, I offer the following comments.

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

Second, of likely relevance is §87(2)(c), which permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." Based upon that provision, if a contract is in the process of being negotiated, and if disclosure would impair the agency's ability to engage in an optimal contractual agreement, or if disclosure would place a party to the negotiations at an unfair disadvantage, I believe that §87(2)(c) could properly be asserted as a basis for a denial of access.

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-7901

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 5, 1993

Mr. Andrew Lockett
91-R-4956
Wende Correctional Facility
3622 Wende Rd., P.O. Box 1187
Alden, NY 14004-1187

Dear Mr. Lockett:

I have received your letter of September 29 in which you appealed a denial of access to records to the Committee on Open Government.

In this regard, although the Committee is authorized to provide advice concerning the Freedom of Information Law, this office is not empowered to render a determination on an appeal or otherwise compel an agency to grant or deny access to records.

The provision pertaining to the right to appeal a denial of access 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 in Albany.

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 7902

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 6, 1993

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:

As you are aware, I have received your letter of September 1. Please accept my apologies for the delay in response.

You complained that the Commissioners of the Sullivan County Board of Elections "are constantly changing the rules by which information can be gotten from that office," and that the times during which information can be obtained was restricted to certain hours.

Since you referred to provisions of the Election Law requiring that copies of records be made available "during the day except 15 minutes before 5 p.m.", it is noted that I have neither the authority nor the expertise to provide advice concerning the Election Law. Further, although §3-214(3) of the Election Law requires that each central board be open "every business day during usual business hours", and "for the receipt of papers between the hours of nine A.M. and five P.M. on the last day on which a paper may be filed with it and on such other days and hours as may be required herein", I was unable to locate any provision of the Election Law pertaining specifically to the hours during which information must be disclosed. Again, since the Election Law is beyond my area of expertise, it is suggested that you contact the State Board of Elections concerning existence of such a provision.

Notwithstanding the foregoing, however, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, state in §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, when an agency can readily locate records and determine that they are accessible, to comply with the intent of the Law, I believe that the records must be made available during regular business hours. As such, in my view, in that circumstance, an applicant's ability to inspect them, for example, could not be restricted to a specified time period on a particular day.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Elections

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7903

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 6, 1993

Mr. Eugene F. Hauver
84-A-2500
Adirondack Correctional Facility
P.O. Box 110
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 Mr. Hauver:

As you are aware, I have received your letter of August 28 addressed to Mr. Bookman, Chairman of the Committee.

You have complained with respect to delays in response to your requests made to the Division of Parole and you alleged that the Division has failed to comply with the Freedom of Information Law. The focal point of your letter involves a request for "records/data that would reflect those inmates granted release by the Board of Parole following a hearing who had been convicted of a violation of section 130.35 of the Penal Law, prior to the conditional release date when the Board no longer has the discretion to deny release."

In this regard, I offer the following comments.

First, it is my view that the Division of Parole has consistently sought to comply with the Freedom of Information Law. I would conjecture that any failure to comply with the Freedom of Information Law would be or have been unintentional.

Second, a key issue may relate to the ability of Division staff to locate the records described above. 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 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 event 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 Division'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. If the records in question cannot be retrieved based upon the Division's filing systems other than by engaging in individual searches of voluminous records, the request, in my view, would not have met the standard that it reasonably describe the records.

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

Robert J. Freeman
Executive Director

RJF:jm

cc: William Altschuller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7904

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 6, 1993

Mr. Eugene Zienkowicz
#93-A-3500
Box 338
Napanoch, NY 12458

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

Dear Mr. Zienkowicz:

As you are aware, I have received your letter of August 25 in which you sought an opinion and related information concerning requests made under the Freedom of Information.

Your requests were made to the headquarters of the New York City Police Department, the 105th Precinct in Queens and to an office of the Division of Parole in Queens. In this regard, I point out that each agency must designate at least one "records access officer". The records access officer at the agency that maintains the records has the duty of coordinating an agency's response to requests, and a request should ordinarily be made to the records access officer at the agency that maintains the records in which you are interested. For your information, the records access officer at the New York City Police Department is Sgt. William Matusiak, whose office is located at One Police Plaza; William Altschuller is the records access officer at the Division of Parole, 97 Central Avenue, Albany, NY 12205. If a request is made to a person other than the records access officer, that person should in my opinion respond to the request in accordance with law or forward the request to the records access officer.

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 §87(2)(a) through (i) of the Law.

Some of the records sought, such as your signed complaint, a description of your injuries and photographs of you, would likely be available, for none of the grounds for denial would likely

apply. I have no familiarity with contents of accident and Aided card to which you referred. As such, I cannot provide specific guidance concerning access to that document.

With regard to an "in-office interview summary report" or related records prepared by an employee of the Division of Parole, I believe that §87(2)(g) of the Freedom of Information Law would be relevant in determining rights of access. 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 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.

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

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7905

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 6, 1993

Mr. Brian Kiesel
92-A-0354
Suite N-1-22
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. Kiesel:

As you are aware, I have received your letter of August 21, which reached this office on September 1.

You asked initially whether §18 of the Public Health Law "still exists" and, if so, whether you can obtain birth records maintained by a hospital under that statute. In this regard, §18 of the Public Health Law generally deals with rights of access by patients to records about themselves that are maintained by the providers of medical services. Therefore, if you are seeking birth records or medical records pertaining to a person other than yourself, §18 of the Public Health Law would not apply.

Further, access to birth records is governed by §4173 of the Public Health Law. That statute states in relevant part that a birth record "shall be issued only upon order of a court of competent jurisdiction or upon a specific request therefor by the person, if eighteen years of age or more, or by a parent or other lawful representative of the person to whom the record of birth relates." I point out, too, that §4173 pertains to birth records maintained by the State Department of Health and local registrars of vital 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 1906

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 6, 1993

Ms. Laurie Molz
[redacted]

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

Dear Ms. Molz:

As you are aware, I have received your letter of August 28. Please accept my apologies for the delay in response.

You wrote that you have encountered difficulty in obtain records from the Commack School District. In brief, having made a request on August 5 for bills pertaining to the redecoration/renovation of the Board of Education Meeting Room, the request was denied on August 12 on the ground that the records sought did not exist in the form in which you requested them. You changed the wording of your request and appealed on the same day. The District's records access officer responded in a letter of August 23 and indicated that "she was waiting for the information from the Business Office". As of the date of your letter to this office, you had received no further response.

In this regard, I offer the following comments.

First, 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)].

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 §87(2)(a) through (i) of the Law. From my perspective, assuming that the bills in which you are interested can be located, they must be disclosed, for none of the grounds for denial could be asserted to withhold those 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 the District's records access officer.

I hope that I have been of some 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 1907

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 6, 1993

Mr. Stephen G. Roche, Esq.
Attorney at Law
23 Hillcrest Avenue
Natick, MA 01760

The staff of the Committee 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. Roche:

I have received your letter of August 24 and a variety of materials attached to it.

You have sought an advisory opinion concerning the propriety of a denial of access to records by the Metropolitan Transportation Authority. The records sought involve "any and all reports or other evaluation materials prepared by or for the TBTA [Triborough Bridge and Tunnel Authority] after March 13, 1992 as part of the testing and evaluation process commenced by the TBTA in response to the 'Interagency Request for Technology (RFT) of Compatible Electronic Toll Collection Equipment,' dated January 1, 1992." You also expressed the view that a denial of access to the information "actually impairs the procurement process for an ETC system because only one (very) likely bidder, AmTech, has access to the ETC system test data for TBTA's Verrazano-Narrows Bridge site." You added that "[t]his approach denies other potential bidders the opportunity to submit a bid for a system that meets the unique requirements at the Verrazano-Narrows Bridge" and "gives the appearance that the TBTA has already selected its vendor, AmTech, for the installation at the Verrazano-Narrows Bridge."

In this regard, I offer the following comments.

First, having discussed the matter with Jeannette Redmond, the MTA's Freedom of Information Officer, I was informed that several firms have submitted proposals, and that the Authority has narrowed the scope of its evaluation and negotiation process to two firms. Further, while the Verrazano-Narrows Bridge may be a site of the operation of an ETC system, that is not the only site that at which the system will operate. On the contrary, I was led to believe

that it is one among several locations that would be covered by a contract award and implementation of the ETC system.

Second, in conjunction with Ms. Redmond's response to your appeal dated September 14, her remarks offered during our discussion of the matter, the language of the Freedom of Information Law and its interpretation, with which you are familiar, it appears that a denial of your request would be proper at this time. As you are aware, §87(2)(c) of the Freedom of Information Law authorizes an agency to withhold records insofar as disclosure "would impair present or imminent contract awards." Although you contended in your appeal that no contract award was "imminent", Ms. Redmond indicated to you that a "schedule concerning testing of competing vendors' technologies" had been established, that those vendors have tested equipment, that the TBTA would engage in testing of the competing technologies between September and December of this year, and that a vendor would likely be selected in January 1994. In view of the steps that have been taken and the schedule that has been established, it is clear in my view that the records sought relate to an "imminent" contract award. Due to the fact that the competing technologies are currently being tested and that negotiations are ongoing with the vendors, it is likely in my opinion that disclosure at this juncture would impair the negotiation process and that §87(2)(c) would serve as a valid basis for denial.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Jeannette Redmond

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1908

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 6, 1993

Ms. Sue Wimmershoff-Caplan
Attorney at Law
250 West 57th Street
Suite 2232
New York, NY 10107

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

Dear Ms. Wimmershoff-Caplan:

As you are aware, I have received your letter of August 24. Please accept my apologies for the delay in response.

According to your letter and the correspondence attached to it, on May 6, you addressed a request under the Freedom of Information Law to the Police Commissioner of the City of New York for "a list of the names and locations of all firearms ranges that are 'authorized' within the meaning of Chapter 5 of the compilation of rules of the Police Department." As of the date of your letter to this office, you had received no response to the request, and you asked whether there is any "legal justification for this failure to respond."

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21NYCRR Part 1401), each agency 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, and a request should ordinarily be made to that person. Although I believe that your request should have been answered by the Commissioner or forwarded to the records access officer for response, it is suggested that you might resubmit the request to the records access officer, Sgt. William J. Matusiak.

Second, 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)].

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

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. Therefore, if there is no "list" of the names and locations of firearms ranges, Department staff would not be obliged to prepare such a record on your behalf. Unless you are certain that list exists, it is suggested that you request records or portions of records that include the names and locations of the firearms ranges in question.

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 1909

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 6, 1993

Mr. Anthony Logallo
90-B-1210
3622 Wende Road
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. Logallo:

I have received your letter of August 29, as well as a letter of September 29 in which you inquired as to whether I had received the former correspondence.

Your inquiry pertains to a denial of access to a "victim notice", which may be filed by a victim or family member of the victim pursuant to §149-a of the Correction Law. Under that statute, if such a notice has been filed, the Department of Correctional Services is required "at the time of any discharge, temporary release or parole of an inmate named in such form, to notify the victim or family member by certified mail of such release." Since §149-a does not specify that a victim notice is confidential, you have contended that it is a "public document". You asked whether in my view a victim notice may be withheld, and if so, whether it may be still withheld if all names and addresses are deleted.

In this regard, I offer the following comments.

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

Second, although §149-a of the Correction Law does not require that a victim notice remain confidential, in my opinion one or more of the grounds for denial appearing in the Freedom of Information Law would likely justify a denial of access to such a record. Section 87(2)(b) of the Freedom of Information Law enables an

agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy". While that standard is not and in my view cannot be precisely defined, I believe that a victim notice would fall within the scope of that exception. Further, even if identifying details are deleted, it is likely that an inmate could ascertain the identity of a person filing such a notice, for notices may be filed only by victims or members of their families. Consequently, it is likely that a victim notice could be withheld in its entirety. In addition, arguably, §87(2)(f) would serve as a basis for denial. That provision states that an agency may withhold records when disclosure would "endanger the life or safety of any person."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7910

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 8, 1993

Mr. Charles B. Smith
[redacted]

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

Dear Mr. Smith:

As you are aware, I have received your letter of September 3. Please accept my apologies for the delay in response.

You have sought advice and assistance concerning requests made under the Freedom of Information Law directed to the Office of the Rensselaer County Executive in July and August. Because they were not answered, you appealed. However, as of the date of your letter to this office, both the requests and the appeals have been "ignored".

In this regard, I offer the following comments.

First, it is noted at the outset 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)].

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 §87(2)(a) through (i) of the Law.

The first request attached to your letter involves "records which reflect the names, titles and salaries of any and all persons hired by Rensselaer County from July 1, 1992 to date." I point out that §87(3) of the Freedom of Information Law pertains to payroll information concerning public employees. 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 described above and related information, such as an employee's starting or hiring date, 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.

Similarly, based on the same analysis, a record indicating an employee's starting date would in my view be available. In a decision involving attendance records, i.e., those indicating the days and dates of sick leave claimed by a particular employee, the Court of Appeals affirmed a decision in which it was held that those records must be disclosed and 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 records, as well as items indicating the dates of public employees' employment must be disclosed under the Freedom of Information Law.

A second request involved the County's "affirmative action hiring plan and any statistics on file which identify the number of minorities employed in the county work force and any correspondence from any state or federal agency regarding minority employment and hiring practices."

Insofar as the records sought can be located and identified, it is likely that one of the grounds for denial would be particularly relevant. That provision, however, due to its structure 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, an affirmative action hiring plan would consist either of instructions to staff that affect the public available under §87(2)(g)(ii) or a final agency policy available under §87(2)(g)(iii). Statistics indicating minority employment would clearly be available under §87(2)(g)(i). Correspondence with state agencies would constitute inter-agency

material that is available or deniable, in whole or in part, depending on its contents. Correspondence with federal agencies would not fall within §87(2)(g), because those entities are not "agencies" as defined by §86(3) of the Freedom of Information Law. Therefore, that correspondence would likely be available, for none of the grounds for denial would otherwise appear to be applicable.

However, an issue of potential significance in view of the open-ended aspect of the request in terms of time period that it might cover involves the capacity of agency officials to locate the records of your interest. Section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping 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. Whether or the extent to which correspondence from state or federal agencies concerning minority employment and hiring practices can be located in conjunction with the County's record-keeping systems based upon the terms of your request, and, therefore, whether your request reasonably describes those records, is unknown to me.

The remaining request involves "letters, correspondence, or change orders to or from MRB or MLB regarding any and all design changes or authorizations involving construction of the new jail which were specifically signed by James Girzone", as well as "change orders and or credits authorized by Rensselaer County or the Department of Engineering which relate to the construction of the new county jail." You informed me upon my inquiry that "MRB" is an architectural firm and "MLB" is a construction firm. To the extent that the request reasonably describes the records, I believe that they must be disclosed. In short, the grounds for withholding records are limited, and in my opinion none could justifiably be asserted to withhold such records.

Lastly, in conjunction with the last request, you asked that, if such records do not exist, a statement to that effect be made in writing. In this regard, I point out that §89(3) of the Freedom of Information Law states in part that, upon request, an agency "shall certify that it does not have possession of such records or that such records cannot be found after diligent search."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Office of the County Executive

ERROR

NO FOIL AO 7911

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7912

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 12, 1993

Mr. Salvadore Pou, Jr.
90-D-0017, Y-604
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. Pou:

As you are aware, I have received your letter of August 30. You have sought assistance concerning a request for records directed to the Office of the Jefferson County District Attorney. You have sought a "pen register", a warrant and related documents. It appears that the response to your request did not include an indication of a right to appeal a denial of access.

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)].

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.

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 §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, the extent to which they exist, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the kinds of records that you described.

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 as a basis for denying access to records or for 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 remaining ground for denial of likely relevance 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 an 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.

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 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 found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James T. King, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7913

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 12, 1993

Ms. Matilda Tomeo
[redacted]

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

Dear Ms. Tomeo:

As you are aware, I have received your letter of August 31. Please accept my apologies for the delay in response.

In brief, having requested a file concerning your complaint from the New York Telephone Company under the Freedom of Information Law, you were informed that you would need a subpoena to obtain the documentation in question. You have asked whether that is so.

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) of that law defines the term "agency" to mean:

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

Based upon the foregoing, the Freedom of Information Law generally pertains to records maintained by entities of state and local government. It does not apply to non-governmental entities, such as the New York Telephone Company. Since the Freedom of Information Law does not include the Telephone Company within its coverage, it may indeed be necessary to obtain a subpoena to acquire the records sought.

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

OML-AO 2269
FOIL-AO 7914

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 14, 1993

Ms. Monica Getz, President
Dobbs Ferry League of Women Voters
Shadowbrook
Broadway
Irvington, NY 10533

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

Dear Ms. Getz:

As you may be aware, Susan King has asked that I review and offer an opinion with respect to certain provisions of code of ethics proposed by the Village of Dobbs Ferry.

The focus of the inquiry involves the proposal as it may relate to the Freedom of Information Law and the Open Meetings Law. Specifically, the proposed code would state in relevant part that:

> "The Village Ethics Board shall, with respect to every complaint that it receives and all related deliberations, findings, opinions, recommendations and dispositions thereof:
>
> a. hold all such matters in confidence and not publicly reveal them, to the fullest extent allowable by applicable law, including the New York State Freedom of Information Law, as it may be amended.
>
> b. meet only in executive session, closed to the public, to the fullest extent allowed by the New York State Open Meetings Law, as it may be amended, and
>
> c. render a written confidential report of its findings, opinions and recommendations which report will be

> provided to the subject of the investigation."

In my opinion, the language quoted above is unnecessary and potentially in conflict with both the Freedom of Information Law and the Open Meetings Law. In this regard, I offer the following comments.

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

Due to the breadth of the language quoted above, any documentation, irrespective of its function or origin, maintained by an agency would constitute a "record" subject to rights of access.

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

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, 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, 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 opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of

Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics code must be disclosed; rather, I am suggesting that those records may in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, and that any local enactment that is inconsistent with that statute would be void to the extent of any such inconsistency.

It is likely in my view that two the grounds for denial would be particularly relevant with respect to records maintained by a board of ethics.

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. 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. 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.

There may also be privacy considerations concerning persons other than employees who may be subjects of a board's inquiries. For instance, I believe that the name of a complainant or witness could be withheld in appropriate circumstances as an unwarranted invasion of personal privacy.

The other provision of relevance, §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 inquiry or 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. 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.

Lastly, as in the case of the Freedom of Information Law, insofar as a local enactment is more restrictive concerning access than the Open Meetings Law, I believe that it would be void.

Section 110 of the Open Meetings Law, entitled "Construction with other laws," states in subdivision (1) that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Further, although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally by conducted open to the public, §105(1) of the Law specifies and limits the grounds for entry for entry into executive session.

Relevant to the duties of a board of ethics is §105(1)(f) of the Law, which permits a public body to enter into an executive session to discuss:

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

If the issue before a board of ethics involves a particular person in conjunction with one or more of the subjects listed in §105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, §105(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

I also point out that a public body cannot "meet" in executive session. 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. Moreover, a procedure 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..."

In sum, because the Freedom of Information Law and the Open Meetings Law, which are state statutes, provide the parameters concerning the extent to which records and meetings must be open or

may be closed, again, I believe that specific reference in a local enactment to the extent to which records should be withheld or meetings closed is unnecessary, and that any such reference could result in confusion, difficulties of interpretation and perhaps failure to comply with state statues.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Village Board of Trustees
Susan King

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2270
FOIL-AO 7915

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 14, 1993

Mr. Jeffrey McCheskey
Executive Director
Jamestown Housing Authority
City of Jamestown
Hotel Jamestown Bldg.
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. McCheskey:

As you are aware, I have received your letter of August 31. Please accept my apologies for the delay in response.

On behalf of the Jamestown Housing Authority and its Chairman, you raised a series of questions concerning the Open Meetings Law, particularly as that statute pertains to executive sessions.

First, you asked whether the "mover", the person who introduces a motion to enter into an executive session, is "obligated to inform the public as to whether or not formal action will result from an impending Executive Session" (emphasis yours).

From my perspective, since executive sessions are held to discuss, to deliberate, and perhaps to debate the positive and negative aspects of certain issues, it cannot necessarily be known at the time that a motion is made to conduct an executive session that "formal action will result." Nothing in the Open Meetings Law deals directly with the question, and in my view, the Law imposes no obligation in advance of an executive session to specify whether action will or will not be taken during the executive session.

Second, you questioned whether the recording secretary is "obligated...to take minutes of an executive session even if no formal action has been taken by the Board", and whether, if minutes are prepared, they must be made available in "any or all cases" (emphasis yours) to the public.

In this regard, §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.

If minutes or notes are prepared concerning an executive session even when there is no requirement to do so, any such documents would fall within the coverage of the Freedom of Information Law. It is noted that §86(4) of the 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 any notes or minutes that are prepared would constitute "records" subject to rights conferred by the Freedom of Information Law.

This is not to suggest that all such records would be available. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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. Therefore, the specific contents of the records would determine the extent to which records are available or deniable. For instance, while minutes indicating that the Board decided to fill a vacant position by hiring a particular individual would clearly be public, insofar as minutes identify applicants for dwellings or tenants in public housing, I believe that they must be withheld (see Public Housing Law, §159).

Lastly, you asked whether there may be "'rules of thumb' that apply in all instances involving both the entrance into and the exit from an Executive Session" (emphasis yours). Here I point out that 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, provided, however, that no action by form vote shall be taken to appropriate public moneys..."

The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. There is nothing in the Open Meetings Law pertaining specifically to "the exit" from an executive session. It is suggested that when discussion of the subject or subjects identified the motion to enter into executive session has ended, the Board should return to the open portion of the meeting to continue carrying out its business.

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 1916

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 18, 1993

Ms. Wanda McCabe
[redacted]

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

Dear Ms. McCabe:

I have received your letter of August 30 and the materials attached to it.

As I understand their contents, you appealed denials of various requests for records of the Village of Lindenhurst. In all but one instance, it appears that the appeals were made beyond the time period prescribed in the Freedom of Information Law. In addition, you referred to a certain denial of an appeal based solely upon a statement that the "document represents an interagency memorandum."

In this regard, I offer the following comments.

First, for purposes of clarification, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records. That provision states in relevant part that:

> "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."

If more than thirty days have elapsed since an agency's initial denial, an applicant could request the records again, and if that request is denied, an appeal could be made within thirty days of

that denial. Alternatively, an agency could waive the thirty day limitation and render a determination on the appeal even though the time to appeal has expired.

Second, the mere characterization of a document as an "interagency memorandum" or reference to §87(2)(g) of the Freedom of Information Law would, in my view, be inadequate to justify a denial of access. While that provision represents a potential basis for denial, due to its structure, it often requires disclosure. 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.

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. Similarly, insofar as inter-agency or intra-agency materials consist of instructions to staff that affect the public or final agency policies or determinations, I believe that they would be available.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerard Glass

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7917

162 Washington Avenue, Albany, New York 12231
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October 19, 1993

John D. Chestara, Counsel
Board of Hudson River-Black River
Regulating District
350 Northern Boulevard
Albany, NY 12204

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

Dear Mr. Chestara:

As you are aware, I have received your letter of September 2 and related correspondence. Please accept my apologies for the delay in response.

In your capacity as Counsel to the Hudson River-Black River Regulating District (the District), you have sought an advisory opinion concerning a request made in August by Tim O'Brien of the Times Union for correspondence between the District and the New York State Ethics Commission (the Commission). Michael Cleary, Administrative Associate for the District, responded to Mr. O'Brien, stating that "there are no such records other than routine correspondence" and added that:

> "Inasmuchas [sic] certain information maintained by the Ethics Commission is personal and confidential in nature, we would respond by indicating that copies of all such records are on file with the Ethics Commission, and would refer your request to the Ethics Commission that can properly decide which correspondence is confidential according to the Ethics Law, and which is not."

Having received Mr. Cleary's response, Mr. O'Brien referred to the admission that the District maintains routine correspondence falling with the scope of his request, renewed that request and contended that "the law makes no provision for an agency to refer a request to another agency." In addition, he indicated that the response failed to indicate the reasons for a denial of access or the name of the person or body to whom an appeal could be made.

Subsequently, on September 2, Mr. O'Brien appealed, and the appeal was referred to your attention. Although you acknowledged the principles inherent in the Freedom of Information Law, you wrote that, in response to Mr. O'Brien's original request, the District referred him to the "Commission itself in that the Ethics Commission would be better able to determine which records are accessible and which records may be shielded pursuant to the New York State Ethics Law itself", for "[i]t was felt the Ethics Commission was better able to make that determination than [y]our agency." Prior to your determination, however, you forwarded Mr. O'Brien's correspondence with the District to me for the purpose of seeking an advisory opinion.

In this regard, I offer the following comments.

First, while I appreciate your interest in complying with the Freedom of Information Law and seeking the advice of this office, I do not believe that a request for an advisory opinion relieves the District of its responsibility to comply with the time limitation imposed by §89(4)(a) of the Freedom of Information Law concerning the issuance of a determination following an appeal, unless the appellant has waived adherence to that limitation. The cited provision states in relevant part that:

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

Moreover, as you are aware, the function of the Committee in providing opinions is purely advisory, the Committee has no authority to review records in camera or otherwise, and there is no indication in your correspondence of the precise nature of the records at issue.

Second, in conjunction with the definitions of "agency" and "record" appearing respectively in subdivisions (3) and (4) of §86 of the Freedom of Information Law, any documentation maintained by the District would constitute an agency record subject to rights of access, and it is my view that the District is required to disclose its records to the extent required by the Freedom of Information Law. Certainly representatives of the District may consult or confer with representatives of other agencies prior to granting or denying access to records; nevertheless, I believe that it is the District's responsibility to grant or deny access to its records and that it would be inappropriate to transfer a request for its records to another agency.

Further, while the District in my opinion is clearly subject to the requirements of the Freedom of Information Law, the State Ethics Commission and its records are excluded from the coverage of that statute. Section 94(17)(a) of the Executive Law 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 section seventy-three-a of the public officers law except the categories of value or amount, which shall remain confidential, and any other item of information deleted pursuant to paragraph (h) of subdivision nine of this section;
>
> (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."

While it appears unlikely that the correspondence requested by Mr. O'Brien would fall within the four categories of records available from the Commission under the language quoted above, it is possible that some aspects of correspondence may be available from the District under the Freedom of Information Law.

Third, since the District is an agency required to comply with the Freedom of Information Law, 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.

While I am unfamiliar with the contents of the documentation falling within the scope of Mr. O'Brien's request, it appears that two of the grounds for denial may be particularly relevant.

Communications between the District and the Commission would fall within the scope of §87(2)(g). That provision enables an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, 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. An example of a record that in my view would be available would be a list of officers or employees of the District who are required to submit financial disclosure statements that is transmitted to the Commission. Although the list would constitute inter-agency material, it would consist of factual information available under §87(2)(g)(i). Conversely, if, for instance, a communication seeks or offers an opinion or recommendation, that document or portion thereof could be withheld under §87(2)(g).

The other ground for denial of likely relevance, §87(2)(b), provides that an agency may 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. 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. Additionally, 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)]. 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 unsubstantiated allegations, questions regarding impropriety 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.

Again, since I am unfamiliar with the contents of the records, I regret that I cannot offer more specific guidance. I hope, however, that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Tim O'Brien

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7918

162 Washington Avenue, Albany, New York 12231
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October 19, 1993

Mr. Warren A. (Ed) Dorsch
Secretary
Columbia County
Sportsmen's Federation Inc
PO Box 122
Elizaville, NY 12523

The staff of the Committee 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. Dorsch:

As you are aware, I have received your letter of August 31 and various materials related to it.

You have sought assistance in obtaining records from the Columbia County Office of the Surrogate relating "restricted pistol licenses."

In this regard, having contacted the Division of State Police on your behalf, I was informed that there is no particular officer designated for the issuance of pistol licenses in most jurisdictions in the state. Under §265.00(10) of the Penal Law, in most locations in the state, including Columbia County, the licensing officer may be "a judge or justice of a court of record having his office in the county of issuance." I was also informed that the phrases "restricted license" and "restricted pistol license" are not specifically defined in any provision of law, and that local written policies and procedures relating to any such licenses may or may not exist. Therefore, it is possible that there are no records in existence in the nature of policies or administrative procedures concerning restricted pistol licenses. If that is so, neither the Freedom of Information Law nor other statute pertaining to access to records would apply.

If policies or administrative procedures do exist, I believe that they would be available. As you are aware, 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 or other governmental 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.

Whether the records maintained by a "licensing officer" should be characterized as court records or agency records is conjectural. While functions of licensing officers are carried out by judges in most locations in the state, in other locations, the same functions are carried out by commissioners of police or a county sheriff. Therefore the functions of licensing officers do not appear to be inherently judicial in nature.

Assuming that policies and procedures exist and that any such records are subject to the Freedom of Information Law, I point out that 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.

Of likely relevance would be §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. Policies and procedures would in my view be available under §87(2)(g)(iii), unless a different ground for denial could appropriately be cited.

If the same kinds of records exist and are not subject to the Freedom of Information Law, but rather are court records, it appears that they would be accessible under §255 of the Judiciary Law. I point out that nearly thirty years ago, it was found that §255 and other statutes reflect the state's general public policy that records kept in a public office be made available, unless secrecy is conferred by statute or rule [see Werfel v. Fitzgerald, 23 AD 306 (1965)].

Lastly, as indicated earlier, there is no law that requires the preparation of polices or procedures concerning the area of your interest. If no such records have been prepared, neither the Freedom of Information Law nor any other statute of which I am aware would require they be created. In such a circumstance, in my opinion, the Freedom of Information Law and similar or related statutes would be inapplicable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Don Lynk
Elizabeth R. Bennett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7919

162 Washington Avenue, Albany, New York 12231
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October 20, 1993

Mr. David D. Bott
[redacted]

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

Dear Mr. Bott:

I have received your letter of September 2 and the correspondence attached to it. Your inquiry concerns access to records indicating the "sale prices and assessment value on all property sales that have occurred in the Town of Canadice from January 1, 1992 through and including mid July, 1993."

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. 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, §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. In short, while I believe that records indicating the assessed value of parcels of real property must be disclosed, insofar as records indicate sales prices of properties, those items would be available or deniable, depending upon their intended use. I point out, too, that legislation that becomes effective on July 1, 1994 will require the disclosure of records indicating sale price, irrespective of the purpose of a request.

Second, in view of the delays that you encountered, it is noted that the Freedom of Information Law provides direction concerning the time and manner in which an agency 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: James Smoot, Supervisor
Gerald Nicolay, Chairman, Board of Assessors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7920

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 20, 1993

Mr. Wilson Rodriguez
88-T-2617 C-14-11
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. Rodriguez:

I have received your letter of September 1 in which you raised a question concerning an agency's duty to respond to a request for records in a timely manner.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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: Carol Hafer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7921

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 20, 1993

Hon. Caroline W. Corwin
Town Clerk
Town of New Castle
200 South Greeley Avenue
Chappaqua, NY 10514

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

Dear Ms. Corwin:

I have received your letter of September 1. Please accept my apologies for the delay in response.

Having reviewed an advisory opinion prepared by this office concerning access to building plans, you wrote that you would feel "uncomfortable" in providing copies of those records. You added that, in the past, the Town's policy has been to preclude copying building plans unless the owner of the property provides consent, and it is your view that the policy should be upheld "for the reasons of invasion of privacy and for the security of that home owner."

You have asked my views on the subject, and in this regard, I offer the following comments.

First, in general, whether the subject of a record prefers to authorize or preclude disclosure is, in my opinion, irrelevant in terms of an analysis of rights conferred by the Freedom of Information Law. In a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference concerning the agency's disclosure of the incident to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold the record based upon the "preference" of the person who reported the offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

> "There is no question that the 'releasable copies' of reports of offenses prepared and maintained by the Genesee County Sheriff's

> office on the forms currently in use are governmental records under the provisions of the Freedom of Information Law (Public Officers Law art 6) subject, however, to the provisions establishing exemptions (see, Public Officers Law section 87[2]). We reject the contrary contention of respondents and declare that disclosure of a 'releasable copy' of an offense report may not be denied, as a matter of law, pursuant to Public Officers Law section 87(2)(b) as constituting an 'unwarranted invasion of personal privacy' solely because the person reporting the offense initials a box on the form indicating his preference that 'the incident not be released to the media, except for police investigative purposes or following arrest'."

Moreover, although the issue did not involve law enforcement, the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557, 567 (1984)].

Second, building plans per se contain no personal information concerning an individual. Consequently, I do not believe that those kinds of records could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy under §87(2)(b) of the Freedom of Information Law. However, in certain circumstances, those plans may include reference to alarms or security systems, for example, and it is possible that §87(2)(f) might be asserted. That provision authorizes an agency to withhold records when disclosure would "endanger the life or safety of any person." In general, however, I believe that building plans are available, and they were public records even before the enactment 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 7922

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 21, 1993

Mr. Leo Carl Halpern
Civil Rights Law Advocate
Democratic Party, Bronx County
100-10M-Casals Place
Bronx, NY 10475

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

Dear Mr. Halpern:

I have received your letter of September 2 concerning access to records of the State Senate.

You asked that I describe the "best procedure to use in obtaining records from the New York State Senate Committee on Mental Health." In this regard, each entity subject to the Freedom of Information Law is required to designate at least one "records access officer". The records access officer has the duty of coordinating the entity's response to requests, and a request ordinarily should be directed to that person. The records access officer for the Senate is the Secretary of the Senate, Mr. Stephen Swan. You may write to him at the Capitol, Albany, NY 12247.

It is emphasized that §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 staff to locate and identify the records in which you are interested.

Lastly, since you referred to an interest in draft proposals to amend certain provisions of law, I point out that rights of access to records of the State Legislature are described in §88(2) of the Freedom of Information Law, which lists categories of records that must be disclosed. While bills introduced by legislators are public records, draft proposals in my view need not be disclosed. Nevertheless, the Senate would have discretion to disclose such records if it so chooses.

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 7923

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 21, 1993

Mr. William Brown
#86-A-6587
Box 51, A-7-30
Comstock, NY 12821-0051

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

Dear Mr. Brown:

I have received your letter of September 7 in which you sought assistance in obtaining records from the New York Hospital-Cornell Medical Center under the Freedom of Information Law concerning a person other than yourself.

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 or other governmental 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, if the hospital in possession of the records sought is private and is not a governmental entity, it would not be subject to the Freedom of Information Law.

Second, even if the hospital is a governmental entity subject to the Freedom of Information Law, I believe that medical records pertaining to a person other than yourself could be withheld. Relevant 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..."

Further, I believe that various provisions of the Public Health Law prohibit the disclosure of medical records to persons other than the subjects of those records or their representatives.

In sum, the Freedom of Information Law would not, in my opinion, serve as a vehicle for obtaining the records in which you are interested.

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 1924

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 22, 1993

Mr. Donald A. Davis
Secretary
Deer Crossing Homeowners Association, Inc.
Old State Road
Fishkill, NY 12524

The staff of the Committee on Open 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 addressed to the Committee on Open Government.

You wrote that the Deer Crossing Homeowners Association, Inc., "is a not for profit, type A Corporation as defined in subparagraph (a) of Section 102 of the Not-for-Profit Corporation Law." You have asked whether the Association is "required to conform to the requirements of the Freedom of Information Law in regard to [y]our meeting records, contracts and other records."

In this regard, I offer the following comments.

The Freedom of Information Law, as well as the Open Meetings Law, applies to governmental entities. Specifically, 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 or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since the organization you serve is not a "governmental entity", it is not in my opinion an "agency", and rights conferred by the Freedom of Information Law would not extend to the Association. As

such, although you may choose to disclose records, you are not required to do so by the Freedom of Information Law.

Similarly, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of that law defines the phrase "public body" to include:

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

Again, based upon my understanding of the organization, it would not constitute a public body, for it does not perform a governmental function. Therefore, meetings of the Association and its Board would not be governed by the Open Meetings Law and the Board could, in its discretion, choose to conduct public or private meetings.

I hope the foregoing serves to clarify the matter. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7925

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 22, 1993

Mr. William Adams
NYS Friends of Ferrets
PO Box 268 - Gracie Station
New York, NY 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:

As you are aware, I have received your letter August 25, which reached this office on September 10.

According to the correspondence attached to your letter, following a request for records of the New York City Department of Law, some of the records were disclosed, while others withheld. However, having requested "an itemized list" of the documents that were withheld, you were informed that no such list would be prepared. You cited a number of judicial decisions which in your view require that such a list be prepared when records are withheld.

I disagree with your contention. In this regard, I offer the following comments.

First, when a denial of an initial request is appealed, §89(4)(a) of the Freedom of Information Law requires that the person designated to determine the appeal must make the record available or "fully explain in writing to the person requesting the record the reasons for further denial." Nothing in that provision requires the preparation of an itemized list identifying the records that have been withheld. Further, having reviewed the determination of your appeal by Jeffrey D. Friedlander, I believe that he "fully explained" the reason for denial in a manner consistent with the requirements of the Freedom of Information Law.

Second, the judicial decisions to which you referred pertain to an agency's burden of proof in judicial proceedings in which a denial of access is challenged in court. While those decisions in some instances might require the degree of specificity that you seek, again, they involve the justification for a denial that must

be demonstrated in judicial proceedings rather than in response to administrative appeals made under §89(4)(a).

Lastly, as you may be aware, Vaughn v. Rosen [484 F2d 820 (1973)], a decision rendered under the federal Freedom of Information Act, requires federal agencies in some circumstances to provide 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:pb

cc: Jeffrey D. Friedlander

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7926

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 22, 1993

Hon. Charles D. Cook
Member of the Senate
P.O. Box 351
Delhi, NY 13753

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

Dear Senator Cook:

I have received your letter of October 14 in which you sought my views concerning a matter relating to the Freedom of Information Law.

According to your letter, in response to a request for school telephone bills by a resident of the Greenville School District, he was informed that "he could have the bills but that the actual phone numbers would be blocked out." You wrote that "[s]ince the purpose of the inquiry was to determine whether private telephone calls were being made from school telephones, that policy pretty much defeats the whole purpose of the inquiry."

In this regard, I offer the following comments.

First, as you are aware, all agency records are subject to rights conferred by the Freedom of Information Law, 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."

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 §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §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, three of the grounds for denial may be 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.

If phone records are generated by the District, I believe that the records 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. If the records were prepared by a phone company and sent to the District, they would not fall within §87(2)(g), because the phone company would not be an agency.

A second 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. 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. 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 an officer or employee of the District who uses a District phone.

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 though the numbers may be disclosed, nothing in the Freedom of Information Law would require an individual to indicate the nature of a conversation. In short, I believe that the holding in Wilson is conclusory in nature and lacks a substantial analysis of the issue.

This is not to suggest that the numbers appearing on a phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance, informants in the context of law enforcement, or persons seeking certain health services. It has been advised in the past that if a government employee contacts those classes of persons as part of the employee's ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance, disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance 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.

In the context of a school district's phone bills, a third ground for denial, §87(2)(a) of the Freedom of Information Law, would be relevant, at least with respect to some of the bills. Section 87(2)(a) pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in funding or 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 of over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under the Buckley Amendment define the phrase "personally identifiable information" to include:

> "(a) The students name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR §99.3).

Having contacted the Family Policy Compliance Office, the entity within the federal Department of Education that oversees the Buckley Amendment, and describing the situation, it was advised that the Buckley Amendment would be implicated in ascertaining public rights of access to the records in question.

If a person employed by the District routinely and as a part of his or her official duties contacts parents of students by telephone, those portions of a phone bill that could identify parents and, therefore, students, would in my opinion be exempted from disclosure. Stated differently, under the federal regulations cited above, if a phone number could identify a parent of a student, a disclosure of that number would likely "make the student's identity easily traceable." To that extent, I believe that the Buckley Amendment would forbid disclosure.

A problem involves the ability of District officials to know which numbers on a bill involve calls made to parents, especially when the calls are local, and there may be no way of knowing, based upon a review of numbers called, which pertain to contact with parents, as opposed to others.

In order to comply with the Buckley Amendment, for those records reflective of calls made by staff who routinely and who, as part of their duties, contact parents of students, it is suggested that the last four digits appearing in a local phone number might be deleted, unless it is known that certain phone numbers do not involve contact with parents. In the case of reference to long distance calls, as well as 800 and 900 numbers, I believe that reference to those calls should be disclosed in their entirety, unless it could clearly be asserted that a particular long distance call or calls involved contact with the parent of a student. Similarly, those records of calls made by staff who do not telephone parents of students routinely and as part of their official duties in my view must be disclosed. In those instances, I do not believe that any basis for denial could justifiably be asserted.

I recognize that the foregoing comments and suggestions might not, if implemented, entirely achieve the goal of the person who contacted you. While I believe and the courts have held that the Freedom of Information Law should be construed expansively, in this case, a federal statute, the Buckley Amendment, essentially forbids a school district from disclosing information that could identify students. I have attempted in my comments to recognize and give effect to the public policy considerations reflected in both the Freedom of Information Law and the federal statute concerning confidentiality.

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-7927

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 22, 1993

Mr. Robinson Johnny
#93-B-0486
Watertown Correctional Facility
PO Box 168
Watertown, NY 13601-0168

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

Dear Mr. Johnny:

I have received your letter of August 29, which reached this office on September 8. You have sought assistance concerning an unanswered request for records directed to the "Rochester Sheriff office."

In this regard, I offer the following comments.

First, there is no "Rochester" sheriff. There is, however, a Monroe County Sheriff's Office, which includes the City of Rochester within its jurisdiction.

Second, 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 response to requests, and it is suggested that you resubmit your request to the records access officer at the agency that maintains the records in which you are interested.

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)].

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 1928

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 22, 1993

Mr. Jose Medina
#81-A-0781
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. Medina:

I have received your letter of August 27, which reached this office on September 9.

You have sought assistance in obtaining records from the City of Yonkers, specifically its Police Department and Office of Public Information concerning an incident involving gunshots.

In this regard, I offer the following comments.

First, you cited 5 USC §§552 and 552a as the basis for your request. Those provisions represent the federal Freedom of Information and Privacy Acts, which apply only to records of federal agencies. The statute that generally pertains to access to records of government in New York is the New York Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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. Nevertheless, 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 an 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 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 found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Dee Barbato

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7929

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 25, 1993

Mr. George E. Jordan
#93-A-1656/B-15-27
Box 149
Attica Corr. 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. Jordan:

I have received your letter of September 10. In brief, you wrote that you requested medical records pertaining to you from your correctional facility, but that you had received no reply 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)].

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1930

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 26, 1993

Mr. Bill Dentzer
Gannett Suburban Newspapers
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, unless otherwise indicated.

Dear Mr. Dentzer:

As you are aware, I have received your communication of September 28 and related materials concerning a request directed to the City of Yonkers under the Freedom of Information Law.

According to a letter addressed to the City's records access officer, you sought the following information "pertaining to security measures" taken with respect to Mayor Zaleski:

> "1) A breakdown of the cost of the mayor's police protection from its inception to the present. Breakdown as follows:
>
> -- Cost of training for personal bodyguards.
> -- Cost of salaries (including overtime) and benefits for personal bodyguards.
> -- Cost of round-the-clock police protection (in salary and overtime) at mayor's home.
> -- Cost of all other special security measures undertaken on mayor's behalf, such as special equipment purchases, travel expenses for bodyguards accompanying the mayor, etc.
>
> 2) A description of regular security assignments, i.e., number of officers on each shift, both those assigned to the mayor's home and to his personal security detail; regular hours worked (i.e., do bodyguards work Monday-Friday?); scope of each officers duties and responsibilities (i.e., do bodyguards travel

with the mayor at all times or only on official city business?).

3) Records of all police or other city-generated reports involving threats against the mayor or security complaints, as well as records of any and all official police action, such as investigation, taken in response to any threat or complaint.

4) A description of any and all security measures in place for other city officials, either in the past or at present."

In response to item 1 of the request, you were given a sheet containing figures that indicate the average salary of police officers employed by the City, the average payments made to police officers under the headings of holiday, parity, longevity and uniform. The sheet also provides the average amount of fringe benefits paid to officers. Also made available were two purchase orders indicating travel expenses of or advances for two of the Mayor's bodyguards. You were also informed that the "cost of round-the-clock police coverage of the Mayor's home" was being denied on the basis of subparagraphs (f) and (g) of §87(2) of the Freedom of Information Law. Similarly, although you were told that general information concerning "special security measures" would be made available, the only materials disclosed involved those cited earlier concerning the bodyguards; other records falling within that portion of the request were withheld pursuant to the same provisions cited earlier. Records falling within item 2 of the request were withheld in their entirely. By providing the information, it was stated that "we might be risking the health and safety of the Mayor". With respect to item 3 of the request, the records access officer wrote that the Police Department indicated that "no reports involving threats against the Mayor were located." The final item of the request was rejected on the ground that it is "too broad."

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, with respect to item 1 of the request, I do not believe that the disclosure of statistics indicating the average salary and other payments and fringe benefits of a City of Yonkers police officer is responsive to your request. You did not seek an "average" of salaries, and it is assumed that records exist identifying those officers engaged in protecting the Mayor, the number of hours they worked, their salaries, including overtime, and benefits. While the City may not have "breakdowns" of the

costs in which you are interested and would not be required to create new records on your behalf in an effort to provide the information sought [see Freedom of Information Law, §89(3)], it is likely that a series of existing records reflective of costs (i.e., salaries, number of hours worked, overtime and the like) could be reviewed and that you could prepare a breakdown or totals on the basis of those records.

It is noted, too, that item 1 of your request deals solely with records reflective of the expenditure of public monies. You did not seek records indicating the times that police coverage occurred at the Mayor's home; rather you sought records indicating the "cost" of coverage. That being so, although there may be three grounds for denial of significance, none in my view would in most instances justify a denial of access to records.

One of the grounds for denial cited by the records access officer is §87(2)(g). That provision enables an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, 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. Most of the records sought, insofar as they exist, would constitute "intra-agency" material. However, the records requested would consist in great measure, if not in their entirety, of statistical or factual information that must be disclosed under §87(2)(g)(i), unless a different ground for denial could be asserted. As such, §87(2)(g) does not appear to constitute a valid basis for denial.

Also potentially relevant is §87(2)(b), 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 may often necessitate the making of subjective judgments, the courts have provided substantial direction regarding the privacy of public employees. 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, 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, 109 AD 2d 292, aff'd 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 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.

It does not appear on the basis of your request that the names of police officers or bodyguards assigned to the Mayor or his home or who may have engaged in training, travel or purchases associated with protection of the Mayor were requested. Since the records or portions of records of your interest involve only facts and figures reflective of the expenditure of public moneys, §87(2)(b) would not, in my view, be relevant as a basis for denial.

The remaining ground for denial of potential significance is §87(2)(f), which permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person."

Records indicating the expenditure of public monies would in my opinion be available, unless, in conjunction with §87(2)(f), it could be demonstrated that portions of those records describe equipment, a procedure, or a means of providing security so unique that disclosure would enable potential lawbreakers to evade detection, engage in unlawful acts and, therefore, endanger one's life or safety. It is noted, too, that your request involves security services that have already been provided. If your request was prospective, i.e., if you sought a schedule indicating when the Mayor will and will not have bodyguards assigned to him, it might be argued that disclosure could endanger his safety. Even in that case, particularly since there are apparently no reports or records involving threats against the Mayor, it is questionable in my view whether §87(2)(f) could appropriately be asserted.

In addition, it appears that you are and that others, or even the public generally, may be aware of the assignment of security people to the Mayor and his home. If that is so, and if those personnel can be plainly seen or observed, I question how disclosure of the records describing what can be publicly observed would endanger one's safety.

I would conjecture that many mayors or chief executive officers of units of government similar in size or larger than Yonkers have no special security detail assigned to them or their homes. Are those people in greater danger than Mayor Zaleski? I do not know the answer; nevertheless, it is questionable in my opinion how, whether or the extent to which disclosure of the records sought would endanger the safety of the Mayor or others.

Third, 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).

Lastly, item 4 of your request was denied on the ground that it was "too broad." In that aspect of the request, you sought "a

description of any and all security measures in place for other city officials, either in the past or the present." I agree with the records access officer's assessment of that portion of your request and 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 in which you are interested. It is suggested that you might alter your request so that it pertains to particular officials or classes of officials, as well as a time period during which any such security measures were implemented.

I hope that 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: Richard Slingerland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7931

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 26, 1993

Ms. Helen S. Rattray
The East Hampton Star
153 Main Street
PO Box E
East Hampton, NY 11937

<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. Rattray:

I have received your communication of September 20.

You have requested an advisory opinion concerning what appears to be a memorandum reflective of guidelines "laid out for the press" by a municipal police department. The guidelines provide as follows:

> "1 - All items that are blacked out cannot be copied (even if you can see).
>
> 2 - Reports are not allowed to leave HQ, for any reason.
>
> 3 - Exact addresses, names of victim's telephone numbers of victims are not to be reported.
>
> 4 - Victims are not to be contacted or badgered.
>
> 5 - Do not report the race of any defendant. Do not want to stereotype a particular race or culture.
>
> 6 - All given a copy of the civil rights law prohibiting the disclosure of the identity of a sexual assault victim (in certain cases)."

In this regard, I offer the following comments.

First, I do not believe that the "guidelines" can be equated with law or be considered binding upon members of the news media.

While it can be suggested that victims are not to be contacted, or that the race of a defendant should not be reported, certainly members of the news media may use discretion in reporting and may contact victims or report the race of a defendant if they so choose. In short, what is newsworthy, in my opinion, involves a judgment made by members of the news media, not by government officials.

Second, some aspects of the guidelines appear to conflict with law.

By way of background, the general statute involving access to government records, the Freedom of Information Law, pertains to all agency records, irrespective of their origin, use, or physical form. 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 §87(2)(a) through (i) of the Law. It is also emphasized that the introductory language of §87(2) refers to an agency's ability to withhold "records or portions thereof" in accordance with the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that single record may include portions that are available, as well as portions that may justifiably be withheld. That phrase also imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may properly be withheld prior to disclosure of the remainder. Those records or portions of records that are accessible under the Freedom of Information Law must be available for inspection and copying, and §89(3) of the Law requires that agencies prepare copies of accessible records, in which case a fee may be charged.

It appears that several aspects of the guidelines are designed to protect the privacy of victims of crimes. In the case of victims of sex offenses, §50-b of the Civil Rights Law prohibits a police agency from disclosing records identifying the victims of those offenses. In those instances, the records are "specifically exempted from disclosure by...statute" in accordance with §87(2)(a) of the Freedom of Information Law.

Only when a statute specifically requires confidentiality is an agency precluded from disclosing records or portions of records. When no statute specifically requires confidentiality, of potential relevance is §87(2)(b) of the Freedom of Information Law. That provision enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy". That standard in my view is flexible and often requires the making of subjective judgements. While the name of a victim of a burglary who is an 82 year old female living alone might properly be withheld as an unwarranted invasion of personal privacy, certainly the name of the proprietor of liquor store that was robbed would be public. In between those extremes are countless situations in which there may be victims, and the attendant facts in each instance must be considered. In some cases, criminal or

other events are public or involve public responses in which victims are directly or indirectly identified. In others, where a record involves intimate personal information, perhaps considerations of privacy might outweigh the public's interest in disclosure. From my perspective, those latter situations would be relatively rare.

Further, a policy or guideline that restricts the disclosure of victims' names in all cases is, based upon case law, inconsistent with the Freedom of Information Law. In a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference concerning the agency's disclosure of the incident to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold the record based upon the "preference" of the person who reported the offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

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

Similarly, although the issue did not involve law enforcement, the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557, 567 (1984)].

Moreover, the Court of Appeals has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the

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

Based on the foregoing, even if it is determined that disclosure would constitute an unwarranted invasion of personal privacy, for example, an agency would have the authority to disclose. In a related vein, when in possession of information, the news media is free to disclose or disseminate it, even if the information could have been withheld to pursuant law.

Lastly, since the guidelines refer to the race of a defendant, as you are aware, often the race and other details regarding suspects and others are disclosed. In addition, §500-f of the Correction Law, which pertains to records maintained by the "keepers" of county jails, 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."

Based upon the foregoing, often the public record kept at county jail will contain a variety of information, including race, about persons who have been arrested and/or convicted. Equivalent information should in my view be disclosed by other law enforcement officials. Whether a member of the news media chooses to disseminate any or all of that information is, in my opinion, a matter of editorial judgment.

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 7932

162 Washington Avenue, Albany, New York 12231
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October 27, 1993

Mr. Melvin Richardson
#83-A-3636 - 1 West
Fishkill Correctional Facility
PO Box 1245
Beacon, NY 12508-0901

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

Dear Mr. Richardson:

I have received your letter of September 16. In brief, you wrote that you have encountered difficulty in obtaining a response to a request for records of the New York City Police Department.

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)].

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

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. Nevertheless, 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 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 an 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.

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 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 found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Sgt. William J. Matusiak, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO 2274
FOIL AO 7933

162 Washington Avenue, Albany, New York 12231
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October 27, 1993

Mr. Vincent P. Campion, Trustee
Village of Freeport
46 North Ocean Avenue
Freeport, NY 11520

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

Dear Trustee Champion:

I have received your letter of September 17 in which you raised questions concerning both the Freedom of Information Law and the Open Meetings Law.

According to your letter:

> "For years, the Board of Trustees received a monthly budget allocation report from the Treasurer's Office which basically consisted of a line by line report on the Village Budget. It showed each budget line, the amount budgeted, transfers, expenditures, outstanding purchase orders, and the remaining balance of the budgeted amount. This report is computer generated and requires no special programming to generate. After taking office, Mayor Thompson decreed that the Board of Trustees as well as the public was not entitled to this information because it is a 'working document' for the benefit of the Budget Officer (mayor) only."

Nevertheless, it is your view that the Board "cannot responsibly do its job without knowing what funds are available", and that "the taxpayers are entitled to have an accounting of how their money is spent." You added that requests by the public for the information in question have been denied, that the Mayor has directed the records access officer to show him any request that may be "politically sensitive" and that he has withheld records even though the records access officer has contended that they must be released.

In conjunction with the foregoing, you have asked whether the Board and the public are "entitled to view the Budget Allocations Report or its equivalent" and whether the Mayor, "based on politically sensitive reasons", may deny access to records.

In this regard, I offer the following comments.

First, whether records are characterized as "working documents", "politically sensitive", or otherwise, I believe that they fall within the scope of the Freedom of Information Law. It is emphasized that §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 their characterization or physical form.

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. Moreover, when records are accessible under the Law they must be made equally available without regard to one's status or interest [see Farbman v. New York City, 62 NY 2d 75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976)].

A budget allocation report or its equivalent would in my view be available. Although one of the grounds for denial is relevant to an analysis of rights of access to that kind of record, due to its structure, that provision often requires disclosure. Specifically, §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. Budget allocation records would constitute "intra-agency materials"; nevertheless, I believe that they would consist solely of statistical or factual information that must be disclosed pursuant to §87(2)(g)(i).

With respect to denials of access on the basis that records or a request may be "politically sensitive", it is reiterated that the grounds for withholding records are specified and limited by the Freedom of Information Law, and being "politically sensitive" is not among those grounds. Moreover, 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 enable an agency official to withhold a record. In this instance, I am unaware of any statute that would render the records sought exempted from disclosure.

The remaining issue that you raised relates to executive sessions. You wrote that the Village Attorney "maintains that engaging attorneys is part of discussing litigation." Further, the minutes that you enclosed refer to hiring a particular firm to replace another in tax certiorari matters.

As you may be aware, 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 discusses its litigation strategy, it does not appear that §105(1)(d) could justifiably be 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.

However, a discussion of which attorney or firm should be retained would likely fall within §105(1)(f). That provision permits a public body to enter into executive session to discuss:

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

It appears that the issue in question would involve matters leading to the appointment or employment of a particular attorney or firm. To that extent, I believe that an executive session could properly be held.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Mayor Thompson
Karen Navin, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7934

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 28, 1993

Mr. Nick Masullo
#86-A-1151
Sing Sing Corr. 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. Masullo:

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

In conjunction with your inquiry, on August 30, this office received a copy of the determination of your appeal rendered by the Division of State Police in accordance with §89(4)(a) of the Freedom of Information Law

Since you referred to the degree of detail in the determination of your appeal, I point out that the provision cited above pertaining to the right to appeal requires that the person designated to determine the appeal must make the record available or "fully explain in writing to the person requesting the record the reasons for further denial." Nothing in that provision requires the preparation of an itemized list identifying the records that have been withheld. While judicial decisions in some instances have required specificity regarding the particular records that were withheld, they involve the justification for a denial that must be demonstrated in judicial proceedings rather than in response to administrative appeals made under §89(4)(a).

As you may be aware, Vaughn v Rosen [484 F2d 820 (1973)], a decision rendered under the federal Freedom of Information Act, requires federal agencies in some circumstances to provide 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 that 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)].

Enclosed are the materials that you requested. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J Freeman
Executive Director

RJF:pb
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7935

162 Washington Avenue, Albany, New York 12231
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October 28, 1993

Mr. Scott S. Oakley, Counsel
State of New York
Crime Victims Board
845 Central Avenue, Room 107
Albany, NY 12206-1588

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

Dear Mr. Oakley:

As you are aware, I have received your letter of September 22. Please accept my apologies for the delay in response.

You have sought my views concerning rights of access to "Goals and Timetables Status Reports" prepared by the Department of Civil Service. It is your understanding that those reports consist of "summary statistical information" and that they do not identify agency employees by name or social security number, but rather "by job title and the sex and race or ethnicity" of the incumbents of positions. In conjunction with the foregoing, having sought guidance on the matter from the Department of Civil Service, your agency's affirmative action officer was advised that insofar as such a report "permits the idenfication of individuals because of the small number of employees in a category, such information must be withheld" on the ground that disclosure would constitute an unwarranted invasion of personal privacy pursuant to the Freedom of Information Law and the Personal Privacy Protection Law.

The letter containing that advice included reference to and relied upon an advisory opinion that I prepared in 1985. That opinion involved a list that contained racial or ethnic data identifiable to gubernatorial appointees, and it was advised the names of appointees coupled with information concerning their minority status, racial or ethnic characteristics could be withheld based upon consideration of privacy.

I disagree with the guidance offered to your agency, and I believe that the situation at issue in the 1985 opinion was factually different and, therefore, distinguishable from the matter that you have raised. While I continue to believe that portions of records including public employees' names and their race or ethnicity may be withheld, the reports that are the subject of your inquiry do not contain names coupled with racial or ethnic characteristics. On the basis of those reports, in order to establish that the incumbent of a particular title has a certain racial or ethnic characteristic, there would have to be some independent knowledge or source of knowledge that exists separate from the data contained in the records.

It is noted that in the 1985 opinion, I expressed the view that "a general listing of all gubernatorial employees, without reference to data pertaining to ethnicity or race, would be accessible." Reference was also made to §87(3)(b) of the Freedom of Information Law, which requires that each agency maintain a record that includes the name, public office address, title and salary of all officers or employees of an agency. For reasons described in that opinion, that record in my view is clearly available. To suggest that elements of the reports in question or, alternatively, a list of appointees or a record identifying employees by name, title and salary must be withheld because a recipient of those records could use them to ascertain an employee's race or ethnicity would in my view be unreasonable and inconsistent with the law. None of those records include reference to the race or ethnicity of named individuals. Consequently, I do not believe that they could properly be withheld.

Lastly as you are aware, when disclosure by a state agency would constitute an unwarranted invasion of personal privacy, the Freedom of Information Law, §89(2)(a), when read in conjunction with the Personal Privacy Protection Law, §96(1), would preclude an agency from disclosing. The application of those statutes in that manner was relevant in offering advice in the 1985 opinion because the record in question identified individuals by name and race, ethnicity or minority status. No such personal identification appears in the reports in question.

In sum, for reasons discussed in the preceding commentary, I believe that the nature of the records at issue is different from those considered in the 1985 opinion upon the Department of Civil Service apparently relied. Moreover, since the reports in question consist wholly of statistical or factual information and do not identify specific employees, they must, in my view, be disclosed pursuant to §87(2)(g)(i), of the Freedom of Information Law.

I hope that I have been of some assistance. If you would like to discuss the matter, please feel free to call.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Marie D. Dukes, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7936

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 28, 1993

Mr. Joseph C. Donawick
[redacted]

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

Dear Mr. Donawick:

I have received your letter of October 10, as well as earlier related correspondence. Please accept my apologies for the delay in response.

By way of background, in August, you wrote to the Director of the Albany County Airport to express dissatisfaction concerning an offer for an easement on your property. You indicated that you had little information about the "process of determining the avigation easement" and requested additional information in order to "properly evaluate [your] options", specifically copies of "the two avigation appraisals of the property and the methodology the appraisers followed in arriving at their figures." In response to that request, Airport Counsel wrote that:

> "It is the policy of this office to offer copies of our avigation appraisals only on the basis of an exchange of bonafide appraisals commissioned and completed by the property owner. If you have such an appraisal we would be more than happy to participate in an exchange."

In conjunction with those comments, you asked whether there is any provision of the State Constitution or any law that authorizes government agencies or officials "to make and implement a rule or policy whereby a citizen must 'barter' to obtain information and data which should be freely available to a citizen."

In this regard, I offer the following comments.

First, I know of no provision of the constitution or law that would authorize an agency or representative to require that a member of the public "barter" in order to obtain information.

Second, the statute that generally pertains to records of entities of state and local government, the Freedom of Information Law, is expansive in its coverage. It is noted that §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."

Therefore, appraisals maintained by or produced for the County, as well as any other informational materials related to them, would constitute "records" subject to rights conferred by the Freedom of Information Law.

Moreover, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 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 or the fees that agencies may charge. In addition, 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)].

Third, although all agency records are presumptively available, I believe that two grounds for denial may be relevant to an analysis of rights of access.

Section 87(2)(c) permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." As it relates to the impairment of "contract awards", §87(2)(c) is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for 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 are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

The other situation in which §87(2)(c) has successfully been asserted to withhold records pertains to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Again, premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving an optimal price [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In both of the kinds of the situations described above, there is an inequality of knowledge. More specifically, in the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an appraisal would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

When there is no inequality of knowledge between or among the parties to negotiations, or if records have been shared or exchanged by the parties, it is questionable and difficult to envision how disclosure would "impair present or imminent contract awards, (see Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Further, if a lease or contract has been signed, presumably negotiations have ended, any impairment that might have existed prior to the consummation of an agreement would essentially have disappeared. In this instance, it appears that the County is willing to share records with you under certain conditions. While I do not believe that the conditions mentioned are relevant to public rights of

access to the records in question, again, §87(2)(c) may have a bearing upon disclosure.

Also of potential relevance is §87(2)(g), which pertains to the authority to withhold "inter-agency or intra-agency materials." If an appraisal or survey is prepared by agency officials, it could be characterized as "intra-agency material." Further, the Court of Appeals has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of §87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

More 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.

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with 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 A2d 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 [i.e., §87(2)(c)] 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
Executive Director

RJF:pb

cc: Richard M. Meyers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7937

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 29, 1993

Mr. Edward MacKenzie
92007197
Nassau County Correctional Center
Hicksville, NY 11802

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

Dear Mr. MacKenzie:

I have received your letter of September 13, which reached this office on September 22.

You referred to a request to the Nassau County District Attorney's Office for a "jail subpoena". Specifically, in the request, you described the record sought as the "jail subpoena used by the Nassau County District Attorney's Office to have [you] produced from the jail in East Meadow to the courthouse in Mineola on August 12, 1992." You specified that you were not seeking a securing order, a grand jury subpoena, or an order to produce. Further, "if there is no such thing as a jail subpoena", you asked to be so advised.

In response to the request, Assistant District Attorney Andrea M. DiGregorio wrote that, upon payment of the appropriate fee, you would be provided with "a copy of the subpoena relating to your August 12, 1992 appearance." She added that "It is a subpoena of the Grand Jury of Nassau County." You appealed on the ground that your request had been denied, for it involved a "jail subpoena". The Deputy Chief of the Appeals Bureau, Mr. Schwarz, answered your appeal, indicated that the prior response involved the record that had been requested and that the Freedom of Information Law is "a vehicle for procuring appropriate governmental records", rather than a "device by which to conduct interrogatories of government agencies."

You have requested an advisory opinion on the matter.

In this regard, on the basis of the correspondence, the District Attorney's Office agreed to provide the record used to produce you at the courthouse on August 12 and in fact described

the nature of that record. In my opinion, that response was fully in compliance with the Freedom of Information Law.

As Mr. Schwarz suggested, the Freedom of Information Law pertains to existing records and requires agencies to disclose existing records in accordance with law. It is not a statute that requires agency officials to create a record in response to a request [see §89(3)], to provide information by responding to questions or to offer legal advice or conclusions.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Andrea M. DiGregorio
Lawrence J. Schwarz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1938

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 29, 1993

Mr. Henry Smith
85-B-1294
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. Smith:

I have received your letter of September 16, which reached this office on September 22.

You have contended that you were convicted of a crime that you did not commit, that during the investigation of your case, the fingerprints obtained at the crime scene were not yours, and that the "latent print unit was unable to match any of the fingerprints to anyone." Since it is your belief that computers can be "used to match fingerprints to anyone that has ever been fingerprinted in the United States", you have asked whether a police department and the latent print unit that took the fingerprints found in your case must disclose the fingerprints under the Freedom of Information Law.

In this regard, I offer the following comments.

First, I have no knowledge of whether your statement that computers can match fingerprints to the extent that you suggested is accurate. Further, even if your assumption is correct, I am unaware of whether you could require that a fingerprint match or search be conducted.

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.

One of the grounds for denial, §87(2)(b), authorizes an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". Although a request for fingerprints

of a named individual other than yourself could in my opinion be denied on that basis, the existing fingerprint records of the police department do not include names or other identifying details. As such, I do not believe that §87(2)(b) could serve as a ground for denial.

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). If I understand the situation correctly, it is unlikely that the records in question could be withheld under §87(2)(e), for the investigation ended with your conviction.

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 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- 7939

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 1, 1993

Ms. Rochelle J. Auslander
Anderson, Banks, Curran & Donoghue
P.O. Box 240
Mount Kisco, NY 10549-0240

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

Dear Mr. Auslander:

As you are aware, I have received your letter of September 21 and the materials attached to it.

You referred to "Findings and Recommendations" issued pursuant to §3020-a of the Education Law in the Matter of Red Hook Central School District v. Nagel. That document was prepared "in the format of an arbitration award stating the charges, summarizing the testimony with reference to documentary evidence, stating the argument, discussing the evidence and stating the determination." Further, according to your letter:

> "[T]he majority found that a guidance teacher had engaged in misconduct and conduct unbecoming a teacher. It was argued by Complainant that such behavior constituted sexual harassment in violation of federal and state laws and in which [sic] interfered with the operation of the guidance office in which he and two other individuals worked. The teacher's defense was in large part to give testimony that his alleged victim was not the object of sexual harassment, but to the contrary, a victim of sexual harassment. In developing his case the teacher made offensive statements about what he claimed was the victim's sexuality which are referred to on pages 25-27. While these statements made by the teacher were not credited as truthful by the majority of the panel (Pages 30-31) they are considered offensive to the

> witness...[and] to others whose names are stated in those pages."

Your question is whether these references can be "removed from the document" prior to public 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, from my perspective, the question is whether disclosure of the portion of the record at issue would constitute "an unwarranted invasion of personal privacy" in accordance with §87(2)(b) of the Freedom of Information Law. 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. 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, 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)].

In this instance, the person whose privacy is at issue, the victim, was not the subject of the charges in the proceeding. Further, she was the subject of allegations that were not proven and which were found by a majority of the panel to be lacking credibility. Since there is neither any indication nor any finding that the claims made in the passages in question are anything more than unsubstantiated allegations, it is my view that disclosure of those portions of the report would constitute an unwarranted invasion of personal privacy and, therefore, may be withheld from 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-1940

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 1, 1993

Ms. Susan P. Hammond
[redacted]

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

Dear Ms. Hammond:

I have received your letter of September 17 and the materials attached to it. Please accept my apologies for the delay in response.

You have sought advice concerning your "next course of action...in the pursuit of information" that you are seeking from the Oswego County Industrial Development Agency. By way of background, you submitted a request to the Clerk of the Oswego County Legislature on July 15. Having received no response, you appealed on August 13 to the County Attorney, the person designated to determine appeals made under the Freedom of Information Law. As of the date of your letter to this office, you had not yet received any response.

In this regard, I offer the following comments.

First, although the County of Oswego Industrial Development Agency functions within Oswego County, it is a corporate entity separate from the County.

As you may be aware, the Freedom of Information Law is applicable to agency records and imposes certain responsibilities upon agencies. 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, §911-b of the General Municipal Law specifically established the "County of Oswego 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" subject to the Freedom of Information Law. Further, I believe that it is a legal entity separate from the County that has an independent responsibility to give effect to the Freedom of Information Law. As a legal entity, under §87(1) of the Freedom of Information Law, the Agency's board has the duty to ensure compliance with the Freedom of Information Law. One of its responsibilities involves the designation of a records access officer and an appeals person or body. If the Clerk of the Legislature was designated records access officer for the Agency, that person in my opinion was required to respond to your request in a manner consistent with the Freedom of Information Law. If the Clerk is not the Agency's records access officer, I believe that he or she should have so indicated. Similarly, if the County Attorney does not serve as the freedom of information appeals officer for the Agency, I believe that he should have so informed you. It is suggested that you contact the Agency directly in an attempt to ascertain the identities of the records access and appeals officers for the Agency.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agency officials 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)].

Lastly, your request involves "lists" of "straight lease agreements" and "PILOT payments" from 1987 to present, as well as breakdowns of payments made to legal and accounting firms. In this regard, from a technical perspective, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, if the lists or breakdowns that you requested do not exist, the Agency would not be required to prepare those records on your behalf. Rather than requesting a list, for example, it is suggested that you seek existing records, i.e., records reflective of lease agreements, records of payments made to attorneys or accountants, etc.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: County of Oswego Industrial Development Agency
Clerk of the Oswego County Legislature
Bruce Clark, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1941

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 1, 1993

Mr. Dorphus Williams
#93-A-5937
CCF Annex, Box 2002
Dannemora, NY 12929

Dear Mr. Williams:

I have received your letter of October 25 in which you appealed a denial of access by the Queens County Clerk's Office to your trial court file.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to make a determination following an appeal or compel an agency to grant or deny access to records. For future reference, the provision in the Freedom of Information Law dealing with 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."

Further, I point out that the Freedom of Information Law pertains to agency records and that §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:

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

As such, the Freedom of Information Law does not apply to the courts or court records. It is noted, however, that other provisions of law often require the disclosure of court records (see e.g., Judiciary Law, §255), and it is suggested that a request for records be made pursuant to an applicable statute.

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 1942

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 1, 1993

Mr. Roberto Rivera
[redacted]

Dear Mr. Rivera:

I have received your letter of September 29 concerning a request made under the Freedom of Information Law that apparently had not be answered. You have sought assistance in the matter, and in this regard, I offer the following comments.

First, on the basis of your request, I could not ascertain whether the entity from which you sought information is public or private. Through a series of phone calls, I was able to find out that you intended to send the request to Ms. Priscilla Feinberg at the Governor's Office of Employee Relations. Further, having spoken to Ms. Feinberg, I was informed that your letter was inaccurately addressed and that she never received it. For future reference, correspondence to her may be addressed to:

Ms. Priscilla Feinberg
Governor's Office of Employee Relations
Swan Street Bldg.
Core 1
2nd Floor
Albany, NY 12223.

I have forwarded your letter to Ms. Feinberg.

Second, pursuant to regulations promulgated by the Committee (21 NYCRR Part 1401), each agency must designate at least one "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be made to that person. At the Governor's Office of Employee Relations, the records access officer is Ms. Loren DeSole.

Third, it is noted that you requested information by raising a series of questions. Here I point out that 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. Based upon the foregoing, an agency in my view is not obliged to provide information sought by answering questions raised in a request. Nevertheless, in conjunction with the general thrust, intent and spirit of the Freedom of Information Law, if an agency maintains records reflective of some of the information sought, and can readily disclose "information" derived from existing records, certainly an agency may and should be encouraged to do so.

Lastly, when an appropriate request is made, the Freedom of Information Law provides direction concerning the time and manner in which an agency 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Priscilla Feinberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1943

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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November 2, 1993

Mr. Jeffrey Grune
[redacted]

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

Dear Mr. Grune:

I have received your letter of September 21 in which you raised questions concerning the Freedom of Information Law.

Having requested records from the City of Peekskill Police Department, you were informed that:

> "...this office cannot fulfill any request to provide information unless a Freedom of Info. request has been made through the Peekskill City Clerk's Office. Such request requires the completion of a standard form and the filing of a fee" (emphasis yours).

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

> "1. Under the FOIL is it permissible for an agency or city to require a 'filing fee' for an FOIL request?
>
> 2. Is it permissible for an agency or city to require that FOIL requests be submitted on a 'standard form'?
>
> 3. When a city agency, which has previously processed FOIL requests, changes procedure and now requires such requests to be submitted to the city clerk, should not such policy change be brought to the public's attention and passed on by city council?"

In this regard, I offer the following comments.

First, although an agency may change a fee for copying records pursuant to §87(1)(b)(iii) of the Freedom of Information Law and may require payment of the appropriate fee prior to preparing copies of records, an agency in my view cannot change a "filing fee" or other fee other than that described in the provision cited above.

Second, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §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 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.

Third, as you may be aware, §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 City of Peekskill, is the City Council, and I believe that the Council 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 City Council 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 and states in part that:

> "The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.

(2) Assist the requester in identifying requested records, if necessary.
(3) Upon locating the records, take one of the following actions:

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

(4) Upon request for copies of records:

(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the requester to copy those records.

(5) Upon request, certify that a record is a true copy.
(6) Upon failure to locate the records, certify that:

(i) the agency is not the custodian for such records; or
(ii) the records of which the agency is a custodian cannot be found after diligent search."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Sgt. William L. Stillman
City Clerk
Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1944

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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November 2, 1993

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 two letters from you dated September 28. Please accept my apologies for the delay in response.

In the first, you referred to a portion of the contract between the Liberty Central School District and its superintendent specifying that the Board of Education "will pay $5,000 a year towards life insurance premiums." You raised the following question concerning the foregoing: "When the public is paying for a Superintendent's insurance policy, is the public entitled to know the details of that policy?"

From my perspective, if the District maintains a copy of the policy, the policy would be subject to rights conferred by the Freedom of Information Law.

It is noted that the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" broadly to include:

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

Based upon the foregoing, if the policy or a copy thereof is maintained by the District, I believe that it would constitute a "record" that falls within the coverage of the Freedom of Information Law.

With respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, the policy would be available, for none of the grounds for denial would likely apply. The only portion of such a record which in my opinion could be withheld would involve the identification of a beneficiary. If the identity of a beneficiary appears in the record in question, that portion in my opinion could be withheld under §87(2)(b). That provision authorizes an agency to withhold records or portions thereof the disclosure of which would constitute "an unwarranted invasion of personal privacy."

The second letter pertains to an unanswered request for records of the State Education Department.

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: Richard P. Beruk
Eugene Snay

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1945

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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November 2, 1993

Mr. Wallace S. Nolen
Dutchess County Jail
P.O. Box 1389
Poughkeepsie, NY 12602-1389

The staff of the Committee on Open 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 September 22. Please accept my apologies for the delay in response.

According to your letter, the Acting Corrections Administrator for the Dutchess County Jail has contended that "a listing, roster, etc. that contains the names, all assignments, charges, released date, etc. of all inmates/detainees at a county jail is not subject to F.O.I.L."

In this regard, although the Freedom of Information Law does not deal directly with the kind of listing or roster that you described, §500-f of the Correction Law, which pertains to county jails, 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."

It is also noted that it has been held that the names of inmates housed in segregated housing units at a correctional facility must be disclosed [see Bensing v. LeFevre, 506 NYS 2d 822 (1986)].

Therefore, it appears that the listing or log in which you are interested must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Rugar, Acting Corrections Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1946

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November 3, 1993

Mr. Richard Mitzner
[redacted]

The staff of the Committee on Open 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 26 and the correspondence attached to it. Please accept my apologies for the delay in response.

As I understand the materials, it is your view that the Town of Ramapo Police Department failed "to properly respond to [your] telephone call for assistance" and subsequently included erroneous information in its records relating to the incident. You have raised issues concerning your right to gain access to the records and to correct their contents, as well as the ability to appeal a denial of access to records.

In this regard, I offer the following comments.

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

Second, since you asked to amend an incident report, I point out that the Freedom of Information Law requires the disclosure of records in accordance with its provisions; however, nothing in that statute requires that an agency amend or alter records. Therefore, while an agency may choose to amend a record or supplement the record with additional or clarifying information, it is not required to do so.

Third, with respect to a municipality's implementation of the Freedom of Information Law, §89(1)(b)(iii) of that statute 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 Town of Ramapo, 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".

When a request for records is denied, a 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 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 Committee's regulations 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" (§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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Herbert Reisman, Supervisor
Alan M. Simon, Town Attorney
Captain T. Ruggiero

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-150
FOIL-AO-1947

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November 3, 1993

Ms. Krista Bradford
[redacted]

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

Dear Ms. Bradford:

As you are aware, I have received your letter of September 27 and a variety of related correspondence concerning your effort to obtain information from the State Department of Health ("the Department").

You have sought an advisory opinion pertaining to rights of access to the Statewide Planning and Research Cooperative System, commonly known as "SPARCS". According to the regulations promulgated by the Department of Health, 10 NYCRR §400.18(a)(1), "SPARCS" shall mean:

> "...a statewide centralized health care system which incorporates data obtained from, among other sources, the uniform bill and uniform discharge abstract submitted to the department by hospitals pursuant to subdivision (b) and (c) of this section, the patient review instrument data submitted by residential health care facilities pursuant to section 86-2.30 of this Title, and ambulatory surgery data submitted by hospital-based and freestanding centers pursuant to subdivision (d) of this section and section 755.11 of this Title."

"SPARCS" is also defined in §400.18(a)(7) to mean a unit of the Department whose functions and responsibilities involve the acceptance of requests for SPARCS data, and the review of those requests in accordance with criteria described in §400.18(e)(3). Section 400.18(e)(3)(h) states that:

> "After completing its review, SPARCS shall forward all requests for deniable aggregated data, facility stay data, deniable individual stay data, deniable PRI data and deniable ASDAP data together with recommendations, the results of its review and all supporting data to the Data Protection Review Board" (the "DPRB").

The DPRB conducts a second review and prepares recommendations concerning access to the Commissioner, who makes a final determination.

Several of the phrases appearing in subdivision (e)(3)(h) are defined in subdivision (a), as follows:

> "(2) *Deniable individual stay data*, except as provided in paragraph (3) of this subdivision, shall mean data pertaining to a particular individual's facility stay that contain one or more of the following deniable data elements, which, if disclosed, would constitute an unwarranted invasion of personal privacy: medical record number, admit number, admit date, discharge date, date(s) of surgery, third-party payor identification numbers, address, birthdate, physician identification, accident date, facility identification and patient review instrument data elements referred to in paragraph (11) of this subdivision.
>
> (3) *Individual stay data* shall mean data pertaining to six or more facility patients which do not include any of the deniable data elements referred to in paragraph (2) of this subdivision. The following shall not constitute deniable data elements: month and year of admission, month and year of discharge, length of stay, number of preoperative days, number of postoperative days, class of payor, census tract location of patient, age of patient at one-year intervals for patients one-year old or older, age of patient at one-week intervals for patients less than one-year old, physician speciality, number of attending physicians, presence or absence of an accident, and facility reimbursement peer group. Any data pertaining to fewer than six facility patients shall be deemed to constitute deniable individual stay data.

(4) *Facility stay data* shall mean individual stay data and, in addition, the deniable data element of facility identification.

(5) *Aggregated data* shall mean a statistical tabulation of facility patient records, with no single grouping or tabulation to be based upon fewer than six facility patient records. Where groupings are based upon fewer than six records, such groupings will be eliminated or combined with other groupings.

(6) *Deniable aggregated data* shall mean aggregated data which include one or more of the deniable data elements referred to in paragraph (2) of this subdivision...

(11) *Deniable individual PRI data* shall mean data pertaining to a particular individual that contain one or more of the following deniable data elements which, if disclosed, would constitute an unwarranted invasion of personal privacy: operating certificate number, social security number, official facility name, patient name, medical record number, room number, unit number, date of birth, date of initial admission, Medicaid number, and Medicare number.

(12) *Aggregated PRI data* shall mean a statistical tabulation of residential health care facility patient records, with no single grouping or tabulation to be based on fewer than six residential health care facility patient records; however, it shall be noted by SPARCS on the requested data, if approved, where the tabulation would result in fewer than six residential health care facility patient records.

(13) *Deniable aggregated PRI data* shall mean aggregated data which include one or more of the deniable data elements referred to in paragraph (11) of this subdivision.

(14) *Ambulatory Surgery Data Abstract Project (ASDAP)* shall mean the data format used by hospital based and free-standing ambulatory surgery centers to report to the Department of Health pursuant to subdivision (d) of this section and section 755.11 of this Title.

(15) *ASDAP data* shall mean the data submitted by hospital-based and free-standing ambulatory surgery centers."

Subdivision (d)(1) states that:

"All hospitals certified by the department to provide hospital-based ambulatory surgery services shall submit to the department for each patient surgical visit the following information:

(i) SPARCS hospital identification number;

(ii) an identity-shielded patient record number;

(iii) the patient's birth date, sex and ZIP code;

(iv) the date of the visit;

(v) the hour of admission and discharge for the visit;

(vi) operating room time used;

(vii) principal diagnosis code;

(viii) principal procedure code;

(ix) other procedure code;

(x) primary reimbursement code;

(xi) county of the patient's residence;

(xii) the disposition of the patient on discharge from the service;

(xiii) physician's or dentist's license number; and

(xiv) method of anesthesia used."

With the background of the regulations in mind, on July 1, you wrote to the Executive Secretary of the DPRB, Gene D. Therriault, and, under the Freedom of Information Law, sought various elements of SPARCS data. You expressed support for the general policy of protecting data identifiable to patients and specified that some of the information sought is "deniable" according to the regulations.

You also described your role as a journalist and indicated that your initial project would "examine the rate of Caesarean sections and other child birth intervention", and you contended that "it is in the public's (and the consumer's) best interest not only to know the c-section rate of the hospitals, as is currently state law, but of the very doctors delivering these babies". In an acknowledgement of the receipt of the request on July 7, the Executive Secretary sought clarification of portions of the request and expressed a need to know whether the request was meant to be made under the Freedom of Information Law or the regulations, in which case an application form would have to be completed. He also indicated that the "process for responding to your request will be substantially different, depending upon how you perceive your request." Finally, Mr. Therriault wrote that if you want to seek the data under the Freedom of Information Law, he would forward your request to Donald Macdonald, the Department's records access officer; on the other hand, if you wanted to request the data under the SPARCS regulations, you were asked to complete an application form. On July 20, you asked that your request be considered under the Freedom of Information Law and that it be forwarded to the records access officer. You also expressed the view that it is not your role to suggest how the Department should process the request, "for [your] only interest is obtaining information [you] believe to be legally due [you]." Notwithstanding the foregoing, on August 2, Mr. Therriault wrote to you and advised that SPARCS data must be requested on a SPARCS application form. You transmitted the application form with a cover letter on August 12. On September 15, Mr. Therriault denied the application for a number of reasons, most of which involve your failure to provide information sought by means of the form. In a draft of an appeal that was not made due to the pendency of a request for an advisory opinion from this office, you referred to the denial letter from the DPRB's Executive Secretary and wrote that:

> "In his letter, Therriault maintained [you were] requesting 'patient information' would be, upon release, an unwarranted invasion of personal privacy. [You] maintain that releasing the names of the doctors, the facility, the insurers (3rd party payors) and the medical record numbers by no means invades the personal privacy of the patients. [You] have stated [you] have no intent to identify individual patients and would be unable to identify them, as no identifying information would be contained in [your] copy of SPARCS (name, date of birth, social security number, address, etc.) However, [you] will not promise to keep public information, information due [you] through FOIL, private as the SPARCS regulations seem to insist."

In this regard, I offer the following comments.

First, 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. It is emphasized, however, 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."

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)]. In my view, since SPARCS consists of data that is maintained in some physical form by the Department, I believe that the SPARCS database (or databases) would clearly constitute a "record" subject to rights conferred by the Freedom of Information Law.

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 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)].

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.

While various portions of the Department's regulations cited earlier refer to "deniable" data, I do not believe that an agency's regulations may render records deniable or confidential, unless there is a basis for so doing pursuant to one or more of the grounds for denial appearing in the Freedom of Information Law.

The first ground for denial, §87(2)(a), refers to records that may be characterized as confidential and enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." A statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or Congress [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)], and it has been found that agencies' regulations are not equivalent of statutes for purposes of §87(2)(a) of the Freedom of Information Law [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. Therefore, insofar as the Department's regulations render records or portions of records "deniable" in a manner inconsistent with the Freedom of Information Law or some other statute, those regulations would, in my opinion, be invalid.

The primary basis for a potential denial of SPARCS data is referenced in both the Freedom of Information Law and the Department's regulations. Specifically, §87(2)(b) of the Freedom of Information Law authorizes 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)(a) states in part that an agency may delete identifying details to protect against unwarranted invasions of personal privacy when it makes records available, and §89(2)(b) includes examples of unwarranted invasions of personal privacy. The first includes reference to medical histories; the second pertains to "disclosure of items involving the medical or personal records of a client or patient in a medical facility." Based upon those provisions, it is clear that SPARCS data, insofar as it includes personally identifiable information concerning patients, is indeed "deniable". As indicated earlier, in your request of July 1, you expressed support for protecting the privacy rights of patients, and you wrote that, irrespective of the nature of the data you might receive, there would be no effort on your part to identify patients. In short, it appears that you are not contending in any way that personally identifiable data must be disclosed or that the Freedom of Information Law requires the disclosure of such data.

Also relevant in considering issues relating to privacy is the Personal Privacy Protection Law. Section 96(1) of that statute precludes a state agency from disclosing personal information about a "data subject", unless disclosure is permitted pursuant to

exceptions authorizing disclosure that appear in the ensuing portions of that provision. 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)].

Further, §89(2-a) of the Freedom of Information Law states that:

> "Nothing in this article [the Freedom of Information Law] shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter."

As such, when the Freedom of Information Law and the Personal Privacy Protection Law are read in conjunction with one another, a state agency cannot release records when disclosure would result in an unwarranted invasion of personal privacy, unless disclosure is otherwise permitted by §96.

It is noted that one of the provisions authorizing disclosure, §96(1)(c), pertains to disclosures made pursuant to "article six of this chapter." Article six of the Public Officers Law is the Freedom of Information Law. In other words, personal information subject to the Personal Privacy Protection Law is available under the Freedom of Information Law when disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

In reviewing the various items characterized in the Department's regulations as "deniable", the issue in terms of the Freedom of Information Law, the Personal Privacy Protection Law and the validity of those regulations is whether disclosure would indeed constitute an unwarranted invasion of personal privacy. I believe that a name of a patient, that person's address, social security number, Medicaid number or similar identifier would, if disclosed, in combination with the other items described in regulations described earlier, result in an unwarranted invasion of personal privacy. However, if those unique personal identifiers are deleted or removed, it is difficult to envision how disclosure of several items characterized in the regulations as deniable could possibly identify a patient or, therefore, result in an unwarranted invasion of personal privacy. For instance, the name of a facility, a hospital where treatment was provided, although

designated as deniable individual stay data, must be disclosed in my opinion to comply with the Freedom of Information Law because there is nothing "personal" about that data.

From my perspective, the provisions in the Freedom of Information Law pertaining to privacy are intended to deal with natural persons, rather than entities, such as corporations, hospitals, other health care facilities or insurers. The Personal Privacy Protection Law, when read in conjunction with the Freedom of Information Law 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 hospitals or insurance companies rather than natural persons, I do not believe that the information 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.

Moreover, based upon the judicial interpretation of the Freedom of Information Law, not every disclosure of an individual's name or other identifier would, if disclosed, constitute an unwarranted invasion of personal privacy. On the contrary, as suggested earlier, disclosure in some instances would result in a permissible invasion of personal privacy. In the case of SPARCS data, I believe that a primary goal involves the protection of patient privacy, and it is clear that patients' names, for example, are indeed deniable. Nevertheless, included as deniable data is physician identification. Based upon a judicial interpretation of the Freedom of Information Law that dealt with different records maintained by the Department, I do not believe that the Department may restrict the disclosure of SPARCS data that identifies physicians. In Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991), the issue involved access to records that ranked individual surgeons performing cardiac surgery in hospitals throughout the state. Although the Department withheld portions of the records identifiable to physicians on the ground that disclosure would constitute an unwarranted invasion of personal privacy, it was my view that the information should be disclosed, for it pertained to professional activities carried out by persons licensed by the state. As stated in an advisory opinion prepared on May 14, 1992 at the request of Newsday that was cited in the court's decision:

> "...the information sought, although identifiable to particular physicians, pertains solely to the performance of their

> duties in a profession licensed by the state. Unlike an individual's social security number or medical records identifiable to patients, which would involve unique and personal details of people's lives, the records in question are not 'personal', in my opinion; rather, again, they deal with functions carried out by individuals in their capacities as licensed professionals. Further, in terms of the public interest in the records, the public is increasingly interested and concerned regarding a variety of issues relating to medical treatment, including a hospital's performance, the necessity of surgical procedures and alternatives to surgery, assessment of risks and similar matters. In short, as suggested in the decisions cited above, the exception concerning privacy likely does not extend to the kind of information at issue, which relates to persons acting in their business or professional capacities, and that, in balancing the interests, disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy."

Aside from the two examples of data described in the preceding paragraphs which could not in my view be validly characterized as "deniable" (data identifying facilities and physicians), there may be other aspects of so-called deniable data that could not justifiably be withheld. In short, the issue in my opinion involves the extent to which disclosure of the data could identify patients, thereby resulting in an unwarranted invasion of personal privacy. Insofar as disclosure would not identify patients, it would appear to be difficult, if not impossible, for the Department to justify a denial.

Third, 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)].

Lastly, the use of information that could ordinarily be withheld under the Freedom of Information Law or the Personal Privacy Protection Law may be a relevant factor in determining whether an agency can or should disclose in conjunction with an exception that permits disclosure. However, in general, the reasons for which a request is made and an applicant's potential use of records are irrelevant, and it has been held that when records are accessible under the Freedom of Information Law, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City. 642 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, when records accessible under the Freedom of Information Law are disclosed to the public, I believe that the recipient of the records may use the records as he or she sees fit.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gene Therriault, Executive Secretary
Donald Macdonald, Records Access Officer
Peter Slocum, Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 7948

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 3, 1993

Mr. Mark Hartley
#92-A-9275 C-3-49
Box 200 C.C.F.
Helmuth, NY 14079-0200

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

Dear Mr. Hartley:

I have received your letter of September 26, as well a variety of correspondence related to it.

According to the materials, you requested "a photostatic copy of [your] reception photo I.D. that was taken at the Downstate Correctional Facility..." Following a series of denials, you appealed under the Freedom of Information Law to Counsel to the Department of Correctional Services. He affirmed the denial pursuant to §87(2)(f) of the Freedom of Information Law, stating that "the disclosure of the requested document could endanger the life or safety of any person."

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

First, as indicated above, §87(2)(f) enables an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person." If the copy of the photograph of yourself is typical of "headshots", "mugshots" and similar photos, I cannot envision how disclosure, particularly to you, could endanger anyone's life or safety. Similarly, although §87(2)(b) of the Freedom of Information Law enables agencies to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy", you could not invade your own privacy by viewing a copy of a photograph of yourself.

Second, in a case involving access to photographs of persons arrested during a protest, as well as other records, it was held that the photographs must be made available, except those involving persons whose charges were dismissed. In that case, where charges against an accused are dismissed, photographs and other records are

ordinarily sealed under §160.50 of the Criminal Procedure Law. It is also noted that, under that provision, photographs are generally returned to the person whose charges are dismissed.

In short, I do not believe that there would be any valid basis for precluding you from obtaining a copy of the photograph in question. In an effort to assist you, a copy of this opinion will be forwarded to Counsel to the Department of Correctional Services.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Anthony Annucci, Deputy Commissioner and Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2281
FOIL-AO- 1949

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 4, 1993

Paul K. Johnson, D.V.M.
President, Board of Education
Enlarged City School District of
Middletown
223 Wisner Avenue
Middletown, NY 10940

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

Dear Dr. Johnson:

I have received your letter of October 1 in which you asked that I confirm advice rendered in August during a discussion with the Clerk of the Middletown City School District.

Specifically, you referred to guidance indicating that an advisory committee designated by the Board of Education is not subject to the Open Meetings Law, but that any minutes prepared by the committee are subject to the Freedom of Information Law. According to your letter, reference was also made to §414 of the Education Law, which may require that certain events held on school property must be open to the public.

In this regard, I offer the following comments.

First, the Open Meetings Law applies 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)]. Therefore, an advisory body such as a citizens' advisory committee would not in my opinion be subject to the Open Meetings Law. This is not to suggest that meetings of advisory bodies must be closed, for a board of education, for example, could require that such meetings be conducted in accordance with the Open Meetings Law.

Second, depending upon its purpose, an event held on school property might be required to be conducted in public, even though the event does not involve a public body or the Open Meetings Law. The Education Law enables a board of education to authorize that school property be used for various purposes, including:

> "For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public" [§414(1)(c)].

Therefore, if an entity, such as a PTA, or perhaps a citizens' committee, meets on school property for a "civic" purpose, or for a purpose "pertaining to the welfare of the community", their meetings would appear to be open to the public, even if the Open Meetings Law does not apply.

Lastly, the Freedom of Information Law pertains to agency records, as §86(4) of that statute defines the term "record" expansively to mean:

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

When an advisory committee produces minutes or other documentation for or at the request of a board of education, those materials in

my view constitute "records" subject to rights conferred by 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-7950

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 4, 1993

Mr. Kevin Smith
87-A-9373
135 State Street
Auburn, NY 13024-9000

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

Dear Mr. Smith:

I have received your letter of September 30 and the materials attached to it.

In brief, you referred to failures to respond to your requests for records in a timely manner on the part of the New York City Police Department and the Kings County District Attorney's office. You asked that I contact those agencies to find out why they have not responded. Rather than contacting the agencies in question, I offer the following remarks, which will be shared with those agencies.

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, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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: Sgt. William J. Matusiak, Records Access Officer,
New York City Police Department
Records Access Officer, Kings County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1951

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 4, 1993

Mr. Ralph B. Phillips
92-A-2578
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

<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. Phillips:

I have received your letter of September 30 in which you sought assistance in obtaining transcripts from a television station of broadcasts pertaining to you.

In this regard, 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 or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally includes units of state and local government within its scope. Rights conferred by that statute would not extend to a private television station. Further, other than attempting to acquire the records in question as a litigant in a proceeding in which the information is relevant and necessary to the proceeding, if such records exist, I am unaware of any law that would require the production of those records.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1952

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 4, 1993

Mr. Rudy Jordan
90-T-4645
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. Jordan:

I have received your letter of September 26, which reached this office on October 4.

You wrote that a "directive" prepared by the Department of Correctional Services is unavailable from your facility library, and you asked where you can obtain a copy. In this regard, I offer the following comments.

First, according to the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law, a request for records kept at a correctional facility may be made to the facility superintendent or his designee. To seek records kept at the Department's central offices in Albany, a request may be made to the Deputy Commissioner for Administration. If your facility does not maintain the records in question, a request may be made to that person.

Second, 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 §87(2)(a) through (i) of the Law.

With respect to the directives, I direct your attention to §87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

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

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

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

A directive would in my view be available on the ground that it constitutes agency policy, unless a different ground for denial applies. Further, having contacted the Department in the past, I was informed that directives classified for "A" distribution are generally available under the Freedom of Information Law. Those characterized as "D" involve security at a facility and, therefore, might justifiably be denied under §87(2)(f). That provision permits an agency to withhold records when disclosure would "endanger the life or safety of any person."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1953

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 4, 1993

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 in which you asked to know "who or whom is the body that is authorized to supervise and penalize, if necessary, a FOIL officer that refuses to follow and comply with her duties."

In this regard, there is no person or body that is specifically designated to "supervise and penalize" those charged with the duty of giving effect to the Freedom of Information Law. However, I point out that requests for records kept at a correctional facility, according to §5.20 of the regulations promulgated by the Department of Correctional Services, should be directed to the facility superintendent or his designee. As such, the superintendent may designate a person to act on his behalf in responding to requests for records. Since such a designation has been made in this instance, it is suggested that you express your complaint to the superintendent. He has the authority to choose a different designee if he sees fit to do so. Further, the person ultimately responsible for ensuring compliance with the Freedom of Information Law at the Department of Correctional Services is the Commissioner.

Since you indicated that the designee has in some instances failed to respond to requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agency officials 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-1954

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 4, 1993

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, unless otherwise indicated.

Dear Mr. Kane:

I have received your letter, which reached this office on October 5.

You have sought an advisory opinion concerning a request directed to the Department of Environmental Conservation for records relating to an application for a declaratory ruling. Although you indicated that the Department refused to respond to your appeal, I have received a copy of a determination of the appeal dated October 13. According to the determination, the record denied consists of a "memo to Mitch Goroski from Janice Corr." Both of those persons are members of staff and attorneys for the Department. As such, the request was denied pursuant to §87(2)(g) of the Freedom of Information Law and because it is subject to the attorney-client privilege.

Based upon the description of the contents of the record in question, the Department's denial appears to have been proper. 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 §87(2)(a) through (i) of the Law.

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 apparently consists of legal advice or an opinion prepared by a Department attorney, the other ground for denial of relevance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §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 the record consists of legal advice provided by counsel to or for 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.

Lastly, I note that your correspondence includes a request made to the Division of Criminal Justice Services for "the names of pedophiles living" in certain counties. I would conjecture that neither the Division of Criminal Justice Services nor any other agency could locate records containing information sought, in part, because people change their residences. In addition, 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. 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

cc: Mark Gerstman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1955

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 5, 1993

Mr. Michael A. Kless
[redacted]

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

Dear Mr. Kless:

I have received your letter concerning fees charged by the Department of Motor Vehicles in the amount of $5 for search and $1 per copy. You have questioned the propriety of those fees.

In this regard, as you suggested in your letter, the Freedom of Information Law ordinarily permits agencies to charge up to 25 cents per photocopy. Specifically, §87(1)(b)(iii) of the Freedom of Information Law requires agencies to adopt rules and regulations concerning the implementation of the Law, as well as:

> "the fees for copies of records which shall not exceed twenty-five cents 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 language quoted above, an agency cannot charge more than 25 cents per photocopy or impose a fee for search "except when a different fee is otherwise prescribed by statute."

In this instance, a statute, §202 of the Vehicle and Traffic Law, authorizes the Department of Motor Vehicles to charge the fees to which you referred. Specifically, §202(2)(a) states that "The fee for a search which is made manually by the department shall be five dollars." Further, §202(3) states in relevant part that: "The fees for copies of documents other than accident reports shall be one dollar per page." It appears that the fees that you were charged are based upon §202 of the Vehicle and Traffic Law, a statute, and that those fees, therefore, are proper.

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-7956

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 5, 1993

Mr. Harvey J. Halstrom
[redacted]

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

Dear Mr. Halstrom:

I have received your letter of September 26, which reached this office on October 12.

Your letter consists of a complaint concerning the Supervisor of the Town of Willet, Kenneth Burlingame. You wrote that, early in June, you contacted the Supervisor to request a copy of a "service contract between an assessor and the town." Although he indicated that he would locate the record and permit you to review it, you received no further response. Consequently, on August 1 you sent a request for the record under the Freedom of Information Law by certified mail. After thirty days, having received no response, you contacted another member of the Town Board, who indicated to you that the Supervisor did not intend to provide access to the record.

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 that the grounds for denial are limited and that a contract, in my view, is clearly accessible, for none of the grounds for denial could justifiably be asserted to withhold that kind of record.

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)].

In an effort to enhance the understanding of and compliance with the Freedom of Information Law, copies of this response will be sent to Town officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth Burlingame, Supervisor
Town Board

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7957

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 5, 1993

Ms. Barbara Weed
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 October 11 and the materials attached to it.

You have described ongoing difficulties in obtaining timely responses to requests for records directed to Saratoga County. Specific reference was made to a request of September 23 sent by certified mail that was received by the County on September 27. As of the date of your letter to this office, you had received no response to the request, and you sought an opinion concerning the failure to respond.

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)].

In an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the County's records access officer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kermit Plummer, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7958

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 5, 1993

Mr. James S. Hyde
[redacted]

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

Dear Mr. Hyde:

I have received your letter of October 5, which reached this office on October 13.

According to your letter, the Assessor for the Town of Hammond has refused to disclose property record cards. You have asked that I "inform her that this is public information." In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records and §86(4) of the Law defines the term "record" broadly to mean:

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

Since the cards were produced for and are maintained by the Town, I believe that they clearly constitute "records" that fall within the scope of the Freedom of Information Law.

Second, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could be asserted to

withhold the records in question. 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).

Further, data used for purposes of comparing property, such as 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)].

In short, I believe that the Town and its Assessor are required to disclose the records that you described.

As you requested, and in an effort to enhance understanding of and compliance with the Freedom of Information Law, copies of this opinion will be forwarded to the Assessor and other Town officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ruth Brook, Assessor
Janie G. Hollister, Supervisor
Ann Mitchell, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7959

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 5, 1993

Ms. Linda Mangano
[redacted]

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

Dear Ms. Mangano:

I have received your letter of October 8. In brief, you complained that, despite the Freedom of Information Law and the Town's rules on the matter, the Town of Ossining Assessor has begun a practice of charging one dollar per photocopy. You also referred to other issues involving the implementation of the Freedom of Information Law by the Town.

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 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.

Second, with regard to its procedural implementation, §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 Town 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, §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, §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. In most towns, the records access officer is the town clerk, for that person, under §30 of the Town Law, is the legal custodian of all town records.

Although an agency may require that a request may be made in writing, it may accept oral requests [see Freedom of Information Law, §89(3); regulations, §1401.5(a)]. In my view, agencies should be consistent in treatment of requests. If a request for certain records is required to be made in writing by one person, others, in my opinion, should be required to do the same. However, when a request is routine and requires no search, an agency can waive the requirement of submitting a written request. For instance, if a clerk's minute book is kept close at hand, and a person asks to inspect the minutes, there may be no reason for making or requiring a written request. In short, I believe that the treatment of requests should be consistent.

Further, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (21 NYCRR 1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [21 NYCRR 1401.5(a)]. As such, 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.

With respect to a list of records by subject matter, §87(3) of the Freedom of Information Law states in relevant part that:

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

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 town 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 some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Assessor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1960

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 5, 1993

Mr. John P. Curry
[redacted]

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

Dear Mr. Curry:

I have received your letter of October 7. Having sought a list of employees of the City of Binghamton, including their job descriptions and salaries, the request was denied. According to the form attached to your letter, the City referred to "unwarranted invasion of personal privacy" and "commercial solicitation" as the grounds for denial.

You have sought my opinion concerning the propriety of the denial. 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 §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 described above must be disclosed for the following reasons.

As indicated in the response to your request, §87(2)(b) of the Freedom of Information Law 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.

Second, 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. 642 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. However, section 89(2)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses is relevant, and case law indicates that an agency can ask why a list of names and addresses has been requested [see Goldbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980).

Nevertheless, §89(6) of the Freedom of Information Law states that:

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

As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since payroll information in question was found to be available prior to the enactment of the Freedom of Information Law, I believe that it must be disclosed, regardless of the intended use of the records. Consequently, in my view, the payroll record required to be maintained should be disclosed to any person, irrespective of its intended use.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Juanita Crabb, Mayor
Linda Kingsley, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1961

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 8, 1993

Mr. Terry Hooker
#86-A-5113
Eastern Correctional Facility
Box 338
Napanoch, NY 12458-0338

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

Dear Mr. Hooker:

I have received your letter of October 1 and the correspondence attached to it.

You have complained that the Office of the Queens County District Attorney has failed to respond to your request for records and ensuing appeal in a timely manner. Consequently, you have asked for an advisory opinion "on whether [you are] correct in demanding" that the appropriate official at the District Attorney's office respond "in a timely manner as required."

In this regard, while I do not believe that you can "demand" that those officials respond in a certain way, 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)].

However, as I understand the correspondence, the records that you have requested are not in the physical possession of the Office of the District Attorney in Queens; rather it appears that they are maintained in an archives in Manhattan. It also appears that the District Attorney's staff has attempted to acquire the records in order to respond to your request. Nevertheless, because the records are beyond its physical custody, the staff may have no control over when the records may be transferred. If that is so, there may be no method of providing an estimated date of when rights of access can be determined. In that circumstance, I believe that an explanation of the reason for the delay, which was given to you, represents an indication of a good faith effort to comply with the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Steven J. Chananie
Gregory C. Pavlides

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1962

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 8, 1993

Mr. Ricardo DiRose
85-C-773
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. DiRose:

I have received your letter of October 6, which reached this office on October 14.

According to your letter, having sought records from the Department of Correctional Services relating to your transfer from one correctional facility to another, you were informed that you could obtain "redacted" copies of the records. Those portions of the records that were "evaluative" in nature were withheld, and you have questioned 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 §87(2)(a) through (i) of the Law.

Second, as you suggested in your letter, §87(2)(g) of the Freedom of Information Law is relevant to an analysis of rights of access. 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 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 point out that a decision rendered in 1989 dealt with records that are likely the same as or similar to those in which you are interested.

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, §87[2][g]. We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Based on the foregoing, insofar as the records sought consist of advice, recommendations, opinions or which are evaluative in nature, I believe that they may be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1963

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 8, 1993

Mr. Carlos Vargas
aka Aturo Cruz
92-A-5770
Drawer B
Stormville, NY 12582-0010

<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. Vargas:

I have received your letter of September 30, which reached this office on October 14.

You have sought assistance in obtaining your medical records from the Montefiore Hospital. You indicated that you requested the records early in August pursuant to the Freedom of Information Law, but that you had received no response.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an agency, 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."

Based on the foregoing, the Freedom of Information Law includes within its scope records of entities of state and local government; it does not apply to records maintained by a private hospital, for example.

Second, a different provision of law, §18 of the Public Health Law, generally grants patients with rights of access to medical

records pertaining to them from the hospital or physician in possession of the records. Therefore, it is suggested that you might renew your request, citing §18 of the Public Health Law and including adequate proof of your identity.

To obtain additional information concerning access to medical records, you may write to:

Access to Patient Information Coordinator
New York State Department of Health
Division of Public Health Protection
Corning Tower - Room 2517
Empire State Plaza
Albany, New York 12237

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7964

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 8, 1993

Ms. Linda A. Butler Askew
[redacted]

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

Dear Ms. Askew:

I have received your letter of October 15, which reached this office on October 22.

You have complained that a letter of September 13 addressed to the Superintendent of the South Glens Falls School District in which you requested information concerning access to the District's records had not been answered as of the date of your letter to this office. You asked that the Committee "investigate, process and review [your] complaint."

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee cannot enforce the Law or compel an agency to comply with its provisions. However, in conjunction with your complaint, 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, since much of your request involved records reflective of the District's implementation of the Freedom of Information Law, I point out by way of background that §89(1)(b)(iii) of that statute 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 Board of Education, 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 Board 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.

Although an agency may require that a request may be made in writing, it may accept oral requests [see Freedom of Information Law, §89(3); regulations, §1401.5(a)]. In my view, agencies should be consistent in treatment of requests. If a request for certain records is required to be made in writing by one person, others, in my opinion, should be required to do the same. However, when a request is routine and requires no search, an agency can waive the requirement of submitting a written request. For instance, if a minute book is kept close at hand, and a person asks to inspect the minutes, there may be no reason for making or requiring a written request.

With respect to the list of records that you requested, §87(3) of the Freedom of Information Law states in relevant part that:

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

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 District's "records management officer" designated pursuant to §57.19 of the Arts and Cultural Affairs Law should be familiar with that document.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
James P. McCarthy, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1965

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 9, 1993

Mr. John Uciechowski
Ms. Joan Uciechowski
[redacted]

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

Dear Mr. and Ms. Uciechowski:

I have received your letter of October 19 in which you sought "rulings" concerning issues that you raised under the Freedom of Information Law. In brief, those issues involve delays in responding to requests directed to the Sullivan County Board of Elections and a contention by the Board that you "cannot video tape documents that can be copied."

It is noted at the outset that the Committee on Open Government cannot issue "rulings" or render binding determinations. The primary function of the Committee involves the authority to provide advice concerning the statutes within its jurisdiction, such as the Freedom of Information Law. In this regard, I offer the following comments.

First, although I believe that agency officials should respond promptly to requests, the Freedom of Information Law does not require that they respond instantly. Section 89(3) of that statute 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..."

As such, an agency may require that a request be made in writing. Further, an agency has five business days from the receipt of a

request to respond in some manner to the request. The foregoing is not to suggest that agencies should unnecessarily delay responding to requests; on the contrary, I believe that the Freedom of Information Law is intended to enhance the public's right to know and to encourage agencies to respond to requests quickly and efficiently. Nevertheless, agency officials, in my opinion, are not required to respond to requests for records immediately.

Second, §87(2) of the Freedom of Information Law states, in general, that records accessible under its provisions must be made available for inspection and copying. From my perspective, if an applicant for a record accessible under the law seeks to photograph or videotape that record, I do not believe that an agency could justifiably preclude the applicant from so doing.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sullivan County Board of Elections

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1966

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 9, 1993

Mr. Raymond Campanale
#88-A-6177
PO 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. Campanale:

I have received your letter of October 14. You have raised questions concerning the adequacy of a request for information sent to the New York City Department of Buildings, as well as rights of access to the information.

Having reviewed the request, I offer the following comments.

First, you cited the New York Freedom of Information Law, as well as 5 USC 552, which is the federal Freedom of Information Act. The federal Act applies only to records maintained by federal agencies. As such, it does not apply to an agency of New York City government.

Second, although certain aspects of your request involve copies of records, others seek information. Here I point out that the title of the Freedom of Information Law may be somewhat misleading, for that statute deals with existing records, rather than information per se. While the Law may require the disclosure of existing records, it does not require that agency officials provide information in response to questions or create records in response to requests [see Freedom of Information Law, §89(3)].

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unaware of the specific nature of records maintained by the Department of Buildings. However, assuming that the Department maintains records containing the information sought and that those records can be located based on the terms of your request, I

believe that some would be available, while others could likely be withheld.

Building plans and similar records must in my opinion be made available in most instances. However, in some circumstances, those records may include reference to alarms or security systems, for example, and §87(2)(f) of the Freedom of Information Law might be asserted. That provision authorizes an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person."

Records indicating the owner of real property and the "zoning code and classification of the building" would in my view be available, for none of the grounds for denial of access would apply.

The remaining expects of the request involve the names of residents of the building and "any lease for rental privileges." It is doubtful in my opinion that the Department of Buildings would maintain such records. However, if it does, I point out that §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." Names of residents or leases, insofar as they identify residents or tenants, could in my view be withheld as an unwarranted invasion of personal privacy.

Lastly, it is noted that every agency 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, and a request should ordinarily be directed to the records access officer. The records access officer for the Department of Buildings is Charles Sturcken, whose office is located at the Department's main office at 60 Hudson Street, New York, NY 10013.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Department of Buildings
Charles Sturcken

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 1967

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 9, 1993

Mr. Bernard Blum
President
Friends of Rockaway, Inc.
67-11 Beach Channel Drive
Arverne, NY 11692

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

Dear Mr. Blum:

I have received your letter of October 15 and the correspondence attached to it. You have asked that the Committee on Open Government "rule on the legality of New York City Department of Sanitation not responding to the Freedom of Information Law request on July 22nd '92 to examine the files of the Department with respect to Rockaway waste facility planning."

The body of your letter of July 22 includes a series of facts and opinions. The portion of your letter that might be characterized as a request appears as follows:

> "Inre: Request under FOIL to have files of Solid Waste Management Planning Facilities Division open to inspection for Rockaway and Jamaica Bay (Edgemere Landfill, AURA, and Beach 80th St. transfer station (WSI Operator) Specifically from beginning of previous administration to date. Will this be done and when? Will the 'antics' of the Lot Cleaning Division be halted until management is improved? When will the 'unpermitted landfill of processed C&D be removed?"

In this regard, I offer the following comments.

First, for purposes of clarification, it is noted at the outset that 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.

Second, as suggested earlier, the majority of your letter of July 22 is not, in my view, a request for records. Further, it is questionable whether the portion of your letter that might be considered a request is adequate. I point out that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v. Federal Communications Commn. 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of your request, I must admit to being unfamiliar with the agency's record-keeping system; whether it has

the ability to locate and identify the records sought in the manner in which you requested them is unknown to me.

Third, when a proper request is made, 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, since you asked that this office "rule" on the matter, it is emphasized that the Committee on Open Government is authorized to provide advice. It cannot "rule" or compel an agency to comply with the statutes within its advisory jurisdiction. Similarly, while I might personally agree with some of your contentions, i.e., those regarding the ability to participate at meetings or the need to remove breeding grounds for mosquitoes, often your contentions simply do not deal with the laws upon which the Committee can comment. In those instances, despite whatever

personal feelings I may have, if the matter is beyond the jurisdiction of this office, I cannot appropriately advise or comment.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jane Levine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7968

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 9, 1993

Mr. Keith Silvera
90-T-3701
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. Silvera:

I have received your letter of October 12, which reached this office on October 20.

Attached to your letter is a copy of a determination of an appeal in which a denial of access to "DD5's" was affirmed by the New York City Police Department. It is your view that the records should be disclosed because they include statements made by witnesses against you. You have sought assistance in the matter.

In this regard, the position apparently taken by the Department, to engage in blanket denials of DD-5's generally, is in my opinion inappropriate as a matter of law.

The case that upon which the Department relied, Scott v. Slade [577 NYS 2d 861, ___AD 2d___(1992)], affirmed a decision upholding a denial of a request for a DD-5. While that decision might have been correct in that instance, another decision rendered by the same court, the Appellate Division, First Department, reached a different conclusion following an in camera inspection. In Mitchell v. Slade, it was found that:

> "[t]he Motion Court, after reviewing the documents in camera, declined to dismiss the petition and held that respondent had failed to meet its burden of proving exemption for the redacted DD-5 follow up report. The Motion Court held that the exceptions contained in Public Officers Law §87(2) did not apply in this factual context, citing *Cornell Univ. v. City of N.Y. Police Dept.* (153 Ad 2d 515), and ordered production of the

> DD-5 with appropriate redaction. On this record, after a careful review of the documents produced to the Motion Court, we are satisfied that the materials are not exempt under the law enforcement exemption (Public Officers Law §87[2][e] or the intra-agency (Public Officers Law §87[2][g])" [173 Ad 2d 226, 227 (1991)].

In my opinion, based upon Mitchell, it would be inappropriate to engage in denials of access to DD-5's in every instance in which they are requested. Rather, as suggested in that decision, the "factual context", the specific contents of the records, and the effects of their disclosure are the factors that must be considered in determining the extent to which those records may be withheld or, conversely, must be disclosed. Several grounds for denial may be relevant in ascertaining rights of access.

For instance, §87(2)(e) 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."

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 §87(2)(e).

Another basis for denial of potential significance, §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.

Since you referred to witness statements, §87(2)(b) may also be relevant. That provision authorizes an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy.

Again, I believe that the contents of the records and the effects of disclosure determine rights of access, and that a policy of denying requests for DD-5's in their entirety is inconsistent with the requirements of the Freedom of Information Law.

In an effort to assist you, a copy of this opinion will be forwarded to the New York City Police Department.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan R. Rosenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1969

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 9, 1993

Mr. Jason T. Balkum
#92-B-2207
Attica Correctional Facility
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. Balkum:

I have received your letter of October 12, which reached this office on October 21. In brief, you have sought an advisory opinion concerning procedural compliance with the Freedom of Information Law by Monroe County and its records access officer or officers.

In this regard, 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 body of a public corporation, the County of Monroe, is the County Legislature, and I believe that it 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, County government has the ability to designate "one or more persons as records access officer".

The Committee's regulations describe the duties of the records access officer and state in §1401.2(b) that:

> "The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
>
> (2) Assist the requester in identifying requested records, if necessary.
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
>
> (4) Upon request for copies of records:
>
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records.
>
> (5) Upon request, certify that a record is a true copy.

> (6) Upon failure to locate records, certify that:
>
> > (i) the agency is not the custodian for such records; or
> > (ii) the records of which the agency is a custodian cannot be found after diligent search."

When a request for records is denied, a 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 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 Committee's regulations 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" (§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, since several aspects of your request involve the duties of records access officers, as indicated earlier, those duties are described in the Committee's regulations. Moreover, rarely does an individual serve solely as an agency's records access officer. More often, a person designated as records access officer is employed to perform a variety of functions, one of which relates to the implementation of the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Marilyn Lansberry
John Riley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7970

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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November 9, 1993

Mr. Theodis Radcliffe
#91-B-0816
Auburn Corr. Facility
PO Box 618 - 135 State Street
Auburn, NY 13024-0618

<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. Radcliffe:

I have received your letter of October 16. In brief, you wrote that you have requested a copy of a police report relating to your arrest from several government offices without success. You have asked for assistance in the matter. In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law is applicable to agency records, and that §86(3) of that statute defines to 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) of the Law defines "judiciary" to mean:

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

Based on the foregoing, while the Freedom of Information Law applies to a police department or the office of a district attorney, for example, the courts and court records are beyond its coverage. This is not to suggest that court records need not be

disclosed, for provisions of law other than the Freedom of Information Law often provide rights of access to court records.

Second, a request made pursuant to the Freedom of Information Law should be directed to the "records access officer" at the agency (or agencies) that you believe maintains the record in which you are interested. 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all

records 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 record in which you are interested, or the effects of its disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the record 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 an 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.

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 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 found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1971

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 12, 1993

Mr. Gregory Higgs
[redacted]

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

Dear Mr. Higgs:

I have received your letter of October 16 which pertains to difficulties concerning your attempts to gain access to Family Court records.

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which pertains to agency records. Section 86(3) of the Freedom of Information Law defines the term "agency" to include:

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

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

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

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

Of possible relevance to the matter is §166 of the Family Court Act. That statute states that:

> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

Since the matter is outside the jurisdiction of this office, it is suggested that you contact the Office of Court Administration in Manhattan at (212) 417-5900 or that you seek the services of an attorney.

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 7972

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 16, 1993

Mr. Frank Gennuso
#85-C-0127
Clinton Correctional Facility
Dannemora, NY 12929

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

Dear Mr. Gennuso:

I have received your letters of October 18 and October 29. In the former, you sought an advisory opinion concerning alleged failures by certain agencies of the City of Buffalo to respond to your requests in a timely manner. In the latter, you indicated that you received a response from one of the agencies, but that the response did not "adequately answer" your request. Specifically, you wrote that Sharon Comerford, Administrative Director of the Municipal Civil Service Commission, did not state that she was responding to a request under the Freedom of Information Law and did not identify the person to whom you could appeal if you "disagree[d] with her response."

In this regard, I offer the following comments.

First, as you described the information sought in your correspondence, in several instances, you requested "lists" containing certain information. Here 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 an agency does not maintain a list that has been requested, I do not believe that it would be obliged to prepare such a record on behalf of an applicant. If a list is requested that does not exist, although an agency official should in my view so inform the applicant, a failure to provide access could not be characterized as a denial; in my opinion, a denial of access can occur only when an agency determines to withhold an existing record.

Second, assuming that an appropriate request for records is made, 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)].

Moreover, 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Sharon Comerford, Administrative Director
Director, Division of Substance Abuse Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1973

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 16, 1993

Mr. Juan Maldonado
90-A-9212
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. Maldonado:

I have received your letter of October 20 in which you sought assistance in obtaining records from the New York City Police Department relating to your arrest.

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 §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. Nevertheless, 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 an 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.

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. However, in the same decision, it was also found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

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

cc: Sgt. William Matusiak, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7974

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 17, 1993

Mr. Jerry M. Ader, Staff Attorney
Wyoming County Attica
Legal Aid Bureau, Inc.
14 Main Street
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. Ader:

I have received your letter of October 18 and the materials attached to it.

By way of background, on August 19, you requested records from the State Commission of Correction relating to a stabbing that occurred on July 3 at the Wyoming Correctional Facility. On August 25, the Commission's public information officer, Jack Barry, acknowledged the receipt of your request and indicated that the Commission's report on the incident had not yet been prepared by its Medical Review Board. He also wrote that "[i]f acceptable to you", your request would be kept on file until a final report is completed. Soon after, you wrote to Mr. Barry to ask whether he could offer an approximate date when the final report would be completed. In addition, you requested records containing factual information concerning the incident. In a response dated September 17, Mr. Barry offered an approximation of the date when the final report would be completed and said that the only record in its possession that was "releasable" under the Freedom of Information Law was a one paragraph description of the incident. He again offered to keep your request on file. Upon receipt of that response, you appealed to the Chairman on September 17 and received a determination of the appeal dated September 24. That determination describes records that were withheld and the basis for withholding each.

You have questioned the adequacy of the Commission's responses and expressed the view that there is no legal support for withholding "factual records of a deceased individual based upon a right to privacy exemption." In this regard, I offer the following comments.

First, in terms of the Commission's procedural compliance with the Freedom of Information Law, the only deficiency in my view, if it could be co characterized, relates to Mr. Barry's letter to you of September 17. In that letter, by referring to the only record "releasable", it was inferred that there were records falling within the scope of your request that were not releasable. That being so, I believe that he should have indicated that records had been withheld and informed you of the right to appeal the denial as required by the regulations promulgated by the Committee on Open Government [21 NYCRR 1401.7(b); see also, Barrett v. Morgenthau, 74 NY 2d 907 (1990)].

Among the records referenced in the determination of the appeal were a criminal history record and an autopsy report. While the determination cited §87(2)(b) of the Freedom of Information Law concerning unwarranted invasions of personal privacy as a basis for withholding those records, §87(2)(a) was also cited. As you may be aware, that provision pertains to records that are "specifically exempted from disclosure by state or federal statute."

With respect to a 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 under the control of that agency are exempted from disclosure by statute, §837(8) of the Executive Law (see Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989). Similarly, under County Law, §677, autopsy reports are available as of right only to a district attorney and the next of kin. Further, it has been held that those records are exempted from disclosure even if they are maintained by a law enforcement agency, for example, rather than a coroner or medical examiner [see Lyon v. Dunne, 180 AD 2d 922 (1992); motion for leave to appeal denied, 79 NY 2d 758].

The remaining category in which the Commission denied access based upon privacy considerations involves hospital and medical records. Those kinds of records must ordinarily be withheld with respect to a living patient pursuant to §§89(2)(b)(i), (ii) and 89(2-c) of the Freedom of Information Law, as well as §96(1) of the Personal Privacy Protection Law. In addition, I believe that hospital records are exempted from disclosure by statute [see Public Health Law, §2803-c(3)(f); see Short v. Nassau County Medical Center, 57 NY 2d 399 (1982)].

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

hospital records may continue in effect following the death of the subject of those records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Mark Bonacquist
Jack Barry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-7975

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 17, 1993

Mr. Harry Wenzel
83-A_4882
Tappan 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. Wenzel:

I have received your letter of October 25. You wrote that your son "has received a few traffic summonses", but refuses to show them to you. You have asked whether you can obtain those records under the Freedom of Information Law.

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 §87(2)(a) through (i) of the Law. While three of the grounds for denial are in my opinion relevant, I do not believe that any could justifiably be asserted.

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." While an allegation concerning an individual's conduct could in my view and under appropriate circumstances be withheld as an unwarranted invasion of personal privacy, a finding of a violation which indicates that an individual has failed to comply with law would in my opinion result in a permissible invasion of one's privacy.

Also of 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.

In my view, the issuance of citations or summonses indicates that a violation has been found. I believe that such a finding would consist of "factual" information accessible under §87(2)(g)(i), as well as a final agency determination accessible under §87(2)(g)(iii).

The remaining ground for denial of potential relevance is §87(2)(e), which states that an agency may withhold records that:

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

The language quoted above is based upon potentially harmful effects of disclosure and is generally cited in the context of criminal law enforcement. From my perspective, the effects of disclosure described in §87(2)(e) would rarely, if ever, arise in relation to traffic summonses. Further, it is questionable, in my view, whether the records in question could be characterized as having been "compiled for law enforcement purposes." Even if they could

be so characterized, it does not appear that any of the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e) would arise by means of disclosure.

Based upon the foregoing, the records in question are in my view available under the Freedom of Information Law, for I do not believe that any of the grounds for denial could appropriately be asserted to withhold those records.

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 - 1976

Committee Members

ert B. Adams
William Bookman, Chairman
Walter W. Grunfeld
Stan Lundine
Warren Mitofsky
Wade S. Norwood
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David A. Schulz
Gail S. Shaffer
Gilbert P. Smith
Robert Zimmerman

Executive Director

Robert J. Freeman

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 17, 1993

Mr. John D. Lenox
Town of Vestal
Dog Control Officer
605 Vestal Parkway West
Vestal, NY 13850

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

Dear Mr. Lenox:

I have received your letter, which reached this office on October 28.

In your capacity as Dog Control Officer for the Town of Vestal, you raised the following concerning the release of information relating to dog complaints: "do the names, addresses and phone numbers of people complaining about dogs have to be released to the dog owner?"

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, when a complaint is made to an agency, §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", 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 §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

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

In my view, what is relevant to the work of the 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, and in such circumstances, I believe that identifying details may be deleted.

In short, in most instances, I believe that the names of complainants, their addresses and phone numbers may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1977

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 17, 1993

Mr. Blondell Dobson
90-A-8285
Eastern Correctional Facility
Box 338
Napanoch, NY 12458

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

Dear Mr. Dobson:

I have received your letter of October 25 in which you described a delay in responding to a request for records of the New York City Police Department. 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. 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, 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

OML-AO-2285
FOIL-AO-1978

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 17, 1993

Ms. Ann Watson
[redacted]

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

Dear Ms. Watson:

I have received your letters of October 25, as well as correspondence relating to them.

In the first, you wrote that residents of an eighty-eight home subdivision in the Town of Malta have raised questions concerning the Building Department's inspection procedures, and that you have encountered difficulties in your attempts to view building permit files. You have sought assistance in the matter, and in this regard, I offer the following comments.

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

While the records in which you are interested, as I interpret your comments, fall within the scope of one of the grounds for denial, that provision, due to its structure, often requires disclosure. I direct your attention to §87(2)(g) of the Freedom of Information Law, which enables an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting 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. Therefore, insofar as the records sought consist of factual information, for example, I believe that they would be available under §87(2)(g)(i). Those consisting of procedures carried out by the Building Department staff would likely consist of instructions to staff that affect the public accessible under §87(2)(g)(ii) or the agency's policy, which would be available under §87(2)(g)(iii).

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)].

Second, when an applicant seeks copies of accessible records, as you did in your request of October 14, an agency may charge up to twenty-five cents per photocopy [see Freedom of Information Law, §87(1)(b)(iii)]. If an applicant seeks to inspect accessible records, no fee may be charged.

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)].

The other letter pertains to a meeting of the Malta Town Board on October 4. You wrote that you attended the meeting until it was adjourned at 8:45 p.m. Later that night, you attempted to contact one of the Board members. However, you were informed by the member's wife that he "was in executive session at the town hall still." Soon after, you and others went to the Town Hall where, as I understand your comments, you found four members of the Town Board in a "small meeting room and a closed door."

In my opinion, if the Board members met to discuss public business or continued their original meeting after their official adjournment at 8:45, they failed to comply with the Open Meetings Law.

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)].

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 gathered to discuss Town business, in their capacities as Board members, any such gathering, in my opinion, would have constituted a "meeting" subject to the Open Meetings Law.

Lastly, §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.

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 Town officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Town Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1979

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 18, 1993

Mr. Salvator Letizia
88-C-0573
Auburn Correctional Facility
135 State Street
Auburn, NY 13024

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

Dear Mr. Letizia:

I have received your letter of October 25 in which you sought opinions concerning two requests, copies of which you enclosed. You also asked for an opinion concerning the possibility of obtaining rap sheets of co-defendants and trial witnesses who testified at your trial from the Division of Criminal Justice Services.

One of your letters is a request made under the Freedom of Information Law to the clerk of a federal court in Buffalo. In this regard, I point out that the Freedom of Information Law is applicable to records maintained by entities of state and local government in New York. That statute does not apply to records maintained by a federal court. Further, although the federal Freedom of Information Act pertains to records maintained by federal agencies, federal courts are not subject to the Act.

With regard to your other areas of inquiry, I point out initially that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With respect to "rap sheets" 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.

The remaining request involves records maintained by the Crime Victims Board, including statements made by a crime victim, records obtained by the Board and used in determining the compensation given to the victim, and a record indicating the amount awarded to him.

Although the Freedom of Information Law provides broad rights of access, that statute, when applied in conjunction with the Personal Privacy Protection Law, could likely preclude the Board from much of the information that you have requested.

Significant in my opinion is §87(2)(b) of the Freedom of Information Law, which authorizes 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) of that statute includes a series of examples of unwarranted invasions of personal privacy. Although those examples may not be specifically pertinent with respect to each aspect of the records sought, I believe that they represent few among many conceivable unwarranted invasions of privacy. In my opinion, a statement of a victim, a record indicating the amount of an award, and medical or similar records could clearly be withheld.

With regard to the Personal Privacy Protection Law, §96(1) of that statute precludes a state agency from disclosing personal information about a "data subject", unless disclosure is permitted pursuant to exceptions authorizing disclosure that appear in the ensuing portions of that provision. 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)].

Further, §89(2-a) of the Freedom of Information Law states that:

> "Nothing in this article [the Freedom of Information Law] shall permit disclosure which constitutes an unwarranted invasion of

> personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter."

As such, when the Freedom of Information Law and the Personal Privacy Protection Law are read in conjunction with one another, a state agency cannot release records when disclosure would result in an unwarranted invasion of personal privacy, unless disclosure is otherwise permitted by §96. Therefore, to the extent that disclosure would constitute an unwarranted invasion of personal privacy, I believe that the Board must withhold the records sought.

Also 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Scott Oakley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1980

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 18, 1993

Mr. Anthony Smith
#90-T-3879
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. Smith:

I have received your letter of November 8 in which you complained that officials of the City of Yonkers have failed to respond to an appeal made under the Freedom of Information Law. In addition, you asked whether this office received a copy of the appeal and inquired as to what "corrective steps" may be taken.

In this regard, as you may be aware, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records. That provision states in relevant part that:

> "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 day of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the records sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Having searched our files, the City has not forwarded any documentation to this office concerning your appeal.

With respect to "corrective steps", I point out that the Committee on Open Government has no authority to enforce the Freedom of Information Law or to compel an agency to grant or deny

access to records. However, it is noted that 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 Practive Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Enclosed are copies of the materials that you requested. In addition, in an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this letter will be forwarded to Yonkers officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Encs.

cc: Christina Lomolino
Philip M. Aglietti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7981

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 22, 1993

Mr. Reginald Walton
#92-A-5116
Attica Correctional Facility
PO Box 0149
Attica, NY 14011

Dear Mr. Walton:

I have received your recent letter, which reached this office on November 18. You have requested a copy of your probation report 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 custody or control of records generally. Nevertheless, assuming that you are seeking a pre-sentence report and in an effort to provide guidance, I offer the following comments.

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 opinion 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1982

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 2, 1993

Mr. Felix F. Welka
[redacted]

Dear Mr. Welka:

I have received your letter of November 13 in which you "appealed" to this office.

By way of background, having requested a copy of a collective bargaining agreement between the CSEA and the Dunkirk School District, you were informed that it was "in the process of being typed", and that a copy would be sent to you as soon as copies could be made. Approximately a month later, you again asked for a copy. Since you received no response, you appealed to the Committee.

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 determine appeals or compel an agency to grant or deny access to records. 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 therefore 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 ensuring determination thereon."

Second, the Freedom of Information Law pertains to existing records. If the agreement has not been prepared in printed form, the record sought would not yet exist. Consequently, no record would be denied, and an appeal, in my view, would be premature. From my perspective, an appeal may appropriately be made only when an existing record has been withheld.

Lastly, insofar as a 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 §87(2)(a) through (i) of the Law. Once it exists in form of a record, a collective bargaining agreement would in my view clearly be available, for none of the grounds for denial would be applicable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Terry L. Wolfenden, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1983

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 8, 1993

Mr. Leopoldo Gonzalez
89-A-3541
Box 200
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. Gonzalez:

I have received your letter of November 29 in which you appealed a denial of a request for records.

In this regard, the Committee on Open Government is authorized to provide advice 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 provision in the Freedom of Information Law pertaining to 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. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Further, since the matter involves a request for a pre-sentence report, I believe that the denial was proper. 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.

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-7984

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 9, 1993

Mr. Ricardo DiRose
85-C-773
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. DiRose:

I have received your letter of October 19, which reached this office on November 1. As in the case of previous correspondence, the issue involves records relating to your transfer.

The matter was considered in an opinion addressed to you on November 8 in response to an inquiry of October 6. In brief, it was advised that the records in question consisted of intra-agency materials and that those kinds of records would be accessible or deniable depending upon their content. Under §87(2)(g) of the Freedom of Information Law, those aspects of intra-agency materials consisting of advice, opinion, recommendation and the like may be withheld. However, other portions, i.e., those consisting of statistical or factual information, must be disclosed, unless a different ground for denial can be asserted.

You enclosed two sheets relating to your transfer and you contend that deletions were inappropriately made. One sheet has deletions relating to "transfer considerations" and "explanation for transfer". Although I cannot know precisely what was deleted, it would appear that the commentary would consist of expressions of opinion that could properly be withheld. The other page has deletions under the heading of "other characteristics". Many of the characteristics involve the making of subjective or evaluative judgments. For instance, notations relating to "Vulnerability", "Psychological Instability", "Inmate Negative Attitude", "Nomad", and other characteristics for consideration are of necessity reflective of opinions. Deletions in those kinds of situations in my view were proper. In others, however, it would appear that notations would involve factual information, such as those

pertaining to "Arson (not for money)", "sex crime(s)", and a "Family Court Protection Warrant".

As you requested, I am returning the documents attached to your letter.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1985

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 9, 1993

Mr. Andrew Pratt
88-A-9377 C-2-36-A
P.O. Box 975
Coxsackie, NY 12051-0975

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

Dear Mr. Pratt:

I have received your letters of October 27 and November 25.

In the former, you sought an advisory opinion concerning a denial of a request made to a sheriff's office for copies of "all log books for the month of June 9, 1988 through June 25, 1988", including "the A Block log book, the booking office log book, and the daily log for patrol cars", as well as "all orders to produce [your] person to all courts during the above dates". You wrote that you were informed that the materials in question must be subpoenaed.

In this regard, since you did not describe the log books that you are seeking, I cannot offer specific guidance concerning rights of access to them. It is noted, however, that the Freedom of Information Law pertains to all agency records and is based on a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Consequently, although some of the records or perhaps portions of the records that are the subject of your inquiry might properly be withheld under the Freedom of Information Law, it is likely that others must be disclosed. Because I am unfamiliar with the contents of the records that you are seeking, the following paragraphs will review provisions that may be relevant in ascertaining rights of access to the records.

Of likely 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".

Also of potential significance is §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". As indicated earlier, the names and other details concerning inmates in county jails are available under the Correction Law, §500-f. Further, in a case brought by an inmate who sought the names of others housed with him in a segregated housing unit, the court rejected the agency's claim that disclosure would result in an unwarranted invasion of personal privacy [Bensing v LeFevre, 506 NYS 2d 822 (1986)].

Often 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 two latter provisions cited, §87(2)(c) and (f), might be asserted with respect to a daily log regarding patrol cars, depending upon the degree of detail in the logs. However, since the logs in which you are interested pertain to a period of time of more than five years ago, it is questionable how or whether those grounds for denial would be applicable.

Lastly, orders to produce you for court appearances would in my opinion be available, for none of the grounds for denial would appear to apply.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kermit Plummer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1986

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 9, 1993

Ms. Betty Chapland
[redacted]

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

Dear Ms. Chapland:

I have received your letter of October 28 and the materials attached to it.

Having sought records from the City of Poughkeepsie, you received an acknowledgement of the receipt of the request indicating that a decision to approve or deny the request would be made within ten business days of the date of the acknowledgement. You have questioned the propriety of that response.

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)].

Enclosed for your review are copies of the Freedom of Information Law, procedural rules and regulations and a publication explaining the Law in detail.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2289
FOIL-AO-1987

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 10, 1993

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 October 31 and the materials attached to it.

In your capacity as a member of the Lynbrook Board of Education, you described events involving the Board that occurred in May, and you raised a series of questions relating to those events and of a general nature.

The initial issue relates to a meeting scheduled for May 5 for which notice had been posted. During the afternoon of the day of the meeting, you were contacted by phone and informed that the site of the meeting had been changed. You added that no reason was given for the change in location and that there was no apparent impediment to usage of the site originally designated. No member of the public attended, and the Board entered into an executive session soon after the meeting began. You expressed the view, however, that the subjects discussed did not fall within any of the grounds for conducting an executive session. Following the executive session, you wrote that "the Board walked the block or so to the Atlantic Avenue Administration Building and reconvened in the Superintendent's office" to accept the results of the election, which was held that day. You also raised questions concerning the contents of minutes and the fact that the minutes "do not reflect the vote of the members on the motion to go into executive session."

In this regard, I offer the following comments.

First, one of the basic elements of the Open Meetings Law is that the public must have the ability to know when and where meetings of public bodies are held, and the Law requires that

notice be given prior to every meeting. Specifically, §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."

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.

With respect to the situation that you described, if no notice was given indicating a change in the location of the meeting, the Board in my opinion would have failed to have complied with §104. Moreover, even if notice was given on the day of the meeting, but there was no basis for changing the location, it is questionable in my view whether changing the site was reasonable or, therefore, reflective of compliance with the Open Meetings Law.

Second, every meeting must be convened as an open meeting, and I point out 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.

Third, the Open Meetings Law includes provisions concerning the preparation and content of minutes. 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.

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has

consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. 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.

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.

Since the Law requires that minutes include reference to motions, reference to a motion to enter into an executive session must be included in minutes. Further, 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 [i.e., a board of education; see Freedom of Information Law, §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 short, the vote on a motion to enter into executive session, as well as any other final vote, must be recorded in a manner that indicates how each member cast his or her vote.

Lastly, you asked "[w]hat options are available to a member of a public body when that body insists are [sic] discussing in executive session things which he believes should be public knowledge."

From my perspective, the most important option would involve an effort to educate members of the public body with regard to the provisions of the Open Meetings Law. I believe that understanding of the Law serves as the best method of gaining compliance, and I have enclosed a copy of the Open Meetings Law, which can be reproduced as you see fit.

It is also noted that the Open Meetings Law is permissive. While that statute 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, I am unaware of any statute that would generally prohibit a Board member from disclosing information acquired during an executive session. In few circumstances would there be a prohibition regarding disclosure.

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.

However, in a case in which the issue was whether discussions occurring during an executive session held by a school board could generally 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. 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.

A final method of seeking compliance with the Open Meetings Law would involve the initiation of a judicial proceeding. In my view, that kind of action should be considered a last resort.

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-1988

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 10, 1993

Mr. Casey L. Cain
87-A-2228
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. Cain:

I have received your letter in which you sought assistance in obtaining a "cooperation agreement" between an assistant district attorney and a prosecution witness or his counsel, as well as records pertaining to the prosecution witness, including his criminal history record.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, if no cooperation agreement exists in the form of a record, the Freedom of Information Law would be inapplicable.

Second, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unfamiliar with the contents of any cooperation agreement or related records, I cannot offer specific guidance concerning rights of access. However, there may be several grounds for denial relevant to an analysis of rights of access. For instance, §87(2)(b) of the Freedom of Information Law enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Perhaps most significant with respect to the matter is §87(2)(e) which provides that an agency may withhold records compiled for law enforcement purposes in certain circumstances, i.e., when such records would "disclose confidential information relating to a criminal investigation" or reveal non-routine criminal investigative

techniques and procedures. Further, §87(2)(f) enables an agency to withhold records when disclosure would "endanger the life or safety of any person." In the case of each of the grounds for denial described, the contents of records and the effects of disclosure would be the factors considered in determining rights of access.

Finally, with regard 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 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, 173 AD 2d 825 (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

FOIL-AO-1989

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 10, 1993

Mr. Francis D. McCabe
[redacted]

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

Dear Mr. McCabe:

I have received your letter of November 2 and the materials attached to it.

You described a series of difficulties in your attempts to obtain information from the Town of Frankfort. The matter focuses on the use of garbage to feed hogs and provisions of the Town Code relating to the issue. In a request made under the Freedom of Information Law to the Town's Code Enforcement Officer, you raised the following questions:

> "What criteria do you use to say that transported vegetables that could not or were not sold at a grocery are not vegetable waste.
>
> "When this section of the law was passed what was the intent of the legislative body that defined garbage, when it used the definition. Putrescible...vegetable waste in §52.1(c) of the Frankfort Town Code."

Although some documentation was provided, you indicated that your questions were not answered.

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 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 no records exist specifying legislative intent, I do not believe that the Town would be required by the Freedom of Information Law to prepare new records on your behalf.

Second, in terms of the implementation of the Freedom of Information Law, by way of background, §89(1)(b)(iii) of the 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 Town of Frankfort, 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, §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, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

"The records access Officer is responsible for assuring that agency personnel:

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

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

(4) Upon request for copies of records:

(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the requester to copy those records.

(5) Upon request, certify that a record is a true copy.
(6) Upon failure to locate the records, certify that:

(i) the agency is not the custodian for such records; or
(ii) the records of which the agency is a custodian cannot be found after diligent search."

Under the circumstances that you described, I believe that the Code Enforcement Officer should have responded to your request in accordance with the Freedom of Information Law or forwarded the request to the appropriate person, i.e., the records access officer.

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

cc: Kathleen Aversa, Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1990

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 10, 1993

Mr. Gene Russianoff
Senior Attorney
NYPIRG
9 Murray Street
New York, NY 10007-2272

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

Dear Mr. Russianoff:

I have received your letter of November 1 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter and the materials attached to it, the New York City Charter provides that "public servants" having "substantial policy discretion" are subject to several provisions pertaining to conflicts of interest. Further, the Conflicts of Interest Board has promulgated rules stating in relevant part that:

> "For purpose of Charter §2604(b)(12) and §2604(b)(15), a public servant is deemed to have responsibilities and exercises independent judgement in connection with determining important agency matters. Public servants with substantial policy discretion include, but are not limited to: agency heads, deputy agency heads, assistant agency heads and public servants in charge of any major office, division, bureau or unit of an agency. Agency heads are requested to:
>
> > (a) designate by title or position the public servants in their agencies who have substantial policy discretion as defined by this section;
> >
> > (b) file a list of such titles or positions with the Conflicts of

> Interest Board no later than September 30, 1990; and
>
> (c) notify these public servants in writing of the restrictions set forth in Charter §2604(b)(12) and §2604(b)(15) to which they are subject. Agency heads shall update the filing within 30 days of the creation or elimination of any title or position which involves the exercise of substantial policy discretion."

Having requested lists of those having "substantial policy discretion" submitted by agencies, you were informed by the public information officer for the Conflicts of Interest Board that the lists were "confidential". You have questioned the propriety of that assertion.

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 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 §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 enable an agency to withhold a record. In this instance, I am unaware of any statute that would render the records in question exempted from disclosure by statute.

Third, although tangential to your inquiry, 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 records identifying public employees, such as those that you requested, must be disclosed.

From my perspective, the issue is whether disclosure of the records in question would constitute "an unwarranted invasion of personal privacy" in accordance with §87(2)(b) of the Freedom of Information Law. 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. 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, 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, the designation or identification of public employees as those having substantial policy discretion is clearly relevant to the performance of those employees' duties, particularly in view of the City Charter provisions and rules of the Conflicts of Interest Board referenced earlier.

In sum, I do not believe that a claim of confidentiality or an assertion that disclosure of the records sought would constitute an unwarranted invasion of personal privacy would be valid. On the contrary, the records sought must in view be disclosed, for none of the grounds for denial could justifiably 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: Priscilla Lundin, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7991

162 Washington Avenue, Albany, New York 12231
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December 13, 1993

Mr. Jose Gomez
#89-T-3587
Attica Correctional Facility
PO Box 0149
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. Gomez:

I have received your letter of October 24, which reached this office on November 4.

You wrote that your requests for records of the Office of the Ulster County District Attorney were not answered. In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the 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, although you did not describe the records sought, 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 §87(2)(a) through (i) of the Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Records Access Officer, Ulster County District Attorney's Office

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOILAD 1992

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 13, 1993

Mr. Harvey M. Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your letter of November 2 in which you described a variety of scenarios concerning lesson plans and asked whether they would be available under the Freedom of Information Law. You also requested a copy of the recent decision rendered by the Court of Appeals, Russo v. Nassau County Community College. A copy of the decision is enclosed.

With regard to lesson plans, as you are aware, §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. Further, I believe that the decision rendered in Russo only serves to bolster such a contention.

With respect to rights of access, lesson plans would in my view consist of intra-agency materials that fall within the scope of §87(2)(g) of the Freedom of Information Law. As indicated in many opinions prepared at your request, intra-agency materials may be available or deniable, in whole or in part, based upon their contents, and I see no need to reiterate comments made previously.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7993

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 14, 1993

Mr. Rodney L. Forness
[redacted]

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

Dear Mr. Forness:

I have received your letter of November 1. In brief, you wrote that you have attempted, without success, over the course of years, to obtain medical records used in a proceeding before the Workers Compensation Board. Although both a request and an appeal were made under the Freedom of Information Law, you received no responses from that agency as of the date of your letter to this office.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While medical records pertaining to an individual may be withheld from the public on the ground that disclosure would constitute "an unwarranted invasion of personal privacy", I believe that they must be disclosed to you as the subject of the records.

Second, 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)].

In an effort to enhance your capacity to obtain an appropriate response to your request, a copy of this letter will be forwarded to the Board's Office of Counsel.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Mark Solomon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1994

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 14, 1993

Mr. Rodney B. Brown
#90-A-3027 D/3-37
Clinton Correctional Facility
PO 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. Brown:

I have received your letter, which reached this office on November 4.

You have sought assistance in obtaining records indicating "the facts of the crime" for which you were convicted, including the time and description of events for each indictment. You indicated that the Bronx County District Attorney's Office has had "logistical problems in retrieving [your] folder."

In this regard, I offer the following comments.

First, it is suggested that you submit a request to the "records access officer" at the agency or agencies that would maintain the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests. The records access officer for the New York City Police Department is Sgt. William J. Matusiak. If you believe that the records are maintained by the Department of Correctional Services, Department regulations indicate that a request for records kept at a facility may be made to the facility superintendent or his designee.

It is also noted that §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency officials to locate the records.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, a record or records indicating "the facts of the crime" and the time that it was committed must be disclosed. In short, since you were convicted, I do not believe that any of the grounds for denial would be applicable.

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)].

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1995

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 15, 1993

Mr. Rosa Marinaccio
[redacted]

Dear Ms. Marinaccio:

I have received your letter of November 9, which reached this office on December 13.

You referred to an article that appeared in the New York Law Journal indicating that a particular attorney had been reprimanded. Since your request for records made to the Appellate Division was rejected, you asked that I provide the date that the article appeared in the Law Journal and details concerning the reprimand.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not serve as repository of records, and I cannot provide the information in question because the Committee does not possess it.

Further, the Law Journal is not published by government, but rather by a private company. It is possible that you may be able to acquire the article by calling the Law Journal at (212) 741-8300.

It is also noted that the Freedom of Information Law pertains to agency records, and that §86(3) of that statutes 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.

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 your request to the Appellate Division involved records available under §90(10) of the Judiciary Law, it is suggested that you might renew the request, citing and highlighting appropriate aspects of that statute.

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 7996

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 17, 1993

Ms. Cindy Converse, President
Warren County Assessor's Association
Town of Warrensburg
Warrensburg, NY 12885

Dear Ms. Converse:

Thank you for your letter of December 16 and your kind words. From my perspective, our gathering was enjoyable, and I hope that it was worthwhile for you and your colleagues.

With respect to the SBEA opinion to which you referred, which was issued in 1975, I believe that it is out of date. That opinion was based on §51 of the General Municipal Law, which states in general that records of a municipality are available. However, in responding to a contention that §51 requires that all records of a municipality be made available, regardless of their contents, the state's highest court, the Court of Appeals, held in 1985 that:

> "Such a result would nullify the FOIL exemptions, which the Legislature - presumably aware of General Municipal Law §51 at the time it enacted FOIL - could not have intended. To give effect to both statutes, the FOIL exemptions must be read as having engrafted, as a matter of public policy, certain limitations on the disclosure of otherwise accessible records" [Xerox Corporation v. Town of Webster, 65 NY 131, 490 NYS 2d 488, 489 (1985)].

Therefore, if portions of records would, if disclosed, result in an unwarranted invasion of personal privacy under §87(2)(b) of the Freedom of Information Law, I believe that they may be withheld, notwithstanding §51 of the General Municipal Law.

If you would like to discuss the matter further, please feel free to call.

Happy Holidays!

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1997

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 17, 1993

Ms. Elaine Gilbert, Editor
The Advocate
Rockland Community Development Council
22 Main Street
Monsey, NY 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 Ms. Gilbert:

As you are aware, I have received your letter of November 2 and the correspondence attached to it. Please accept my apologies for the delay in response.

Your initial area of inquiry involves a request made to the Town of Ramapo for records of the "numbers of police officers on duty in the Town". The request was denied because disclosure "would endanger the lives and safety of the citizens of Ramapo" and releasing "the number of officers on duty at any specific time could hamper the Police Department in carrying out its public safety function". You indicated by phone that you are not interested in the location where police officers may be stationed but rather the "numbers of shifts" performed by officers.

Additionally, you asked whether you can obtain "information on how many employees are employed in each Town department and details on the perks (insurance coverage, medical plan, etc.) they are entitled to".

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.

With respect to the initial issue, I believe that the only significant potential basis for denial would be §87(2)(f). That provision states that an agency may withhold records or portions

thereof to the extent that disclosure "would endanger the life or safety of any person". The proper assertion of that provision is in my view dependent upon attendant facts and circumstances. If, for example, a police department is small and a request is made regarding assignments or schedules to be carried out in the future, §87(2)(f) might be validly cited to withhold records. If it is known in advance that there will be police patrols in one part of a municipality but not another during a particular period, disclosure might enable potential lawbreakers to take advantage of the absence of a patrol, thereby endangering lives and safety. However, if a police department is large, and if a request does not involve the placement of officers but merely their presence during a shift, it is questionable in my view whether §87(2)(f) could properly be asserted. Further, if a request pertains to prior activity, i.e., how many officers were present during certain shifts last month or last week, it is difficult to envision how disclosure, after the fact, could endanger anyone's life or safety.

I point out that in a decision affirmed by the State's highest court dealing with attendance records maintained by an agency, specifically those indicating the days and dates of sick leave claimed by a particular police officer, it was found that the records are accessible. In that case, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the 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)].

Based on the preceding commentary, I believe that attendance records pertaining to public employees must be disclosed.

With respect to the remaining materials to which you referred, I believe that they must be disclosed. Although tangential to your inquiry, §87(3)(b) requires each agency to maintain and make available a record setting forth the name, public office address, title and salary of every officer or employee of the agency. As such, I believe that records indicating or containing information that would enable you to know how many persons are employed within Town departments would clearly be available.

With regard to "perks", often fringe benefits are referenced in collective bargaining agreements. Those records and others indicating an agency's costs per employee, or by the category of the benefit conferred, would in my opinion be available. In short, none of the grounds for denial could in my view be asserted to withhold such records. Further, I believe that a disclosure indicating that a public officer or employee is covered by a health insurance plan at public expense would not represent or reveal an intimate detail of one's life that could be withheld as an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)]. Arguably, the record reflective of the dates of sick leave claimed by a public employee found by the courts to be available represents a more intimate or personal invasion of privacy. However, if a disclosure of the cost of coverage for a particular employee indicates which plan that person has chosen or whether his or her plan involves individual or dependent coverage, such a disclosure in my view may potentially result in the revelation of a number of details of a person's life and an unwarranted invasion of personal privacy. For instance, an indication of cost relative to a particular employee might reveal whether the coverage involves medical treatment routinely provided by a clinic, as opposed to a primary care physician; it also may indicate the nature of coverage, i.e., whether coverage is basic or includes catastrophic care. The cost may also reveal whether coverage is for an employee alone or for that person's family or dependents. More appropriate in my opinion would be a disclosure of costs by category, rather than by naming individuals, in terms of plans that are offered or available to officers or employees.

Lastly, in terms of public policy, it is emphasized that in affirming the Appellate Division decision in Capital Newspapers, the case cited earlier involving attendance records, 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).

I hope that 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: Alan Berman, Deputy Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7998

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 20, 1993

Hon. John D. Sandri
Chairman
Lewis County Board of Legislators
P.O. Box 76
Beaver Falls, NY 13305

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

Dear Chairman Sandri:

I have received your recent letter in which you asked "whether or not towns are, by law, required to tape and keep on file for seven years their proceedings when convened for..." public hearings and "regular board meetings."

In this regard, I offer the following comments.

First, while it is common to tape record meetings as an aid in the preparation of minutes, I know of no provision of law that requires that meetings or hearings be tape recorded. While a tape recording would likely contain the elements of minutes, I believe that minutes must exist in writing in order that they constitute a permanent, written record that can be viewed by the public. I point out, too, that in an opinion rendered by the State Comptroller, it was found that although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" of a meeting (1978 Op. St. Compt. File #280).

Second, there is statutory direction concerning the custody, security, retention and disposal of records. For instance, §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..."

Based upon the foregoing, 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.

Lastly in the case of towns, the records management officer is the town clerk. In that capacity, the town clerk should have and be familiar with the retention and disposal schedules referenced above. Alternatively, a copy of the publication containing the schedules may be obtained from the State Archives and Records Administration, a unit of the State Education Department, by calling (518) 474-6926. While I am not fully familiar with the schedules, I believe that tape recordings of meetings and hearings must be retained for a minimum of four months and that written minutes of meetings must be kept permanently.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1999

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 20, 1993

Mr. George J.H. Cook
[redacted]

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

Dear Mr. Cook:

As you are aware, I have received your letter of November 5 and the materials attached to it. Please accept my apologies for the delay in response.

According to the materials, on October 20, you requested from the Village of Farmingdale copies "pre and post election filings 'statement of campaign receipts and expenditures'" concerning the Village Restoration and the Liberty parties relative to elections held in March of 1992. In the request, you noted that "These are the Campaign's financial statements". In an acknowledgement of the receipt of the request on November 1, the Village Clerk-Treasurer wrote that "[w]e estimate that your request will be granted by the end of January, 1994".

You have asked whether the clerk can properly delay disclosure for so lengthy a period. From my perspective, a delay of so long cannot be justified. In this regard, I offer the following comments.

First, as I understand the situation, the records in question must be prepared and timely filed pursuant to Article 14 of the Election Law, which also describes their form and content. Further, there is clear indication that the records are intended to be readily available to the public. Section 14-108 of the Election Law states in part that:

> "3. Each statement shall be preserved by the officer with whom or the board with which it is required to be filed for a period of five years from the date of filing thereof.

4. Each statement shall constitute part of the public records of such officer or board and shall be open to inspection."

Second, aside from the clear intent expressed in the Election Law, 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 this instance, it is clear that the records sought must be prepared, filed and disclosed; they are not voluminous, and there appears to be no valid basis for delaying prompt disclosure. In my view, the estimated date of disclosure is unreasonable and could be characterized as a constructive denial of access that 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)].

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to the Clerk-Treasurer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: John Giordano, Clerk-Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8000

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 20, 1993

Mr. Eugene Forman
#91-A-8549
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. Forman:

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

You commentary pertains to delays by the New York City Police Department in responding to your requests for records and your contention that Department officials have acted in violation of §240.65 of the Penal Law. You have sought my advice in the matter, and in this regard, I offer the following comments.

First, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law deal in my opinion with the situation in which an agency denies the existence of records with the knowledge they do exist or in which requested records are destroyed in order to preclude their disclosure. As I interpret the materials, neither of those circumstances is present.

Second, however, 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: Sgt. William J. Matusiak, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8001

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 21, 1993

Mr. Brian D. Murphy, Attorney
Maroney Ponzini & Spencer
14 North Broadway
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. Murphy:

I have received your letter of November 5 Please accept my apologies for the delay in response.

In your capacity as attorney for the Village of Ardsley, you asked that I review a proposed local law that would require owners of income producing properties to produce and submit income and expense statements annually to the Town Assessor. Section 6 of the proposal would appear to exempt income and expense statements from public disclosure and includes provisions that would penalize those who violate its confidentially requirements.

In this regard, I offer the following comments.

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

Due to the breadth of the language quoted above, any documentation, irrespective of its function or origin, maintained by an agency would constitute a "record" subject to rights of access.

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

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, 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 vBOCES, 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 opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot confer, require or promise confidentiality. This is not to suggest that income and expense statements must be disclosed in every instance; rather, I am suggesting that those records may in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, and that any local enactment that is inconsistent with that statute would be void to the extent of any such inconsistency.

It is likely in my view that two the grounds for denial would be particularly relevant with respect to the records at issue.

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 eg, §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 the statements 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.

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".

In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of business entities identified in the records.

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 proper assertion of §87(2)(d) is dependent upon a variety of factors, such as the specific content of the records, the area of commerce in which business entities are involved, the degree of competition within that area of commerce and, most importantly, the effect of disclosure, i.e., the extent to which disclosure would "cause substantial injury" to an entity's competitive position. I would conjecture that income and expense statements could often be withheld in great measure, if not in their entirely, under §87(2)(d).

However, in the case of both §87(2)(b) and (d), potentially harmful effects of disclosure may diminish with the passage of time. Current financial information regarding a business entity might, if disclosed, be highly damaging; disclosure of the same information three years from now might be innocuous.

For the reasons described above, I believe that section 6 of the proposed local law is inappropriate and would be invalid insofar as it conflicts with a statute, such as the Freedom of Information Law. Preferable in my view would be absence of any specific reference to disclosure; in that case, records could be withheld to the extent permitted by the Freedom of Information Law. Alternatively, a declaration might merely indicate that the records in question need not be disclosed, except as required by 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 8002

162 Washington Avenue, Albany, New York 12231
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December 21, 1993

Mr. Willis S. Retzlaff
Assessor
Town of Wheatfield
2800 Church Street
North Tonawanda, NY 14120-1099

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

Dear Mr. Retzlaff:

As you are aware, your letter addressed to me at the Alfred E. Smith Office Building has been forwarded. Please note that the Committee on Open Government is located in the Department of State.

Your letter was apparently precipitated by a request to remove building plans from your office "for purposes other than viewing the plans." Since the Town does not have the ability to reproduce the plans, which are large, it is your policy to prohibit the plans from leaving Town Hall. You also wrote that "since a large amount of money has gone into the drawing of those plans and they are considered to be of a personal nature", you have not released the plans to the public.

You have asked whether your practices are in compliance with 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 the Law defines the term "record" expansively to mean:

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

Based on the foregoing, building plans, architects plans and similar or related documents in my view clearly constitute "records" subject to rights conferred by the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, it would be a rare case in which any of the grounds for denial could be asserted to withhold the records in question. Further, §87(2) of the Freedom of Information Law states that accessible records must be made available for inspection and copying, and §89(3) indicates that an agency is obliged to make a copy of an accessible record if the applicant pays the appropriate fee for copying.

In my opinion, whether the owner of property consents to permit access to a building plan is irrelevant; if a record is available under the Freedom of Information Law, the subject of the record does not have the ability to control disclosure. Building plans per se contain no personal information concerning an individual. Consequently, I do not believe that those kinds of records could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy under §87(2)(b) of the Freedom of Information Law. However, in certain circumstances, those plans may include reference to alarms or security systems, for example, and it is possible that §87(2)(f) might be asserted. That provision authorizes an agency to withhold records when disclosure would "endanger the life or safety of any person." In general, however, I believe that building plans are available, and they were public records even before the enactment of the Freedom of Information Law.

Additional considerations become relevant if the records in question bear a copyright, and the question in that situation involves the effect of a copyright appearing on a document. In order to offer appropriate responses concerning the effect of a copyright, I have discussed the matter with a representative of the U.S. Copyright Office and the Office of Information and Privacy at the U.S. Department of Justice, which advises federal agencies regarding the federal Freedom of Information Act (5 U.S.C. §552), the federal counterpart of the New York Freedom of Information Law.

To be copyrighted, 17 U.S.C. §401(b) states that a work must bear a "notice", which:

> "shall consist of the following three elements:
>
> (1) the symbol c (the letter C in a circle), or the word 'Copyright,' or the abbreviation 'Copr.'; and

> (2) the year of the first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of the first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and
>
> (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner."

If those elements do not appear on a work, I do not believe that it would be copyrighted, and that it could be reproduced in response to a request made under the Freedom of Information Law.

Assuming that a work is subject to copyright protection, such a work that includes the notice described above is copyrighted. It is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. §408(a)] be registered with the Copyright Office. No action for copyright infringement can be initiated until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision

> permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect

> such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work would be available for copying under the Freedom of Information Law.

Lastly, as indicated earlier, when a record is accessible under the Freedom of Information Law, it must be made available for inspection and copying [see §87(2)]. Further, §89(3) provides that an agency must make available copies of records upon payment of the appropriate fee. In this instance, since the plans are presumably larger than 9 by 14 inches, the basis for a fee would be the actual cost of reproduction [see §87(1)(b)(iii)].

I am not suggesting that the Town provide an original document to an applicant so that he or she can remove the document from Town Hall in order to copy it, and I point out that statutes other than Freedom of Information Law provide direction concerning the custody, security, retention and disposal of records. For instance, §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..."

To comply with the Freedom of Information Law and other statutes, in response to a request for a copy of a building plan, a Town official could transfer or bring that record to a facility where the plan could be duplicated. Again, in that situation, I believe that the actual cost of reproducing the record could be charged, including the cost of transportation, handling, time and the duplication of the document. Further, the Town could in my view require payment in advance of providing the service.

I hope that I 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 8003

162 Washington Avenue, Albany, New York 12231
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December 21, 1993

Ms. Diana T. Nicols
[redacted]

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

Dear Ms. Nicols:

I have received your letter and the materials attached to it. You have sought an advisory opinion concerning a denial of access to records under the Freedom of Information Law.

According to the materials, you requested: "Documentation showing how often deputies must be certified in firearms training and documentation showing dates when deputies received training during the period October, 1991 through October 1993." The request was denied initially and following your appeal. In the determination of your appeal, it was stated that: "The records in question are considered confidential because they reveal criminal investigative techniques or procedures (Section 87(2)(e)(iv) and are Personnel 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law. Although several of the grounds for denial may be relevant in determining rights of access, I do not believe any could properly be asserted.

First, §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..."

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.

It would appear that documentation indicating how often deputies must be certified in firearms training, as well as records of the dates when training was received, would constitute intra-agency materials. However, a rule, a policy, or a directive indicating the necessary frequency of training or certification would appear to consist of instructions to staff that affect the public available under §87(2)(g)(ii) or "final agency policy" 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 §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).

In addition, 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)].

In the context of your request, it is my view that a policy or rule which merely indicates the frequency of required training or certification is "routine" and must be disclosed. Conversely, if you had requested specific details regarding the nature of training, perhaps in that case, the records would have been reflective of "non-routine" criminal investigative techniques or procedures. As such, I do not believe that §87(2)(e)(iv) would serve as a valid basis for a denial.

Records indicating the dates of training would constitute intra-agency materials. However, that information would consist of factual data available under §87(2)(g)(i). Moreover, you did not request the names of deputies who received training. Even if you did seek the names of those who received training and the dates of the training, it is questionable whether a denial would have been proper.

The initial 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 §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)].

Based upon the foregoing, it does not appear that §50-a of the Civil Rights Law would serve as a basis for denial. Further, if you are only interested in dates of training, names of deputies could be deleted from records that would otherwise be available.

As you requested, a copy of this opinion will be forwarded to Carl F. Higgins, Chairman of he Otsego County Board of Representatives.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Carl F. Higgins

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8004

162 Washington Avenue, Albany, New York 12231
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December 21, 1993

Mr. Gerald E. Gordinier
Village of Voorheesville
PO Box 367
Voorheesville, NY 12186

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

Dear Mr. Gordinier:

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

You wrote that you perform the duties of code enforcement officer, zoning officer, fire inspector and assessor for the Village of Voorheesville Board of Trustees, and that you maintain records concerning all of those functions in your office. Having recently purchased a computer, you wrote that you are in the process of transferring the contents of your records onto discs. Your question is whether "the Village has to provide total disclosure of [its] property and departmental records".

In this regard, I offer the following comments, both general and in relation to particular records to which you referred.

First, it is emphasized 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 one 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).

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 §87(2)(a) through (i) of the Law.

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 must 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].

With respect to EA-5217 forms that indicate the transfer price of real property, currently, under §574(5) of the Real Property Tax Law, the transfer price is confidential unless it is requested in conjunction with the administrative or judicial review of an assessment. However, those forms, due to a recent amendment, will become available effective July 1, 1994.

Third, I point out 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)].

Fire or building code inspection reports, as well as inter-office memos, staff opinions and the like would fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

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

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

To the extent that records pertain to multiple dwellings, another provision of law might be relevant. Specifically, §307 of the Multiple Residence Law, which refers to records of municipal building departments, states that:

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

When a complaint is made to an agency, as you suggested, §87(2)(b) of the Freedom of Information Law maybe relevant. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

With respect to such complaints, it has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

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

In my view, what is relevant to the work of the 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, and in such circumstances, I believe that identifying details may be deleted.

I also note that the Freedom of Information Law is permissive. While an agency may withhold records in appropriate circumstances, it is not required to do so. As stated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the

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

Therefore, while I believe that identifying details pertaining to complainants may ordinarily be withheld, an agency is not prohibited from disclosing the records in question in their entirety.

Lastly, when it is clear that certain aspects of information maintained electronically are available and others are deniable, it is suggested that the system be designed and programmed so that the available and deniable data can be readily segregated.

I hope that 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 8005

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 21, 1993

Mr. Donovan Anderson
90-A-0550
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. Anderson:

I have received your letter of October 28 and the materials attached to it. Please note that your correspondence did not reach this office until November 10.

As I understand the materials, you received a memorandum from a court indicating that the Kings County District Attorney's office would disclose certain records to you upon payment of the proper fee. Nevertheless, your ensuing requests had not been answered as of the date of your letter to this office. You have asked for assistance in the matter.

In this regard, I offer the following comments.

First, each agency must designate at least one "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be made 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8006

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(518) 474-2518
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December 21, 1993

Ms. Barbara Weed
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 November 6 and a variety of other correspondence concerning your efforts in obtaining records from Saratoga County and other agencies. Having reviewed the materials, I offer the following observations.

First, although the time limitations imposed upon agencies concerning responses to requests and appeals were discussed in an earlier opinion, I would like to reiterate some of those remarks and provide additional information. As you are aware, §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 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)].

Based on the foregoing, 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.

Second, in several responses, it was stated that the County maintained no records falling within the scope of your requests. In this regard, it is emphasized 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.

Third, references were made in several items of correspondence to reports prepared by consultants, which were denied on the basis of Sea Crest Construction Co. v. Stubing [82 AD 2d 546 (1981)]. I am familiar with that decision. However, the Court of Appeals has provided additional guidance on the subject, and it is possible, if not likely, that some of the denials were overbroad.

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.

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 records in question consist of advice, recommendations or opinions, they could be withheld.

It has also been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with 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 [i.e., §87(2)(c)] could properly be asserted.

Another somewhat related issue involves the assertion of the attorney-client privilege. In analyzing the matter, 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)].

The issue of payments made to attorneys by the County was also raised. From my perspective, 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, 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. Therefore, while some identifying details or descriptions of services rendered found in 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, one aspect of a recent request involved the identities of persons whose property will be inspected and tested for suitability. In Myers v. NYS Low-Level Radioactive Waste Siting Commission (Supreme Court, Allegany County, July 14, 1989), the Commission disclosed locations that it had selected as possible waste sites. Additionally, however, other sites were offered by landowners in conjunction with a promise of confidentiality. In brief, it was held that a promise of confidentiality is irrelevant in determining rights of access and, in ordering disclosure, the Court rejected a contention that disclosure would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(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 Plummer, Records Access Officer
Courtenay W. Hall, Records Appeal Officer
Richard Kupferman, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8007

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 21, 1993

Mr. Raymond Russell
#74-D-41
Sullivan Corr. Fac.
PO Box AG
Fallsburg, NY 12753

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

Dear Mr. Russell:

I have received your letter of November 7. In brief, you indicated that you requested under the Freedom of Information Law from the "Bd of Parole" on October 21, but that you had received no response 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 at the Division of Parole is Ann Horowitz, Counsel to the Division.

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 8008

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 21, 1993

Mr. Anthony Scott
86-C-1161
Box 500
Elmira, NY 14902-0500

Dear Mr. Scott:

I have received your letters of December 15 and related correspondence. You have appealed three denials of requests for records to this office.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. For your information, the provision pertaining to the right to appeal appears in §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...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 note further that two of your appeals relate to court records. Here I point out that 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 or other governmental 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 all court records are beyond public rights of access, for many court records are accessible under different provisions of law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO 8009

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 22, 1993

Mr. Brian Donovan
Newsday
235 Pinelawn Road
Melville, NY 11747-4250

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

Dear Mr. Donovan:

I have received your letter of November 19 in which you requested an advisory opinion "on the releasability of the official photos that police departments have of their officers."

You wrote that the Nassau County Police Department, as a matter of policy, releases photos of officers "only when they do something heroic." It is your contention, however, that the photos are not confidential personnel records subject to the Civil Rights Law, §50-a, and that the policy of releasing them "only in anticipation of a favorable story is an improper policy."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §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."

Based upon the foregoing language, which includes specific reference to photos, it is clear in my view that materials in which you are interested 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.

From my perspective, the only possible basis for withholding official photos of police officers would involve the rare circumstance in which an officer is involved in undercover or similar work and disclosure would place that person in jeopardy. In that instance, I believe that a photograph could be withheld under §87(2)(f), which permits an agency to deny access to records when disclosure "would endanger the life or safety of any person." In the case of most police officers, however, because they interact with and are seen by the public in their official capacities or because their positions do not involve the performance of duties that would place them in danger if their photographs were disclosed, I do not believe that §87(2)(f) would serve as valid basis for that denial.

Third, with respect to a claim that the records are confidential under §50-a of the Civil Rights Law, the language of that statute and its judicial interpretation indicate, in my opinion, that such a contention would be without merit. Section 50-a, which pertains to police officers and certain others, refers to "personnel records, used to evaluate performance toward continued employment or promotion" and states that such records are confidential. In my view, an official photograph could not be characterized as a record that is used for the purposes specified in §50-a. If my contention is accurate, §50-a would not constitute a valid basis for a denial of access.

Moreover, in reviewing the legislative history leading to its enactment, the Court of Appeals 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)].

Based upon the foregoing, again, I do not believe that §50-a of the Civil Rights Law would serve as a basis for denial.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Nassau County Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8010

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 22, 1993

Mr. Joseph Schuster
[redacted]

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

Dear Mr. Schuster:

I have received your note of November 6. As in the case of previous correspondence, you have sought guidance in acquiring information concerning the resignation of the first New York State Inspector General.

Your note appears on a letter sent to you by Stephen Del Giacco, Director of Communications for the Office of Inspector General. In response to your request for records that "describe and explain the reason" for the resignation of the former Inspector General, you were informed that his office maintains no such records. You have suggested that Mr. Del Giacco should use "a little willingness & resourcefulness to attempt to achieve full compliance with FOIA" by speaking to the new Inspector General to ascertain the location of such records or "pick up the phone". In conjunction with the foregoing, you raised a series of questions, such as: "Was the former NY State Inspector General asked to resign?" "Did he cease appearing for work w/out reason?" Was his resignation a total surprise w/out advance notice or reason?"

You expressed the view that you should not be required to "jump through hoops" to obtain the information, and you have asked for assistance in the matter.

In this regard, I offer the following comments.

First, by informing you that the Office of Inspector General does not possess the records in which you are interested, Mr. Del Giacco in my view appropriately responded to your request made under the Freedom of Information Law.

Second, it appears that you misunderstand the Freedom of Information Law. I point out that the title of that statute may be

somewhat misleading, for it pertains to records, not information per se. Stated differently the Freedom of Information Law is a vehicle under which the public may seek existing records and which requires agencies to disclose those records in conjunction with its provisions; it is not a vehicle that provides a member of the public with a right to cross-examine public officials or compel those officials to provide information in response to questions. In short, although an agency subject to the Freedom of Information Law may be required to disclose records, agency officials are not required to answer questions. Further, §89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, if no records exist containing the information sought, agency officials would not be obliged to prepare new records on your behalf. Similarly, Mr. DelGiacco would not be required to "pick up the phone" to attempt to elicit the information you seek.

Third, even if records did exist that contain the information that you are seeking it is likely that those records could justifiably be withheld in part if not in their entirety. While the Freedom of Information Law is based on a presumption of access, two of the grounds for denial would be relevant to an analysis of rights of access to any such records.

Section 87(2)(b) of the Law authorizes agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy". To the extent that one's reasons for resigning are personal, related to a medical condition, the offer of another job, or a desire to move to a new position, I believe that records reflective of that kind of information may be withheld.

Additionally, §87(2)(g) of the Freedom of Information Law permits a denial of access to inter-agency or intra-agency materials that are predecisional, evaluative in nature or which are reflective of opinion, advice, recommendations and the like. Consequently, that provision would also likely serve as a basis for withholding the kinds of records in question if they were to exist.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman

Robert J.Freeman
Executive Director

RJF:pb
cc: Stephen Del Giacco

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8011

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 22, 1993

Mr. Dennis Meehan
#92-B-2787
Box 51
Great Meadow Corr. Facility
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. Meehan:

I have received your letter of November 10 in which you raised a question concerning the use of the Freedom of Information Law. Specifically, you asked whether an individual may seek records under that statute from a police agency while that person's appeal is pending.

In this regard, when records are accessible under the Freedom of Information Law, it has been held that such records must be made available to any person, without regard to one's status or interest [see Burke v. Yudelson, 51 AD 2d 673 (1976)]. 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, whether civil or criminal, would not, in my opinion, affect either the rights of a member of the public or a litigant under the Freedom of Information 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 8012

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 22, 1993

Ms. Kelly A. Watts
#89-A-7943
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 Ms. Watts:

I have received your letter of November 8 in which you sought assistance in obtaining records.

Your first area of inquiry involves delays in response to your request for records of the Bronx County Office of the 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)].

The remaining issue involves an attempt "to obtain the medical reports of an operation performed on the decedent in [your] case". The operation was performed at Jacoby Hospital.

Here I point out that the Freedom of Information Law is applicable to records of an agency, 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 or other governmental 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 entities of state and local government; it does not apply to a private hospital. Moreover, even if the Freedom of Information Law does apply, medical records pertaining to a person other than yourself could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §§87(2)(b), 89(2)(b)] and under provisions of the Public Health Law that restrict disclosure. If you believe that you need to obtain the records in view of your relationship with the decedent, it is suggested that your 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8013

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 22, 1993

Ms. Christine M. Pezzulo
Deputy County Attorney
Department of Law
John H. Mulroy Civic Center
421 Montgomery Street, 10th Floor
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 Ms. Pezzulo:

I have received your letter of November 10 and the materials attached to it. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning Onondaga County's obligation to comply with a request for "a computer tape copy and record layout of all names and addresses of pistol licensees in your county". In conjunction with the foregoing, you were informed that "the information requested is on the arrest data base and there is no current mechanism for extracting that information", and that the County's data processing department has indicated that "a new program must be written to extract this information".

In this regard, it is noted initially 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 indicated earlier, since §89(3) states that an agency is not required to create a record, it has been held that an agency is not required to reprogram or develop new programs to extract information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

In Guerrier, as in the situation that you described, the agency maintained the requested data in its computerized records. However, the agency did not have a computer program that could have been used to compile the information sought, and it was held that "FOIL does not require respondent to do so for the purpose of complying with petitioner's request" (id., 220).

In sum, based upon the preceding analysis and the judicial interpretation of the Freedom of Information Law, I do not believe that the County is obliged to engage in reprogramming or the development of a new program in order to generate the requested data.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8014

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 23, 1993

Mr. Donald M. Brewster
#91-A-8481
Cape Vincent Corr. Facility
Rte. 12E, PO Box 739
Cape Vincent, NY 13618

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

Dear Mr. Brewster:

I have received your letter of November 9. You asked whether you can obtain information concerning the period of your care by the Division for Youth, as well as information about yourself from the Department of Correctional Services.

In this regard, I offer the following comments.

First, §501-c of the Executive Law governs access to and the confidentiality of records maintained by the Division for Youth pertaining to youths. That provision states in relevant part that:

> "Records or files of youths kept by the division for youth shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other than one authorized to receive such knowledge or to make such inspection or examination: (i) by the division pursuant to its regulations; (ii) or by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court; or (iii) by a federal court judge or magistrate, a justice of the supreme court, a judge of the county court or family court, or a grand jury. No person shall divulge the information thus obtained without authorization to do so by the division, or by such justice, judge or grand jury."

Having contacted the Division on your behalf, it was suggested that you submit a request to its records access officer that includes proof of your identity and as much specificity as possible as to particular records of your interest. In addition, I was informed that although some records may be disclosed, a court order may be needed to obtain others.

Second, with respect to the Department of Correctional Services, Department regulations indicate that a request for records kept at a facility may be made to the facility superintendent or his designee. For records kept at the Department's central offices in Albany, requests may be made to the Deputy Commissioner for Administration.

Third, since you asked whether you can obtain "any and all information" that the Department "may have about you", I point out that §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 requested records. It is unlikely in my view that a request for "any and all" records about you would meet the standard of reasonably describing the records.

Lastly, you asked that I inform you as to "which documents [you are] entitled to specifically". That question cannot be answered due to the structure of the Freedom of Information Law. Rather than describing records that must be disclosed, 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. Consequently, the specific contents of records and the effects of their disclosure are often the primary factors in determining the extent to which records must be disclosed.

Enclosed for your review 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:pb
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8015

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 23, 1993

Mr. Abraham Friedman
[redacted]

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

Dear Mr. Friedman:

I have received your letter of November 15 and various materials related to it. Your correspondence deals with your ongoing efforts to obtain records concerning the demolition of your "business buildings" by the New York City Department of Housing Preservation and Development and the ensuing investigation of the matter by the Department of Investigation.

Most recently, Special Counsel to the Department of Investigation affirmed a denial of access to records, stating that:

> "...documents contained in investigative files of law enforcement agencies, other than closing memoranda which have been provided to you, are generally exempt from disclosure pursuant to Section 87(2)(b),(e) and (g) of the Public Officers Law. This is because such disclosure would constitute an unwarranted invasion of personal privacy [POL §87(2)(b)], would identify a confidential source or disclose confidential information relating to a criminal investigation, or would reveal non-routine criminal investigative techniques or procedures [POL §87(2)(e)(iii) & (iv)]."

Here also affirmed the denial of access transcripts of your testimony and that of your family members, asserting that they are "exempt from disclosure pursuant to Public Officers Law §87(2)(g)(iii)". It is noted that in a previous determination of an appeal concerning the same transcripts, he "endorsed" an offer to make a copy of the transcripts available to you for $43, which is based upon a fee of 25 cents per page. Despite that offer, when you asked to view the records, your request to do so was denied.

You have asked that I direct the Department to show the records to you.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee cannot compel an agency to disclose its records or otherwise require compliance with the Law. Nevertheless, I believe that the responses by the Special Counsel are in some respects inconsistent with the Freedom of Information Law. In this regard, I offer the following comments.

First, when records are accessible under the Freedom of Information Law, §87(2) of that statute provides they must be available for inspection and copying. While an agency may charge up to 25 cents per photocopy, no fee may be charged for the inspection of accessible 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 §87(2)(a) through (i) of the Law.

In my opinion, the transcripts of testimony that were "offered" to you must be made available to you for inspection and/or copying. Although it was contended in the correspondence that those records could be withheld under §87(2)(g) of the Freedom of Information Law, that provision in my view would not serve as a basis for denial.

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. 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 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 my view 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 of access to the transcripts of testimony to which you referred. Consequently, you should be able to view them at no cost or obtain copies upon payment of a fee.

Other records that you requested withheld may fall within the scope of §87(2)(g). However, due to the structure of that provision, the contents of the records serve as indicators of the extent to which they 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. 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 proper assertion of the other grounds for denial cited by the Special Counsel would also be dependent upon the contents of the records and the effects of their disclosure. Section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". 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).

In an effort to assist you, a copy of this opinion will be sent to the Department of Investigation.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Andrew B. Melnick, Special Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8016

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 23, 1993

Mr. Robert Camarano
#83-A-2246
Box 2001
Dannemora, NY 12929

Dear Mr. Camarano:

I have received your letter of November 10. In brief, you complained that the Chairman of the Commission of Correction's Medical Review Board and the Commissioner of the Department of Correctional Services have failed to reply to your correspondence. You have asked that I inform you of the "direct superiors" who supervise those officers and agencies.

In this regard, it is noted at the outset that the Committee on Open Government has the duty of providing advice concerning the Freedom of Information Law. The Committee is not an entity that serves as a source of information generally. However, having reviewed provisions of the Correction Law, both the Chairman of the Correction Medical Review Board and the Commissioner of the Department of Correctional Services are appointed by the Governor.

Further, I know of no law that generally requires public officials to answer inquiries or reply to correspondence in every instance. To be sure, I believe that it is generally proper to respond to inquiries; nevertheless, there may be reasonable limitations on the ability or duty to do so.

In a related vein, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it pertains to records, not information per se. Stated differently, the Freedom of Information Law is a vehicle under which the public may seek existing records and which requires agencies to disclose those records in conjunction with its provisions; it is not a vehicle that provides a member of the public with a right to cross-examine public officials or compel those officials to provide information in response to questions. In short, although an agency subject to the Freedom of Information Law may be required to disclose records, agency officials are not required to answer questions. Further, §89(3) of the Law states in part that an agency need not create a record in response to a request.

Under the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency must designate one or more persons as "records access officer". The records access officer has the duty of coordinating an agency's response to requests for records, and a request should ordinarily be directed to that person. The regulations promulgated by the Department of Correctional Services under the Freedom of Information Law state that a request for records kept at a correctional facility may be made to the facility superintendent or his designee. To seek records kept at the Department's Albany offices, a request may be made to the Deputy Commissioner for Administration.

Lastly, when an applicant requests records, under the Freedom of Information Law, the 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Thomas J. Goldrick, Commissioner
Thomas A. Coughlin, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8017

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 23, 1993

Ms. Darlene Balducci
[redacted]

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

Dear Ms. Balducci:

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

Your correspondence focuses upon a day camp/school in the Town of Huntington that apparently is the subject of building and fire code violations. As I understand your remarks, the violations are described in a report that has been withheld. It is your belief that you "have the right to know what violations were found upon inspection" by Huntington Town officials.

I agree with your contention and, 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 §87(2)(a) through (i) of the Law.

In my view, although a report prepared by Town employees would fall within one of the grounds for denial, that provision, due to its structure, often requires disclosure. Specifically, §87(2)(g) of the Freedom of Information Law 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.

In the context of your inquiry and in conjunction with the foregoing, insofar as a report or reports may consist of expressions of opinion or recommendation, I believe that those portions may be withheld. However, those portions consisting of statistical or factual information must in my view be disclosed under §87(2)(g)(i). Further, insofar as such records indicate violations of building or fire codes, for example, those portions would be reflective of final agency determinations available under §87(2)(g)(iii).

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)].

Lastly, although the records in question might relate to or be used in ligitation or enforcement proceedings, that would not apparently remove them from public rights of access. The initial 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 §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.

I hope that 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 Attorney
Jo-Ann Raia, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8018

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 23, 1993

Mr. Joseph Formosa
Security Coordinator
Schenectady Municipal Housing Authority
375 Broadway
Schenectady, NY 12305

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

Dear Mr. Formosa:

I have received your letter of November 10, which reached this office on November 18.

You have sought an advisory opinion concerning a denial of your request for the records of an arrest of a tenant of the Schenectady Municipal Housing Authority for "illegal drug activity". You indicated that illegal drug activity is specifically prohibited in leases between the Authority and tenants. Attached to your letter is a copy of a memorandum addressed to Mayor Duci by Paul Tocker, Deputy Corporation Counsel. Mr. Tocker wrote that the records you seek may be used in a hearing concerning the person arrested "to determine [her] future eligibility for MHA Residency". He referred to §87(2)(e)(ii) of the Freedom of Information Law and contended that since the resident's "home is at stake here...to allow a arrest record without proof of conviction would be prejudicial to her and deprive her of a fair trial or impartial adjudication in MHA or City Court eligibility or eviction proceeding". He also wrote that your statement "that the arrest records are made available to news media is not relevant to a FOI request."

In this regard, although I attempted to reach Mr. Tocker in an effort to resolve the matter, I was informed that he will be out of the office until January 10. Consequently, I offer the following comments.

First, as a general matter, 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 Burke v.

Yudelson, 51 AD 2d 673 (1976); Farbman v. New York City, 62 NY 2d 75 (1984)]. The news media has no special rights under the Freedom of Information Law, and if records are disclosed to the media under that statute, any person in my opinion would have the same rights of access.

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

From my perspective, unless the arrest record has been sealed pursuant to §160.50 of the Criminal Procedure Law, it must be disclosed. Under that statute, when criminal charges have been dismissed in favor or an accused, the records relating to the arrest ordinarily are sealed.

Third, although arrest records are not specifically mentioned in the current Freedom of Information Law, the original Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. In my opinion, even though reference to those records is not made in the current Freedom of Information Law, I believe that such records continue to be available, for the current statute was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the Court of Appeals nearly ten years ago that, unless sealed under §160.50 of the Criminal Procedure Law, records of the arresting agency identifying those arrested must be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)].

Lastly, I disagree with Mr. Tocker's reliance on §87(2)(e)(ii) of the Freedom of Information Law as a basis for withholding the record in question. That provision authorizes an agency to withhold records compiled for law enforcement purposes when disclosure would deprive a person of a right to a fair trial or impartial adjudication. A proceeding involving possible failure to comply with provisions of a lease is separate and distinct from a criminal proceeding relating to the arrest and the record of your interest. Moreover, the provisions of the lease that you forwarded refer to "criminal activity" and "drug related criminal activity". An arrest in my view is related to a charge; it is not reflective of a final determination that a person is guilty or has engaged in criminal activity. While a conviction might constitute a proper basis under the lease for initiating an eviction proceeding, I would conjecture that an arrest, which does not signify guilt, would not serve as a basis for initiating such action regarding a tenant.

For the foregoing reasons, assuming that the arrest record has not been sealed, I believe that it must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Paul Tocker, Deputy Corporation Counsel
Michael Cuevas, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8019

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Pablo Rodriguez
#91-A-9348
Fishkill Correctional Facility
PO 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. Rodriguez:

I have received your letter of November 16. In brief, you indicated that you wrote on two occasions to the inmate records coordinator at the Suffolk County Jail to seek copies of records under the Freedom of Information Law. As of the date of your letter to the office, you had received no response. You have asked that I contact the office to seek an explanation concerning its failure to respond.

Rather than contacting that agency, I offer the following comments, copies of which will be forwarded to Suffolk County officials.

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 appeals regarding denials of access to records by agencies of Suffolk County may be made to the County Attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Inmate Records Coordinator
County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8020

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Ricardo A. DiRose
#85-C-0773
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. Jewett:

I have received your letter of November 15, which reached this office on November 22.

You have sought an advisory opinion concerning a request made under the Freedom of Information Law to the Village of Johnson City Police Department. According to a copy a response to the request that you enclosed, you were advised by the Chief of Police that "the scope of your request relative to information on Drew G. Capello exceeds that which is implied by the Freedom of Information Law". He added that "[a]ny request for information on a court case should be directed to the Court of jurisdiction, in this case the Johnson City Village Court..."

In this regard, the best source of records concerning a judicial proceeding may be, as the Chief suggested, the court in which the proceeding occurred. Nevertheless, if an agency maintains records pertaining to the proceeding, I believe that the agency is obliged to respond to a request made under the Freedom of Information Law.

It is noted that the Freedom of Information Law pertains to agency records and that §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, even though a court may be a more appropriate source of records, insofar as an agency, such as a police department, maintains records falling with in the scope of a request for records reasonably described, the agency must in my view respond to request in accordance with the Freedom of Information Law.

I emphasize that the foregoing is not intended to suggest that the records sought must be disclosed. I an unaware of the contents of any such records, and it is possible that they may be withheld in whole or in part pursuant to the exceptions to rights of access described in §87(2) of the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Rodney Jewett, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8021

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Donald W. Owen
[redacted]

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

Dear Mr. Owen:

I have received your letter and the materials attached to it. You have asked for an advisory opinion concerning a request for records directed to the Town of Union.

A copy of an application indicates that on October 12, you requested:

> "Copies of documentation in any office of the Town of Union (Civil or legal) which relate to an investigation requested by a petition submitted by Kevin Overacker on August 2nd, 1993. Specifically documents (reports, pictures, notes, etc.) expressing facts relating to 2206 E. Main St. or Donald W. Owen or concluding that a violation exists."

In response, the Town Clerk denied the request stating that the documents "are not records of the Town of Union but work that was prescribed by the Town Attorney", and that they "are records that cannot be disclosed under the Public Officer's [sic] Law". You appealed the denial to Richard Place, the Town Attorney. In describing the matter, you wrote that we had spoken and that I concurred with your opinion that "you have a right to be given access to the information...and that [your] civil liberties [had] been violated by the manner in which [your] initial request had been handled". While I recall our conversation and my view that the reasons for the denial as you described them were inappropriate in my view, I do not believe that I would have suggested that your "civil liberties" were violated, because issues involving civil rights are beyond the scope of my jurisdiction and expertise.

Nevertheless, in conjunction with materials that you forwarded, I offer the following comments.

First, if indeed the records sought were prepared as "work that was prescribed by the Town Attorney" I believe that they fall within the coverage of the Freedom of Information Law, even though they may be in the physical custody of the Town Attorney rather than at Town Hall. The Freedom of Information Law pertains to agency records, and §86(4) of that statue 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."

Assuming that the documents in question were produced by or for Mr. Place in his capacity as Town Attorney, it is my view that they clearly constitute "records" subject to rights of access.

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

Third, although the records in question might relate to or be used in ligitation or enforcement proceedings, that would not necessarily remove them from public rights of access. The initial 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 §3101(d) of the Civil Practice Law and Rules, which exempts material prepared for litigation from disclosure. Nevertheless, if records are prepared or acquired in the ordinary course of business or if they 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].

Assuming that the records are not exempted from disclosure under §3101(d) of the Civil Practice Law and Rules or some other statute, it is likely that their contents would serve as the criteria for determining the extent to which they must be disclosed. Although records prepared by or for the Town would fall within one of the grounds for denial, that provision, due to its structure, often requires disclosure. Specifically, §87(2)(g) of the Freedom of Information Law 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.

In the context of your inquiry and in conjunction with the foregoing, insofar as a records may consist of expressions of opinion or recommendation, I believe that those portions may be withheld. However, those portions consisting of statistical or factual information must in my view be disclosed under §87(2)(g)(i). Further, insofar as such records indicate violations of building or fire codes, for example, those portions would be reflective of final agency determinations available under §87(2)(g)(iii).

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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Richard Place, Town Attorney
James Hackett, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8022

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. James Johnson
82-A-6202 SH-6
Shawangunk Correctional Facility
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. Johnson:

I have received your letter of November 16 and the correspondence attached to it. You have sought assistance concerning an apparent denial of access to records by the New York City Police Department.

Having requested various records from the Department, you were informed by the records access officer that your arrest report could not be located. You asked that he clarify his response. However, he had not communicated with you as of the date of your letter to this office, and you appealed.

In this regard, I offer the following comments.

First, as you are aware, §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 or record-keeping 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. Since I am not familiar with the Department's record-keeping or retrieval methods or systems, it is unclear whether your request reasonably described the records sought. However, I believe that an agency's records access officer is required to assist an applicant in identifying requested records if necessary [see 21 NYCRR §1401.2(b)(2)].

Second, with regard to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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. Nevertheless, 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 an 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.

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 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 found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. William J. Matusiak, Records Access Officer
Susan R. Rosenberg, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8023

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Anthony Logallo
90-B-1210
3622 Wende Road
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. Logallo:

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

By way of background, having requested police reports, witness statements and similar records from the office of the Suffolk County District Attorney, you received the records with certain deletions of names and locations. You contended that the documents in question "would normally be provided, without deletions during pre trial discovery in any criminal case." That being so, you questioned how the Freedom of Information Law could permit deletions and whether the situation represents a "double standard". You also questioned the propriety of the deletions under the Freedom of Information Law.

In this regard, I offer the following comments.

First, 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, or the ability of an agency to withhold records sought under the Freedom of Information Law in accordance with the grounds for denial appearing in §87(2) of that statute.

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. As such, there may be a variety of "standards" regarding disclosure that do not necessarily require like results.

Second, while I am unaware of the specific reasons for the deletions, several of the grounds for denial in the Freedom of Information Law may be relevant.

Of potential significance is §87(2)(b) of the 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 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.

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 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 found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Suffolk County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8024

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Frederick Patterson
92-B-2591
Mohawk Correctional Facility
6100 School Road
P.O. Box 8451
Rome, NY 13442

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

Dear Mr. Patterson:

I have received your letter of November 27.

According to your letter, you requested certain "laboratory documents" from an agency but received no response. Consequently, you appealed to the "Administrator of the Crime Laboratory Agency." However, as of the date of your letter to this office, you had received no response. You have sought assistance and asked how to file a Vaughn motion.

In this regard, I offer the following comments.

First, although you did not identify the agency that maintains the records in question, I point out that each agency must designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. While I believe that the person in receipt of your request should have responded as required by the Freedom of Information Law or forwarded the request to the records access officer, it is suggested that you resubmit your request to the records access officer. Similarly, it is doubtful in my view that the administrator of the crime laboratory has been designated to determine appeals under 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 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)].

Lastly, since you referred to a "Vaughn" motion, 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 8025

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Hector Jimenez
#93-A-1216
Attica Correctional Facility
Box 149
Attica, NY 14011

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

Dear Mr. Jimenez:

I have received your letter of November 25 in which you sought assistance.

In brief, having submitted a request for records to the New York City Police Department, you received some of the records. You were informed that others that you requested were not in possession of that agency, and it was suggested that you write to the Office of the Kings County District Attorney. While some of the records sought from that agency were made available and others were withheld, it was suggested that records not maintained by the District Attorney's office might be kept at the precinct where the arrest occurred. Although you wrote to the precinct, you had received no response as of the date of your letter to this office. You described the records sought as follows:

> "(1) Any and all copies of a Police 'back-Up' radio transmission(s). Pursuant to Indictment #13241/91, that was transmitted by Police Officer Douglas Edwards on October 18th 1991.
>
> (2) Any and all copies that include and verify the name and shield number of the Police Officer who moved vehicle, (1980 Chevy Station Wagon) Voucher #A 532227 V, from it's stationary location to destination unknown. Pursuant to Indictment #13241/91."

In this regard, I offer the following comments.

First, each agency is required to designate one or more persons as "records access officer". The records access officer has the duty of coordinating an agency's response to requests. As you may be aware, the records access officer for the New York City Police Department is Sgt. William J. Matusiak. In my opinion, the person in receipt of your request at the precinct should have responded in accordance with the Freedom of Information Law or forwarded your request to the records access officer. Nevertheless, it is suggested that you submit a revised request to Sgt. Matusiak, specifying that the District Attorney's office suggested that the records in question may be located at the 90th precinct and including as much detail as possible in order facilitate locating the records.

Second, the Freedom of Information Law pertains to existing records, and it is possible that tape recordings of radio transmissions have been erased or destroyed. If that is so, the Freedom of Information Law would no longer apply. Similarly, if there is no record that includes the name and shield number of a police officer who moved a vehicle, the Department could not disclose and would not be required to prepare such a record on your behalf [see Freedom of Information Law, §89(3)]. Further, such a record may not be kept or filed in a manner that enables Department staff to locate it in conjunction with the terms of your request.

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 8026

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

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 of November 12 in which you requested an advisory opinion.

Since the Committee on Academic Standing of the CUNY Law School of Queens College "does not maintain records pursuant to" §87(3)(a) of the Freedom of Information Law, it is your contention that such failure constitutes a violation of law.

Based on the materials that you forwarded, the Law School Governance Plan in §III B.6. refers to the entity in question and provides that:

> "The membership of the Committee on Academic Standing shall include the Associate Dean for Academic Affairs who, shall chair the Committee, three faculty, and two students. The Committee shall apply the academic standards of the Law School to individual students from the time of entry until the granting of the Juris Doctor. The Committee will receive and act upon student appeals relating to academic matters. It shall report to the Dean. The Dean shall issue procedures implementing this provision."

In this regard, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although that statute 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" a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based upon the foregoing, it appears that the Committee on Academic Standing is an "agency" required to comply with §87(3)(a). 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)].

I point out tangentially that although the Freedom of Information Law provides broad rights of access, it is likely that many of the records of the Committee on Academic Standing would be outside of the realm of public disclosure. The first ground for denial appearing in the Law, §87(2)(a), pertains to records that "are specifically exempted from state or federal statute." One such statute that exempts records from disclosure is the Family Educational Rights and Privacy Act (20 U.S.C. §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. Concurrently, the Act generally confers rights of access to education records upon parents of minor students and upon

students eighteen years of age or more. The federal regulations promulgated under the Buckley Amendment define the phrase "personally identifiable information" to include:

> "(a) The student's names;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

Therefore, while a CUNY Law student would have the ability to gain access to education records pertaining to himself or herself, I believe that those records or portions thereof that are personally identifiable to students would be confidential with respect to the public.

As you requested, I am returning the copy of the Governance Plan attached to your letter.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Dean Haywood Burns

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8027

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Curtis L. Wrenn
[redacted]

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

Dear Mr. Wrenn:

I have received your letter of November 17 and the materials attached to it.

As I understand the situation, you brought a matter to the attention of the Department of Law more than a year ago. That agency's Bureau of Consumer Frauds and Protection, referring to the matter as "File No. R3906", suggested that the issues raised fall within the jurisdiction of the Office of Court Administration. Accordingly, your correspondence was forwarded to that agency. Since that time, you have attempted to obtain information concerning the matter without success.

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

First, in accordance with the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) pursuant to the Freedom of Information Law, each agency must designate one or more persons as "records access officer". The records access officer has the duty of coordinating an agency's response to requests for records. It is suggested that if you have not already done so, you direct a request to the records access officer at the Office of Court Administration.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, a request should contain sufficient detail to enable agency officials to locate the records. Although your correspondence continually includes reference to the file number identified above, that number was apparently designated by the Department of Law upon its receipt of materials from you; it may have no meaning to the Office of Court Administration.

Consequently, in any request, it is suggested that you describe the subject matter as precisely as possible and that you include information concerning the dates of your contact with the Department of Law and its notification to you on September 14, 1992 that the matter was forwarded to the Office of Court Administration.

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)].

Lastly, although I am unfamiliar with the contents of the records of your interest, 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 §87(2)(a) through (i) of the Law.

Enclosed for your consideration is a copy of an explanatory brochure concerning the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Senator James W. Wright
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8028

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Robert Apy
#85-A-5562
Box 10, Franklin Corr. Fac.
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. Apy:

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

You wrote that you made a request to the Otisville Correctional Facility for "a tape recording and physical evidence of a Tier III disciplinary hearing". Although the facility superintendent acknowledged the receipt of the request and indicated that arrangements were being made to provide the information requested, you asked for guidance in acquiring the information in a timely manner.

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)].

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

Second,it is emphasized that the Freedom of Information Law pertains to "records" as that term is defined in §86(4) of the Law. In a decision in which an applicant sought evidentiary material, such as statements made by a witness, as well as tools and clothing under the Freedom of Information Law, it was found that physical evidence, such as tools and clothing, did not constitute records that fell within the scope of the Freedom of Information Law, even though they might have been used in an evidentiary manner to convey information relating to a crime [Allen v. Strojnowski, 129 AD 2d 700 (1987); motion for leave to appeal denied, 70 NY 2d 871 (1989)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: S.Schriver, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8029

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Claude Phillips
[redacted]

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

Dear Mr. Phillips:

I have received your letter of November 18 and the materials attached to it. You have raised several issues concerning requests for records of the Enlarged City School District of Troy and its implementation of the Freedom of Information Law.

Having sought my opinion regarding those issues, I offer the following comments.

The first involves access to bills for services rendered by attorneys engaged by the District. It is your view that the bills have been "sanitized" by means of various deletions "more than is necessary or legitimate."

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.

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 in most instances. 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 withheld under

§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, §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.

Due to the duties of a school district, there may be other grounds for denial that could be asserted to withhold portions of the records in question. For instance, insofar as the records identify or could identify particular students, I believe that they must be withheld. Another statute that exempts records from disclosure is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under the Buckley Amendment define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law. Similarly, references to employees involved in disciplinary proceedings when such proceedings have not resulted in any final determination reflective of misconduct could be withheld on the ground that disclosure would constitute "an unwarranted

invasion of personal privacy" [see Herald Company v. School District of the City of Syracuse, 430 NY 2d 460 (1980)]. In addition, §87(2)(c) enables agencies to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." That provision may also be pertinent in determining access. In short, there may be a variety of situations in which details found within a bill or similar statement may justifiably be withheld.

Based upon the judicial interpretation of the Freedom of Information Law, information should be extracted from a bill or similar record in an effort to ensure that the public can know the amount of time billed by attorneys and the charges incurred by the District. Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990) involved an applicant ("petitioner") who 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."

In my view, disclosure of information analogous to that described in Knapp would be appropriate. It is reiterated, however, that any such disclosure need not include, for example, information identifiable to students or to employees against whom disciplinary charges are pending, or which if disclosed would impair the contracting or collective bargaining process.

A second issue involves the specificity of requests. The President of the Board has suggested that requests be "particularized" in order "to allow [the District's] record-holder a fair opportunity to identify what's been requested." However, it is your view, that the "District wants to 'particularize' a request so that the School District can give [you] the record they want to give [you] - not the record [you] are after."

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, §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 §89(3) of the current Law, an applicant must "reasonably describe" the records sought. Based upon that standard, 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, irrespective of the breadth of the 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)].

You also questioned the process by which requests are answered, how records sought are reviewed, and how appeals are determined. In this regard, 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 implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a board of education, to adopt rules and regulations consistent with the Law and the Committee's regulations.

Relevant to your inquiry is §1401.2 of the regulations, which provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests. As such, in my opinion, either the records access officer or some other person should respond to requests in a manner consistent with the Freedom of Information Law.

With regard to appeals, the regulations provide 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" (§1401.7).

The last sentence in the quotation above is intended, in my opinion, to ensure that the person who determines an appeal does so independently of the person or persons who initially reviewed the records sought and responded to the request.

Lastly, you questioned the costs incurred by the District relative to its payments to attorneys for their review of records and legal counsel given concerning requests for records under the Freedom of Information Law. While this office is not responsible for viewing records of another agency that has received a request, the Committee on Open Government, as indicated at the beginning of this letter, is authorized to provide advice and opinions concerning that statute. You and others, including District officials, have sought our advice in the past, and you and government officials may continue to do so -- at no direct cost.

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 8030

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Darren Clark
91-A-4426
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. Clark:

I have received your letter of November 22, which reached this office on November 29.

You have sought assistance in obtaining statistics concerning black, hispanic and white inmates incarcerated at the Fishkill Correctional Facility in relation to parole, work release, school and work programs. In addition, you indicated that you requested the data from the Deputy Commissioner for Administrative Services, presumably at the Department of Correctional Services, and question whether you followed the proper procedure.

In this regard, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency must designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and a request should ordinarily be directed to that person. The regulations promulgated by the Department of Correctional Services under the Freedom of Information Law state that a request for records kept at a correctional facility may be made to the facility superintendent or his designee. To seek records kept at the Department's Albany offices, a request may be made to the Deputy Commissioner for Administration.

Second, 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 the Department does not maintain the statistics in which you are interested or cannot generate the statistics based upon existing

computer programs, its staff in my view would not be required to prepare the statistics on your behalf.

Insofar as the statistics in question may exist, I believe that they would be available under §87(2)(g)(i) 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 8031

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Lawrence Streat
90-T-4582
Fishkill Correctional Facility
P.O. Box 307
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. Streat:

I have received your letter of November 22, which reached this office on November 29.

You have sought assistance in obtaining statistics concerning black, hispanic and white inmates incarcerated at the Fishkill Correctional Facility in relation to furloughs and disciplinary decisions. In addition, you indicated that you requested the data from the Deputy Commissioner for Administrative Services, presumably at the Department of Correctional Services, and question whether you followed the proper procedure.

In this regard, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency must designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and a request should ordinarily be directed to that person. The regulations promulgated by the Department of Correctional Services under the Freedom of Information Law state that a request for records kept at a correctional facility may be made to the facility superintendent or his designee. To seek records kept at the Department's Albany offices, a request may be made to the Deputy Commissioner for Administration.

Second, 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 the Department does not maintain the statistics in which you are interested or cannot generate the statistics based upon existing

computer programs, its staff in my view would not be required to prepare the statistics on your behalf.

Insofar as the statistics in question may exist, I believe that they would be available under §87(2)(g)(i) 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 8032

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1993

Mr. Wallace S. Nolen
[redacted]

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

Dear Mr. Nolen:

I have received your letter of November 12 in which you sought assistance concerning the Freedom of Information Law. Please accept my apologies for the delay in response.

Having cited §500-f of the Correction Law in an opinion previously sent to you, you wrote that it appears that Administrator of the Dutchess County Jail has interpreted my comments to mean that only the information described in that provision must be disclosed. If indeed that is his view, I respectfully disagree. While §500-f might require the preparation and disclosure of a particular record, the Freedom of Information Law pertains to all agency records and is based on a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

You indicated that you have attempted to obtain a daily record that contains the following information: "Date/Time of the Printout, Inmate name, Housing Unit/Cell Number, Inmate Number, and religion." In my view, insofar as the record includes inmates' religion, I believe that such items could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." With regard to identification of inmates by cells, it was contended that disclosure might create a security problem. I cannot conjecture as to whether that is so. However, to the extent that disclosure of those items "would endanger the life or safety of any person", they may in my opinion be withheld under §87(2)(f). Reference was made to the decision rendered in Bensing v. LeFevre [506 NYS 2d 822 (1986)], a copy of which is enclosed. In that case an inmate in a Special Housing Unit sought the names of others in that unit, and it was found in part that:

"There is no doubt that a list of names of inmates incarcerated in a particular institution should be readily available for inspection, and the Court can see no distinction in making available the actual Housing Unit within the Facility that an inmate has been placed" (id., 824). It was also found that: "Since the respondents have admitted that the information is probably already available to the petitioner's client by virtue of the fact that he was physically housed with the other inmates" (id.), a denial based upon §87(2)(f) could not be justified. Bensing involved disclosure of the names of inmates housed within a particular unit of a facility with the inmate who sought the records. I am unaware of the layout of the County Jail, whether there are separate units within the Jail, or whether a claim based upon §87(2)(f) may be justified. The proper assertion of that provision and perhaps distinguishing the situation from that described in Bensing would be dependent upon facts and circumstances that may be known to jail officials, but not to me.

A second issue involves the disclosure of the list required to be maintained pursuant to §87(3)(b) of the Freedom of Information Law that includes the name, public office address, title and salary of all officers or employees of an agency. As I understand your comments, the list is maintained up to date, and the agency "allegedly [has] a computer program that prints the list 'upon demand'." Nevertheless, you wrote that a claim has been made that facility officials "can take a month" to produce the list.

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 remaining issue involves access to photographs of employees taken for such routine purposes as the preparation of identification cards.

In this regard, the Freedom of Information Law pertains to agency records, and §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."

Based upon the foregoing language, which includes specific reference to photos, it is clear in my view that materials in which you are interested constitute "records" subject to rights of access.

From my perspective, the only possible basis for withholding official photos of correction officers or other public employees would involve the rare circumstance in which an employee is involved in undercover or similar work and disclosure would place that person in jeopardy. In that instance, I believe that a photograph could be withheld under §87(2)(f), which, as indicated earlier, permits an agency to deny access to records when disclosure "would endanger the life or safety of any person." In the case of many correction officers, however, because they interact with and are seen by inmates and perhaps the public in their official capacities or because their positions do not involve the performance of duties that would place them in danger if their photographs were disclosed, I do not believe that §87(2)(f) would serve as valid basis for that denial.

With respect to a possible claim that the records are confidential under §50-a of the Civil Rights Law, the language of that statute and its judicial interpretation indicate, in my opinion, that such a contention would be without merit. Section 50-a, which pertains to correction officers and certain others, refers to "personnel records, used to evaluate performance toward continued employment or promotion" and states that such records are confidential. In my view, an official photograph could not be characterized as a record that is used for the purposes specified in §50-a. If my contention is accurate, §50-a would not constitute a valid basis for a denial of access.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Rugar, Acting Corrections Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-8033

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 27, 1993

Mr. John Hansgate
[redacted]

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

Dear Mr. Hansgate:

I have received your letter of November 24 and the correspondence attached to it.

In brief, having submitted repeated requests under the Freedom of Information Law to the Iroquois Central School District, you have encountered delays that you believe are "meant to discourage or frustrate access to records." The records sought involve the "details of the close-out payments and other settlements made for Principal William Quick when he retired at the end of the last school year."

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

First, the Freedom of Information Law provides direction concerning the time 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, 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.

Contracts, bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff must generally be disclosed, for none of the grounds for denial could appropriately be asserted to withhold those kinds of records. Likewise, in my opinion, a contract between an administrator, such as a superintendent or a principal, and a school district or board of education clearly must be disclosed under the Freedom of Information Law. It is noted that there is nothing in the statute 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].

I point out, too, that time and attendance records, the kinds of records apparently used as the basis for the settlement agreement, have been found to be available to the public. In addition to the provisions dealing with the protection of privacy, also significant to an analysis of rights of access 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 records could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning the use of leave time or absences or the time that employees arrive at or leave work would constitute "statistical or factual" information accessible under §87(2)(g)(i).

In a decision affirmed by the State's highest court dealing with attendance records, specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In that case, 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, supra, 109 AD 2d 92, 94-95 (1985)].

Moreover, 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).

In sum, I believe that a settlement agreement, a contract, or related records indicating payments made or to be made to a public employee who is retiring or has retired would be available under the Freedom of Information Law for the reasons described in the preceding commentary.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Lawrence F. Pereira, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8034

162 Washington Avenue, Albany, New York 12231
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December 27, 1993

Mr. Robert Gagne
[redacted]

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

Dear Mr. Gagne:

I have received your letter of November 26 and the correspondence attached to it. Please accept my apologies for the delay in response.

According to your letter, having bought a telephone in New York City at a store that must be licensed by the Department of Consumer Affairs, you complained to that agency concerning several issues and to the staff of the State Department of Taxation and Finance. More recently, you requested records from those agencies relating to your complaints, even though "neither...had the statutory posting re. whom to contact as the records access officer and the appeal officer". You have asked whom you may contact as the records access and appeals officers at those agencies, and you questioned whether the records sought must be disclosed.

In this regard, I offer the following comments.

First, there is no statutory requirement that agencies must post the names of their records access and appeals officers. However, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) pursuant to the Freedom of Information Law state in relevant part that:

> "Each agency shall publicize by posting in a conspicuous location and/or by publication in local newspaper of general circulation:
>
> (a) The locations where records shall be made available for inspection and copying.

(b) The name, title, business address and business telephone number of the designated records access officers.

(c) The right to appeal by any person denied access to a record and the name business address of the person or body to whom an appeal is to be directed."

Second, the Official New York City Directory indicates that the records access officer at the Department of Consumer Affairs is Elaine Werbell. No appeals officer is identified. Consequently, pursuant to §89(4)(a) of the Freedom of Information Law, it is suggested that any appeal be made to the head of the agency. In view of the change in administrations, whether or how those persons continue or will continue to serve in those positions is unknown to me. At the State Department of Taxation and Finance, the records access officer is Karl Felsen; the appeals officer is Terrence Boyle.

Third, your request to the Department of Consumer Affairs involved copies of "any and all writings between [the Department] and the complained of, including a copy of the application of the above to be licensed by you and a copy of each license issued to them by you".

As you may recall, 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 §87(2)(a) through (i) of the Law. Without knowledge of the contents of any "writings" falling within the scope of your request, I cannot offer specific guidance. However, it would appear that the only ground for denial of potential relevance would be §87(2)(b), which enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". If, for example, the records include personal financial information or a home address, those items could in my view be deleted from records that would otherwise be available.

Finally, you raised the following question:

"Could a request to the N.Y.S. Dept. of Taxation for a copy of each application for the certificate that the outfits complained must post if they are habilitated to collect sales taxes on items sold by it be turned down in that records sought come under any non-disclosable category? What about the certificate issued? After all if it must be publicly posted by shops, can the Dept. of Taxation refuse me a copy?"

I lack expertise regarding the application of a variety of statutes within the Tax Law that require confidentiality. If none of those statutes is applicable, it is likely that such a request must be honored. It is suggested that you direct a request to Mr. Felsen.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Elaine Werbell
Karl Felsen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 1993

Dr. Alfred B. Udow, Ph.D.
[redacted]

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

Dear Dr. Udow:

I have received your letter of November 29 in which you raised questions concerning access to records.

According to your letter:

> "Several years ago the Great Neck Public Library (fully supported by taxation on real property) hired, and then a few months later, terminated a library director. Two of the trustees told [you] that it cost a lot of money to buy out her contract. When [you] asked just how money it actually cost, neither could say."
>
> "At the most recent board meeting [you] were told that the decision to terminate was made in an executive session where no minutes were taken and that the cost is confidential even though it represents an expenditure of taxpayer funds."

You have asked whether the public "is entitled to such information". In this regard, I offer the following comments.

First, assuming that the Great Neck Public Library is a governmental entity, I believe that it is required to comply with the Freedom of Information Law. In brief that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, contracts bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff must generally be disclosed, for none of the grounds for denial could appropriately be asserted to withhold those kinds of records. Likewise, in my opinion, a contract, a settlement or a "buy-out" between an administrator, such as a library director, and a library board of trustees clearly must be disclosed under the Freedom of Information Law. It is noted that there is nothing in that statute 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]. From my perspective, a contract or settlement would clearly have been relevant to the work of the

employee as well as that of the Board of Trustees. Consequently, I do not believe that such record could be withheld pursuant to §87(2)(b) of the Freedom of Information Law.

In addition to the provisions dealing with the protection of privacy, also significant to an analysis of rights of access 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.

An agreement or settlement between the board of trustees and its former employee would in my view constitute a final agency determination available under §87(2)(g)(iii).

Moreover, in a discussion of its intent and utility, the Court of Appeals, the State's highest court, has held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health 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).

In sum, I believe that a settlement agreement, a contract, or related records indicating payments made or to be made to a public employee would be available under the Freedom of Information Law for the reasons described in the preceding commentary.

Lastly, a library board of trustees is clearly required by §260-a of the Education Law to comply with the Open Meetings Law. That provision 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."

Since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries must be conducted in accordance with that statute.

Section 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.

In the context of the issues that you raised, for reasons expressed earlier, I believe that minutes reflective of the 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 I. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Board of Trustees, Great Neck Public Library

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 1993

Richard E. Scudellari, Co-leader
Tax Pac, Inc.
P.O. Box 188
Greenlawn, NY 11740-0188

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

Dear Mr. Scudellari:

I have received your letter of November 25 and the materials attached to it.

You described your efforts to obtain "Agenda Books" from the Harborfields Central School District. Those documents are apparently prepared by administrators and forwarded prior to meetings to members of the Board of Education. You have raised the following questions concerning access to Agenda Books and related matters:

> "A) Do the Agenda Books constitute the type of records that are required to be made available to the public under Section 2116 of the Education Law?
>
> B) If the Agenda Books contains [sic] material prohibited by law for availability to the public must an abridged copy with the prohibited material expunged be made available?
>
> C) If the Agenda Book is, by policy, made available to the Board members on the Friday preceding the monthly Wednesday meeting, and the district office receives a Freedom of Information request for the Agenda Book 5 or more days prior to that preceding Friday, does such a request conform to the requirements of the FOIL and should that Agenda Book be required to be made available to the public?

> D) Is the Board required to advertise and post notice of board meetings at which the items on the agenda are discussed and is the Board required publish the minutes of such a meeting? [You] have noted that minutes of regular and special meetings usually being with a motion to move to executive session to discuss some item which should be appropriately discussed in executive session. However, [you] have not been able to find the minutes of the meetings for the work sessions where the Board purportedly discusses the items contained in the Agenda Books that are regularly unanimously passed without discussion at the regular meeting which is attended by the public. Is the Board permitted to discuss these types of items in executive session and not report on these discussions?"

In this regard, I offer the following comments.

First, §2116 of the Education Law, which was enacted in 1947, states that:

> "The records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

The current version of the Freedom of Information Law became effective in 1978. 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 §87(2)(a) through (i) of that statute.

In a case involving a statute enacted long before the Freedom of Information Law that also provided for access to records with virtually no exceptions, it was found that a literal interpretation of such a provision would contrary to public policy. In responding to a contention that §51 of the General Municipal Law requires that all records of a municipality be made available, regardless of their contents, the state's highest court, the Court of Appeals, held in 1985 that:

> "Such a result would nullify the FOIL exemptions, which the Legislature - presumably aware of General Municipal Law §51 at the time it enacted FOIL - could not have intended. To give effect to both statutes, the FOIL

> exemptions must be read as having engrafted, as a matter of public policy, certain limitations on the disclosure of otherwise accessible records" [Xerox Corporation v. Town of Webster, 65 NY 131, 490 NYS 2d 488, 489 (1985)].

Therefore, when records or portions of records fall with exceptions to rights of access appearing in the Freedom of Information Law, they may be withheld, notwithstanding the breadth of §2116 of the Education Law.

Second, although the Freedom of Information Law is based upon a presumption of access, the contents of the records in question serve as the factors relevant to an analysis of the extent to which the records may be withheld or must be disclosed. In my view, several of the grounds for denial may be relevant to such an analysis.

As suggested by Mr. Harrington, the Assistant Superintendent and Records Access Officer, records prepared by District staff and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, 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 emphasized that the Court of Appeals, the State's highest court 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)].

Therefore, as indicated earlier, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of teachers or other staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within an Agenda Book might in some instances fall within that exception.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is the Family Educational Rights and Privacy Act (20 U.S.C. §1232g). In brief, that statute generally forbids a school district from disclosing personally identifiable information concerning students, unless the parents of students consent to disclosure.

In short, while a blanket denial of Agenda Books may be inconsistent with the Freedom of Information Law, there would likely to be one or more grounds for denial that could appropriately be cited withhold portions of those records.

Third, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

In my opinion, when records are clearly accessible under the Freedom of Information Law and can readily be located and disclosed, an agency must disclose them within five business days of its receipt of a request. However, as indicated above, if more than that time is needed to locate records or to review them to determine which portions must be disclosed or may be withheld, an agency may acknowledge the receipt of the request and reasonably extend the time in which it grants or denies access to the records sought.

Lastly, you raised several issues relating to the Open Meetings Law. In this regard, it is noted by way of background 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)].

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.

Section 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. There is no requirement that the notice include reference to the subject matter to be discussed.

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. 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.

With respect to minutes, 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. It is also clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. 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 those kinds of actions, such as motions or votes, do not occur during work sessions, technically, I do not believe that minutes must be prepared.

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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Dr. Raymond Walters, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 1993

Ms. Loretta Prisco
Parents Action Committee for Education
30 Westbury Avenue
Staten Island, NY 10301

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

Dear Ms. Prisco:

I have received your letter of November 27 and the materials attached to it. Please accept my apologies for the delay in response.

You referred to your correspondence of July 30 in which you sought an advisory opinion concerning access to records prepared by a Committee designated by the Superintendent of District 31 to review and offer recommendations with respect to the New York City HIV/AIDS curriculum. In brief, it was advised that the records in question should be disclosed, for none of the grounds for denial in the Freedom of Information Law could apparently have been cited to deny access.

Following a denial of access to records and in response to appeals to the Chancellor of the New York City Public Schools, an attorney for Chancellor, Mr. Scott R. Edelman, upheld the denial. In his first letter to you, the denial was based upon §87(2)(g) of the Freedom of Information Law pertaining to inter-agency and intra-agency materials. In the second, reliance upon §87(2)(g) was reiterated, and your contention that meetings of the committee should have been conducted in public pursuant to §414 of the Education Law was rejected. He determined that the meetings held by the committee "are not required to be open to the general public".

While I cannot effectively comment concerning the application of §414 of the Education Law, for that statute is beyond the jurisdiction and expertise of this office, I offer the following remarks regarding access to the records. In some instances, they

may be repetitive of comments offered in response to your letter of July 30.

In brief, in my opinion, if the committee is not a public body subject to the Open Meetings Law, and there appears to be agreement on that issue, it is not an "agency" for purposes of the Freedom of Information Law. Therefore, the records that it has prepared could not in my opinion be characterized as inter-agency or intra-agency materials that fall within the scope of §87(2)(g).

More specifically, in your letter of July 30, you wrote that the committee in question "included parents, Director of SI AIDS Task Force, members of the clergy, a gay person, UFT District Rep, three members of the Community School Board, a principal and a teacher". In addition, you indicated the meetings of the committee were closed to the public. In response to that letter, I referred to the definition of "public body" in the Open Meetings Law and to judicial interpretations pertinent to the status of the committee. To reiterate, §102(2) of the Open Meetings Law defines "public body" to mean:

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

As stated previously, the court have generally held that advisory ad hoc entities, other than committees consisting solely of members of public bodies, that have 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)]. Based upon those decisions, the committee designated by the Superintendent is not a public body, for, according to the courts, it does not perform a governmental function.

Second, I refer once again to the Freedom of Information Law, which defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council,

> office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In view of the language quoted above, an "agency" is a governmental entity performing a governmental function.

From my perspective, if the 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 materials, and §87(2)(g) would not serve as a basis for denial.

I am familiar with the decisions cited by Mr. Edelman in his determination, Town of Oyster Bay v. Williams [134 AD 2d 267 (1987)] and Rothenberg v. City University of New York [594 NYS 2d 219 (1993)]. Both 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 by an entity consisting of a representative cross-section of the community, most of whom were not employed by an agency.

For the foregoing reasons, I do not believe that the work product prepared by the committee could be characterized as inter-agency or intra-agency material that could be withheld under the Freedom of Information Law.

In short, I do not believe that Mr. Edelman, the Superintendent or the Chancellor can rely upon inconsistent contentions in reaching a conclusion. If the Open Meetings Law does not apply to the committee's meetings because it does not perform a governmental function, to be consistent, it cannot be argued that the same committee does perform a governmental function and is an agency when analyzing rights of access to the records it prepared for the Superintendent. In view of the judicial construction of the Open Meetings Law relating to the committee's status under the Open Meetings Law, i.e., that it is not a public body subject to that statute, the same reasoning would lead one to conclude that the committee is not an agency for purposes of the Freedom of Information Law. If its not an agency, it cannot prepare inter-agency or intra-agency materials, and §87(2)(g), the sole basis for denial cited by Mr. Edelman, could not serve as a basis for denial of access to the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Scott R. Edelman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2301
FOIL-AO 8038

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 28, 1993

Mr. Robert F. Reninger
Broadview Civic Association
250 Knollwood Road
White Plains, NY 10607

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

Dear Mr. Reninger:

I have received your letter of November 26 in which you sought an advisory opinion concerning a matter arising in the Town of Greenburgh.

Having requested minutes of meetings, work sessions held by the Zoning Board of Appeals, the Planning Board and the Town Board and receiving no response, you appealed on the ground that the request was constructively denied. Although you received no responses to four appeals, the Town's records access officer wrote that "minutes are not taken at the work sessions of the Town Board". You indicated that the minutes have been requested "because they relate to work sessions at which the various Boards reached a 'consensus' on inquiries concerning a disputed building permit issued by the Town..."

You have asked whether "minutes are required for work sessions and in particular whether items decided by 'consensus' rather than formal motion must be recorded in those minutes". You also asked "whether formal decisions are required for all appeals filed pursuant to the New York State Open Government Law". It is assumed that your reference to the Open Government Law is intended to mean the Freedom of Information Law.

In this regard, I offer the following comments.

First, it is noted 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)]. 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 short, there is no distinction between a "meeting" and a "work session" in terms of the application of the Open Meetings Law.

Second, when action is taken by a public body, I believe that it must be memorialized in minutes, and §106 of the Open Meetings Law provides that:

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

If a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. 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).

Therefore, if a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous 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 a public body relies in carrying out its duties, or when a public body, in effect, reaches agreement on a particular subject, minutes, in my view, should be prepared to reflect the action taken and the actual votes of the members.

Lastly, with regard to appeals made under the Freedom of Information Law, §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 of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business day of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the records sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuring determination thereon."

Based on the foregoing, I believe that the person or body designated to determine appeals under the Freedom of Information Law must render "formal decisions".

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Susan Tolchin, Town Clerk
Town Board
Zoning Board of Appeals
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8039

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 29, 1993

Mr. Shawnon Bolden
#90-T-4601
Drawer B, Route 216
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. Bolden:

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

The initial issue involves delays in granting or denying access to records by 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 alluded to your need to obtain "sentencing memorandums" and related documents. If you are referring to pre-sentence reports or memoranda, it is suggested that you seek those records from a different source. 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:pb
cc: Records Access Officer, Office of the Kings County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8040

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 29, 1993

Mr. Willie Collier, 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. Collier:

I have received your letter of November 29. In brief, you described difficulty in attempting to obtain court records under the Freedom of Information Law.

In this regard, 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 or other governmental 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."

Based on the foregoing, police departments or offices of district attorneys, for example, would constitute agencies required to comply with the Freedom of Information Law. The courts and court records, however, would be outside the coverage of the Freedom of Information Law.

That is not to suggest that court records are not available to the public, for there are other provisions of law that may require the disclosure of court records. For instance, §255 of the

Judiciary Law states generally that a clerk of a court must search for and make available records in his custody. It is suggested that you seek such records from the clerk of the appropriate court. A request should include sufficient detail to enable court personnel to locate the records in which you are interested. Additionally, it is recommended that you confer with an attorney or perhaps a representative of Prisoners' Legal Services.

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 2302
FOIL-AO 8041

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 29, 1993

Mr. Richard E. Scudellari
TAX PAC, INC.
Hunting Township Chapter
Harborfields School District Unit
PO Box 188
Greenlawn, NY 11740

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

Dear Mr. Scudellari:

I have received your letter of November 30 and the materials attached to it.

You have raised issues concerning certain practices of the Harborfields Central School District. Some of the issues were considered in an opinion sent to you yesterday. Those that remain involve access to unapproved minutes of meetings and the Superintendent's contention that they must be approved before being disclosed to the public, and a requirement that the manner in which each member voted be included in the minutes.

In this regard, I offer the following comments.

First, as you are aware, 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 my opinion, the language of §106(3) is clear, in that minutes must be made available "within two weeks of the date of such meeting."

Moreover, 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.

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 that statute 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 both the Open Meetings Law and the Freedom of Information Law require "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987), aff'd 72 NY 2d 1034 (1988)].

In sum, in my view, to comply with law, I believe that a record must be prepared indicating how each member of a board of education casts his or her vote. Ordinarily, the record of members' votes is included in minutes of meetings.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Dr. Raymond A. Walters, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8042

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 29, 1993

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.

Dear Mr. Martin:

I have received your letter of December 2. You complained that you have received "evasive" answers in response to requests for information from the Village of Lyons, and that the Village "has no appeal process and no forms for freedom of information request".

In this regard, I offer the following comments.

First, I know of no law that generally requires public officials to answer inquiries or reply to correspondence in every instance. To be sure, I believe that it is generally proper to respond to inquiries; nevertheless, there may be reasonable limitations on the ability or duty to do so.

In a related vein, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it pertains to records, not information per se. Stated differently, the Freedom of Information Law is a vehicle under which the public may seek existing records and which requires agencies to disclose those records in conjunction with its provisions; it is not a vehicle that provides a member of the public with a right to cross-examine public officials or compel those officials to provide information in response to questions. In short, although an agency subject to the Freedom of Information Law may be required to disclose records, agency officials are not required to answer questions. Further, §89(3) of the Law states in part that an agency need not create a record in response to a request.

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a

public corporation, i.e., a board of trustees in a village, to adopt rules and regulations consistent with the Law and the Committee's regulations.

Relevant to your complaint is §1401.2 of the regulations, which provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests. As such, in my opinion, either the records access officer or some other person should respond to requests in a manner consistent with the Freedom of Information Law.

With regard to appeals, the regulations provide 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" (§1401.7).

Lastly, there is no requirement in the Freedom of Information Law that an agency devise a request form. Section 89(3) of the Law states in part that an agency may require that a request be made in writing and that the request must "reasonably describe" the records sought. Therefore, any request made in writing that reasonally describes the records should suffice.

I hope that I have been of some assistance.

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 8043

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 29, 1993

Mr. Matthew R. Smith
Mathew R. Smith & Associates
333 East 30th Street
New York, NY 10016

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Smith:

I have received your letter of December 3 addressed to Mr. Bookman, chair of Committee, and the materials attached to it. As indicated above, the staff of the Committee is authorized to prepare advisory opinions on behalf of the Committee.

The materials relate to an inquiry by Ms. Marlene Malamy of Board of Education's Office of Special Investigation concerning alleged marketing abuses in the New York City public schools by the Xerox Corporation and your request for a variety of information pertaining to that inquiry. In this regard, I offer the following comments.

First, it is noted at the outset that the title of the Freedom of Information Law may be somewhat misleading, for it pertains to records, not information per se. Stated differently, the Freedom of Information Law is a vehicle under which the public may seek existing records and which requires agencies to disclose those records in conjunction with its provisions; it is not a vehicle that provides a member of the public with a right to cross-examine public officials or compel those officials to provide information in response to questions. In short, although an agency subject to the Freedom of Information Law may be required to disclose records, agency officials are not required to answer questions. Further, §89(3) of the Law 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 or has not been compiled in the form of a record or records, the Board and its staff would not be obliged to create or prepare new records on your behalf.

Second, §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 [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 the Board's filing or record-keeping systems; whether or the extent to which its staff has the ability to locate and identify existing the records sought in the manner in which you requested them is unknown to me.

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.

Relevant to an analysis of rights of access is the provision cited by Ms. Bernstein in her response to you, §87(2)(g). I point out, however, that due to the structure of that provision, the contents of the records serve as indicators of the extent to which

they 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. 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Ruth Bernstein, Deputy Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8044

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 30, 1993

Mr. Joseph A. Glazer, Esq.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Glazer:

I have received your letter of December 2 and the correspondence attached to it.

You have complained with respect to the treatment of your requests to Greene County that began in July for the following records:

> "Copies of all vouchers and disbursements from and to one 'Skip' Curtiss, Private Investigator for matters regarding the Greene Division of the Columbia-Greene Medical Center, since the inception of his contract with Greene County in taking inventory of the tangible property located at the facility;
>
> "Copies of all inventory lists, records, or compilations created under the above stated contract;
>
> "Copies of all vouchers from and disbursements to elected officials in Greene County, including, but not limited to, county legislators, the county Clerk and Treasurer, and any other elected officials, relating to attendance at meetings of the Save Our Hospital Committee, or other meetings or events related to the C-GMC closure and sale process, since April 1, 1992; and
>
> "Copies of all vouchers from and disbursements to the Greene County Administrator, the Greene County Attorney, Assistant or Deputy Greene

> County Attorneys, relating to attendance at meetings of the Save Our Hospital Committee, or other meetings or events related to the C-GMC closure and sale process, since April 1, 1992."

You added that you are:

> "...aware that the public officers law exempts documentation which could be the subject of litigation. In fact, the County of Greene has recently settled a lawsuit, the payment of legal fees for which is the subject matter of the FOIL requests. Said legal fees are in no way an element of the litigation, and therefore do not, in [your] opinion, fall under that exemption."

You have sought my advice concerning the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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)].

Since it appears that you have not received the records and that your requests have been constructively denied, it is suggested that you appeal in accordance with §89(4)(a),

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a county legislature, to adopt rules and regulations consistent with the Law and the Committee's regulations.

Relevant to your complaint is §1401.2 of the regulations, which provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that

agency personnel act appropriately in response to requests. As such, in my opinion, either the records access officer or some other person should respond to requests in a manner consistent with the Freedom of Information Law.

With regard to appeals, the regulations provide 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" (§1401.7).

Third, §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 [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 the County's filing or record-keeping systems; whether or the extent to which its staff has the ability to locate and identify existing the records sought in the manner in which you requested them is unknown to me. However, one of the responsibilities of the records access officer includes the duty of assuring that agency personnel "Assist the requester in identifying requested records, if necessary" [see Regulations, §1401.2(b)(2)].

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. I point out that none of the exceptions to rights of access deals particularly with litigation.

Although some of the records in question might relate to litigation, that would not necessarily remove them from public rights of access. The initial 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 §3101(d) of the Civil Practice Law and Rules, which exempts material prepared for litigation from disclosure. Nevertheless, if records are prepared or acquired in the ordinary course of business or if they 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].

As I understand the matter, the records sought would not have been prepared solely for litigation. If that is so, neither §3101(d) nor any other statute would apparently exempt the records from disclosure.

Lastly, contracts bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff or others must generally be disclosed, for none of the grounds for denial could appropriately be asserted to withhold those kinds of records.

A provision of the Freedom of Information Law of potential 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 particularly 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]. From my perspective, records reflective of public monies paid to public employees and others would be relevant to the work of the employees as well as that of the agency. Consequently, I do not believe that the kinds of records at issue could be withheld pursuant to §87(2)(b) of the Freedom of Information Law.

In addition to the provisions dealing with the protection of privacy, also significant to an analysis of rights of access 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. Inventories, compilations and the like might constitute "intra-agency materials", nevertheless, they would likely consist in great measure if not in their entirely of statistical or factual data available under §87(2)(g)(i) of 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 Greene County Officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Donald Olson, Clerk
Charles J. Brown, Assistant County Attorney
County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8045

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 30, 1993

Mr. Jorge Sprau
#86-A-7925
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. Sprau:

I have received your letter of December 1 in which you sought assistance concerning access to records.

In brief, as I understand the situation, having appealed a denial of access to records maintained by the Office of the New York County District Attorney, you were informed that certain records would be made available upon receipt of a specified fee, a videotape and a cassette. Although you forwarded those items to the agency, as of the date of your letter to this office, you had not yet received the records.

Under the circumstances, although the determination of your appeal appears to have resulted in a reversal and a finding that certain records should be disclosed, it also appears that you have been constructively denied access.

In my view, when an agency determines an appeal under the Freedom of Information Law, it may either "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought" [see Freedom of Information Law, §89(4)(a)]. Further, despite the agency's determination of the appeal, since the records have not been disclosed, it appears that you could initiate a judicial proceeding on the ground that your appeal has been constructively denied.

In an effort to avoid litigation and to expedite disclosure,

copies of this response will be sent to those officials of Office of the District Attorney identified in your letter.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Louis Halpern, Executive Assistant District Attorney
Ms. Greenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8046

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 30, 1993

Ms. June Maxam, Editor
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 December 9 in which you sought my opinion concerning two matters.

The first involves a fee of §15 imposed by the State Police for "a tape recording of radio transmissions from a patrol car to base". You wrote that "[t]hey claim they can charge $15 rather than the actual cost because of Chapter 50 as they claim the tape is an 'investigative' report".

In this regard, as you are likely aware, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may generally charge up to twenty-five cents per photocopy or the actual cost of reproducing other records (i.e., those that cannot be photocopied), unless a statute other than the Freedom of Information Law prescribes a different fee. I believe that Chapter 50 is a statute which, when applicable, authorizes the Division of State Police to charge fees different from those ordinarily payable under the Freedom of Information Law. However, Chapter 50 is lengthy appropriations legislation, and I do not have a copy of the legislation, either in its entirety or the portion dealing with the State Police. In short, I cannot effectively advise concerning the propriety of the fee because I am unfamiliar with the specific language of the provision in question. If you can forward a copy of the applicable provision to me, I would be pleased to review it.

The second issue involves a request to the Warren County Sheriff's Department for "copies of FOIL requests submitted by Channel 13 WNYT to the sheriff's department between September and October, 1993". Major Cleveland of that office denied access to

the requests on the ground that they consist of inter-agency or intra-agency materials.

In my opinion, the provision upon which Major Cleveland relied could not validly be asserted to deny access to the records in question. 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. 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 the news media, 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.

Further, 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 minutes of a meeting of a public body, for example, or other records that indicate nothing 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.

Enclosed are copies of the opinions that you requested.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Enc:
cc: Francis A. DeFrancesco, Chief Inspector
Major Lawrence Cleveland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO 152
FOIL-AO 8047

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December 30, 1993

Mr. Steven Smith
#91-A-2339
Green Haven Correctional Facility
Route 216 / 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. Smith:

I have received your correspondence of November 29 in which you indicated that you forwarded two letters to this office on November 16. You asked that I review those letters, as well as the correspondence, and return them to you.

In this regard, based on a search of our files and mail log, it appears that the letters of November 16 never reached this office. Having reviewed your correspondence, however, I offer the following comments.

First, your rights of access to records as a defendant under the discovery provisions of the Criminal Procedure Law are separate from rights conferred by the Freedom of Information Law. Discovery rights are based on one's status as a defendant or litigant. The Freedom of Information Law does not generally distinguish among applicants, and rights conferred by that statute are conferred upon applicants for records as members of the public.

Second, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)] appears to be relevant to the situation. In Moore, it was found 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 the 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...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

With respect to access to the kinds of records in which you may be interested, the Court in Moore also noted that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

Third, since you referred to various grand jury related records, it is my view that those records could be withheld if requested under the Freedom of Information Law. 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, "subdivision three" of §190.25 includes specific reference to the district attorney. As such, grand jury minutes and related records 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.

Lastly, reference was made to medical records and to the Personal Privacy Protection Law. In this regard, the Personal Privacy Protection Law is applicable only to state agencies. For purposes of that statute, §92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based on the foregoing, the Personal Privacy Protection Law specifically excludes from its coverage "offices of district attorneys". Consequently, I believe that the Personal Privacy Protection Law is irrelevant to the situation.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb